IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Dr. Larre v. College of Psychologists of BC,
2007 BCSC 416

Date: 20070328
Docket: S067760
Registry: Vancouver

Between:

Dr. Lucien Larre

Petitioner

And

College of Psychologists of British Columbia

Respondent

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the petitioner	Christopher E. Hinkson, Q.C.
Counsel for the respondent	Anthony G.V. Tobin
Date and Place of Hearing:	February 16, 2007 Vancouver, B.C.

NATURE OF THE PROCEEDING

[1] This is an appeal brought by Dr. Larre under s. 35(5) of the ***Health Professions Act***, R.S.B.C. 1996, c. 183 (the "Act") from the suspension of his registration as a member of the College of Psychologists of British Columbia (the "College") by the Inquiry Committee of the College pending further investigation or a hearing of the Discipline Committee of the College.

[2] Dr. Larre seeks an order quashing the decision of the Inquiry Committee and an order reinstating his registration upon his giving his undertaking to refrain from the practice of psychology in British Columbia pending the further investigation of his conduct or a hearing of the Discipline Committee.

BACKGROUND

[3] Prior to December 1, 2006 Dr. Larre was a member in good standing of the College.

[4] On June 30, 2006, as a result of unresolved complaints against Dr. Larre to the College concerning his competence in connection with the preparation of certain psychological assessments, the Inquiry Committee of the College commenced an investigation. Without admitting any blame or liability concerning the allegations in the various complaints, Dr. Larre signed an Undertaking and Consent pursuant to s. 36(1) of the Act that included the following provisions:

> 1. Within thirty (30) calendar days of the date of this Undertaking and Consent, or as soon as practicable thereafter, I consent to be subject to an assessment by a psychologist (the

> "assessor") appointed by the College concerning my fitness and competence to practice psychology in the various areas that are the subject of the complaints referred to herein and subject to the following conditions:
>
> 1.2 I undertake and consent to comply fully with any reasonable recommendations that are made by the assessor as a result of the assessment, and which are approved by the Inquiry Committee, including but not necessarily limited to, that I enter into a course of psychology with a registered psychologist appointed by the College, that I undertake educational courses or training in psychology, that I limit or restrict my practice of psychology, that I consent to a period of practice supervision, or that I cease the practice of psychology altogether.

[5] The College appointed Dr. Hedrick, a psychologist who practices in Seattle, Washington to be the assessor. On September 21, 2006 Dr. Hedrick provided her assessment, in which she recommended that Dr. Larre cease practice as a psychologist.

[6] On October 19, 2006 the Inquiry Committee wrote to Dr. Larre and advised him that it would consider the assessment on November 9, 2006. It invited Dr. Larre to make any submissions he might care to make in relation to the assessment. Dr. Larre was out of the country and did not make any submissions.

[7] On November 9, 2006 the Inquiry Committee considered the assessment and on November 10, 2006 it wrote to Dr. Larre and advised him that it approved Dr. Hedrick's recommendation that Dr. Larre not continue to practice as a psychologist. The Inquiry Committee invited Dr. Larre to provide the College with his resignation or consent to the cancellation of his registration with the College.

[8] On November 14, 2006 counsel for Dr. Larre wrote to the College and advised that Dr. Larre did not accept Dr. Hedrick's recommendations as reasonable and that he would not resign or consent to the cancellation of his resignation.

[9] On November 20, 2006 an Inquiry Committee Panel conducted an extraordinary hearing under s. 35(1) of the Act to consider whether it was necessary to take action to protect the public pending a hearing of the Discipline Committee concerning Dr. Larre's refusal to accept the recommendation. Dr. Larre's counsel appeared at the hearing on his behalf and proposed that Dr. Larre would refrain from the practice of psychology in British Columbia pending a discipline hearing and that it was therefore not necessary to suspend Dr. Larre's registration. The Inquiry Committee Panel declined to accept the offer and suspended Dr. Larre's registration.

ERRORS ALLEGED

[10] Dr. Larre submits that the Inquiry Committee erred in law and exceeded its jurisdiction:

(a) by failing to properly apply s. 35(1) of the Act;

(b) by effectively delegating its decision-making powers to a third party; and

(c) in purporting to find a breach of undertaking by Dr. Larre.

THE STANDARD OF REVIEW

[11] The parties are in agreement that the appropriate standard of review in this case as determined by the pragmatic and functional approach described in ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] S.C.J. No. 18 is one of reasonableness *simpliciter*.

THE STATUTORY SCHEME

[12] In my view, it will be helpful at this stage to refer to the applicable provisions of the Act that set out the statutory scheme for the resolution of complaints against those who are governed by the Act, including psychologists.

[13] Under s. 32 of the Act a person may make a complaint to the Registrar of the College who must then refer it to the Inquiry Committee:

> 32 (1) A person who wishes to make a complaint against a registrant must deliver the complaint in writing to the registrar.
>
> (2) As soon as practicable after receiving a complaint, the registrar must deliver to the inquiry committee a copy of the complaint, an assessment of the complaint and any recommendations of the registrar for the disposition of the complaint.

[14] Section 33 sets out the steps that may be taken by the Inquiry Committee upon receiving a complaint. The provisions that are relevant to the case at bar are set out below:

33(1) If a complaint is delivered to the inquiry committee by the registrar under section 32 (2), the inquiry committee must investigate the matter raised by the complainant as soon as possible.

(4) The inquiry committee may, on its own motion, investigate a registrant regarding any of the following matters:

(a) a contravention of this Act, the regulations or the bylaws;

(a.1) …

(b) a failure to comply with a limit or condition imposed under this Act, the regulations or the bylaws;

(c) professional misconduct;

(c.1) unprofessional conduct or unethical conduct;

(d) competence to practise the designated health profession;

(e) a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs his or her ability to practise the designated health profession.

(5) The inquiry committee must request the registrant who is the subject of an investigation under this section to provide it with any information regarding the matter that the registrant believes should be considered by the inquiry committee.

(6) After considering any information provided by the registrant, the inquiry committee may

(a) take no further action if the inquiry committee is of the view that the matter is trivial, frivolous, vexatious or made in bad faith or that the conduct or competence to which the matter relates is satisfactory,

(b) in the case of an investigation respecting a complaint, take any action it considers appropriate to resolve the matter between the complainant and the registrant,

(c) act under section 36, or

> (d) direct the registrar to issue a citation under section 37.

[15] As can be seen, one of the options open to the Inquiry Committee is to act under s. 36, which provides a procedure for disposing of complaints by way of a consensual process without the member having to admit the complaint and without the College having to go through the process of issuing a citation and conducting an adjudication hearing. This was the process undertaken in relation to Dr. Larre. Section 36 provides as follows:

> 36(1) In relation to a matter investigated under section 33, the inquiry committee may request in writing that the registrant do one or more of the following:
>
> (a) undertake not to repeat the conduct to which the matter relates;
>
> (b) undertake to take educational courses specified by the inquiry committee;
>
> (c) consent to a reprimand;
>
> (d) undertake or consent to any other action specified by the inquiry committee.
>
> (1.1) If requested by the complainant and if a consent or undertaking given under subsection (1) relates to the complaint made by the complainant, the inquiry committee must deliver a written summary of the consent or undertaking to the complainant.
>
> (2) If a registrant refuses to give an undertaking or consent requested under subsection (1), or if a registrant fails to comply with an undertaking or consent given in response to a request under subsection (1), the inquiry committee may direct the registrar to issue a citation for a hearing by the discipline committee regarding the matter.

[16] As set out in s. 36(2) above, if a registrant fails to comply with an undertaking or consent given under subsection (1) then the Inquiry Committee may direct the registrar to issue a citation under s. 37 of the Act. A hearing is then held by the Discipline Committee. In this case a citation has been issued for the alleged breach of the Undertaking and Consent. The discipline hearing was commenced but has been adjourned.

[17] In addition to the powers of the Inquiry Committee referred to above, s. 35 gives the Inquiry Committee the power to take action to protect the public pending investigation or pending a hearing of the Discipline Committee. Section 35 provides:

> 35 (1) If the inquiry committee considers the action necessary to protect the public during the investigation of a registrant or pending a hearing of the discipline committee, it may
>
> (a) set limits or conditions on the practice of the designated health profession by the registrant, or
>
> (b) suspend the registration of the registrant.
>
> (2) If the inquiry committee acts under subsection (1), it must notify the registrant in writing of its decision, of the reasons for the decision and of the registrant's right to appeal that decision to the Supreme Court.
>
> (3) A decision under subsection (1) is not effective until the earlier of
>
> (a) the time the registrant receives the notice under subsection (2), and
>
> (b) 3 days after the notice is mailed to the registrant at the last address for the registrant recorded in the register of the college.
>
> (4) If the inquiry committee determines that action taken under subsection (1) is no longer necessary to protect the public, it

> must cancel the limits, conditions or suspension and must notify the registrant in writing of the cancellation as soon as possible.
>
> (5) A registrant against whom action has been taken under subsection (1) may appeal the decision to the Supreme Court and, for those purposes, the provisions of section 40 respecting an appeal from a decision of the discipline committee apply to an appeal under this section.

THE DECISION OF THE INQUIRY COMMITTEE

[18] In its written decision, the Inquiry Committee reviewed the background leading to the assessment report and then considered the urgency, the nature of the risk to the public, the evidentiary test and the action that it considered necessary to protect the public. I have extracted the following excerpts from the Panel's decision, which in my view are particularly relevant:

> ***2. The nature of the degree of urgency***
>
> Counsel for the College noted that once the assessment report was received from Dr. Hedrick along with her recommendation that the respondent should cease the practice of psychology, the Inquiry Committee has a duty to take steps as quickly as possible. He also noted the serious nature of the range of concerns which the Inquiry Committee highlighted in its letter of August 24, 2005 to Dr. Larre have now been augmented or amplified by the nature of the concerns identified in the assessment report that relate to the respondent's fitness to practice psychology. … The panel accepted the submissions of the counsel for the College on this issue.
>
> ***3. Whether or not the registrant poses an immediate risk to the public.***
>
> Counsel for the College quoted several excerpts from Dr. Hedrick's report, specifically from p. 8, 9, 10 and 11 in establishing the view that there is immediate public risk. He also noted that the panel,

consisting of a public member and two experienced practitioners, are best placed to assess such risk. […] the panel is of the view that there are serious public protection concerns and an immediate risk to the public. These serious concerns can be clearly seen from Dr. Hedrick's report (particularly at p. 11).

4. Is there a prima facie case which justifies the imposition of limits or conditions on the practice of a registrant or a suspension?

The panel considered the submission of counsel for the College with reference to Madam Justice AIlan and the standard of proof necessary. Comments from counsel for the respondent made reference to the need to balance public protection with concerns about the reputation of the respondent and reiterated his proposal that the panel consider accepting a willingness of the respondent to "refrain" from the practice of psychology pending a full hearing on the matter.

The panel is of the view that the materials presented before the panel at the extraordinary hearing met or exceeded the standard of proof from Madam Justice Allan with respect to both Dr Larre's refusal to comply with the terms of his Undertaking and Consent as well as the nature of the risk to the public that his practice appears to represent.

5. What action is necessary to protect the public?

Counsel for the College noted that the powers of section 35(1) must be used sparingly and rarely exercised where the result would be to effectively deprive a person of the ability to carry on his or her profession, but that it is a power that should be used when it is demonstrably necessary to provide maximum protection to the public. He argued that there was sufficient material before the panel establishing a strong *prima facie* case and that also established that there is a real and serious threat to the safety of clients entrusted to the respondent's care if he continues to practice.

Counsel for the respondent made reference again to issues of reputation and referred to his client's willingness to "refrain" from the practice of psychology pending a hearing as a compromise position.

> ***6. What is the appropriate remedy?***
>
> The panel reviewed its obligation to come up with a remedy that is proportionate and directly relevant to the nature of the identified risk to the public and consistent with the provisions of S.35(I). The panel is aware of its obligation to consider the options and select the one that is least onerous to the respondent but also the most appropriate in all of the relevant circumstances.
>
> The panel is of the view that there is a real and serious threat to the safety of clients so as to warrant suspending the registration of Dr. Larre.
>
> The panel noted that the respondent's legal counsel stated that the respondent is a Priest and his work in that regard is ongoing. In fact, this work was what kept the respondent from attending today's hearing.

[19] In its conclusions the Inquiry Committee Panel dealt further with the question of the appropriate remedy as follows:

> 10. The panel noted the remedies available as follows:
>
> a. setting of limits or conditions on the practice of the designated health profession, including the option suggested by counsel for Dr. Larre that the panel accept his willingness to "refrain from the practice of psychology and to retain the title psychologist" pending a hearing of the Discipline Committee.
>
> b. suspend the registration of the registrant.
>
> . . .
>
> 13. In consideration of whether or not a less severe remedy than suspension is appropriate in the circumstances, the panel noted a request by counsel for the respondent in which he said that his client is willing to "refrain" from the practice of psychology in British Columbia. The panel noted that this term is not a term referenced in *the Health Professions Act* and in spite of a number of opportunities in which the registrant's counsel was asked to provide more details or specifics (which was not forthcoming), the panel is of the view that there is insufficient clarity and insufficient certainty in the

> representations made by the registrant's counsel upon which to act in the circumstance. The panel further noted that this extraordinary hearing was convened arising from the allegation that the registrant has failed to act in accordance with an Undertaking and Consent.

ANALYSIS OF THE ISSUES

Did the Inquiry Committee Fail to Properly Apply s. 35(1) of the Act?

[20] I agree with the petitioner's submission that a suspension of a professional person pending the outcome of an investigation or hearing is an extraordinary remedy that ought to be used sparingly. As was stated by Cohen J. ***in Patton v. College of Dental Surgeons of British Columbia***, [1996] B.C.J. No. 2864 (S.C.) at para. 30:

> I think it plain, considering the consequences attendant upon the summary suspension of a professional person, that extraordinary action to protect the public requires extraordinary circumstances to serve as a foundation for such a step.

[21] As for the evidentiary foundation that is required in order to take such action, in ***Hannos v. Registered Nurses Assn. of British Columbia***, [1996] B.C.J. No. 138 (S.C.), a case dealing with s. 24 of the ***Nurses' (Registered) Act***, R.S.B.C. 1979, c. 302, which is analogous to s. 35 of the Act, Allan J. said at para. 21:

> Before the Association invokes the extraordinary powers of section 24, it must establish a prima facie case that the member poses an immediate risk to the public such that his or her registration should be suspended prior to a hearing on the merits.

[22] At paras. 34 – 35 Madam Justice Allan said:

> I conclude that the standard of proof necessary to suspend a professional member in the public interest pending a hearing to determine misconduct will depend upon the degree of urgency and other circumstances of a particular case. Here, 5 months elapsed between the Association's notification to the member and the section 24 hearing. The impugned conduct extended over several years. The level of urgency which would justify draconian measures at the expense of procedural fairness is not present in this case.
>
> However, it does not follow that the Respondent was required to meet a high standard of proof of the allegation on a hearing pursuant to section 24. In my view, the applicable standard of proof on an interim application will fall somewhere between the assertion of one or more unsubstantiated allegations and the high standard which is required with respect to the evidence considered at the full hearing of the merits of the case.

[23] I also accept the petitioner's submission that, having concluded that the circumstances warrant immediate action to protect the public, the tribunal must consider all reasonable alternatives to an interim suspension that may be available and that the restrictions or conditions imposed must be the least severe possible, while safeguarding the public. In ***Patton***, Cohen J. stated at para. 32:

> [T]here should always be a consideration as to whether a less severe remedy than a summary suspension is available to protect the public interest until the charges have been disposed of. In this regard, while the appellant denies that he is incapable of reading or understanding radiographics, he is prepared to accept spot audits of his practice at his own expense pending the Inquiry Committee hearing. While I have the jurisdiction to impose terms and conditions on the appellant's practice, I think that the respondent has a duty to give serious considerations to any options that might prove reasonable and feasible to monitor the appellant's practice

> pending the hearing, before resorting to the remedy of a suspension.

[24] It is apparent from the record that at the hearing on November 20, 2006 the petitioner did not challenge the fact that action was necessary to protect the public pending a hearing of the Discipline Committee. The position taken by the petitioner, through his counsel, was that the Inquiry Committee ought to accept his agreement to voluntarily suspend practising as a psychologist in British Columbia pending a discipline hearing without formally suspending his registration.

[25] Likewise, on this appeal the focus of the petitioner's submissions was that the Inquiry Committee acted unreasonably in refusing to accept Dr. Larre's offer to refrain from practising psychology in British Columbia pending the outcome of a discipline hearing and thereby erred in the application of s. 35(1) by failing to impose a remedy that was proportionate to the risk.

[26] It is clear from the record that the Inquiry Committee considered the offer that Dr. Larre put forward and rejected it. The Panel noted that the remedies available under s. 35(1) of the Act were limited to setting limits or conditions on Dr. Larre's practice or suspending his registration. The panel noted that the offer to "refrain" from practising was not something that is provided for in the Act, at least expressly, and was of the view that the offer provided insufficient clarity and certainty to be accepted by the Panel as a sufficient way "to set limits or conditions" of practice.

[27] Counsel for the petitioner submitted that the Panel declined to give him an opportunity to provide further clarity with respect to the offer and declined to tell him what form of agreement the Panel might find acceptable.

[28] In his submissions on the appeal, Mr. Hinkson submitted that his client could have given a further undertaking under s. 36 of the Act. Counsel for the College submitted that the procedure for s. 36 does not apply in circumstances such as these. He submitted that s. 36 is intended to provide for the final resolution of a complaint in a consensual fashion without involving a discipline hearing. If an undertaking is given by a registrant under s. 36 that is the end of the inquiry or discipline process. The registrant may be required to perform certain acts in compliance with the undertaking but the discipline process that led to the undertaking is finished. If the registrant fails to comply with an undertaking given under s. 36 he or she may be subject to discipline proceedings based upon the failure to comply with the undertaking but those are new proceedings.

[29] Having considered the scheme of the disciplinary process provided for by the Act, I conclude that the respondent is correct in its submission that s. 36 could not be invoked as the vehicle by which Dr. Larre might subject himself to an interim restraint with respect to his practice.

[30] That is not to say, however, that the Inquiry Committee could not accept an offer to voluntarily stop practising on an interim basis pending a discipline hearing. I think that the words “it may set limits or conditions on the practice …

by the registrant" in s. 35(1)(a) are broad enough to enable the Panel to consider, and if appropriate, accept such an offer.

[31] The essential question is whether the Panel in this case acted unreasonably in declining to accept the offer that was made. I conclude that it did not.

[32] The investigation concerned serious allegations regarding Dr. Larre's competence. The seriousness of the allegations was reinforced by the review conducted by Dr. Hedrick pursuant to the undertaking. Dr. Larre refused to accept the recommendation, which the Panel considered was reasonable based upon its review of the evidence. The Panel was faced with a situation where it was satisfied that unless Dr. Larre's practice was suspended the public was exposed to a serious risk. There was a need to act without delay. In my view the Panel was entitled to consider the lack of particularity to the offer made by Dr. Larre and to be concerned about whether Dr. Larre would honour it and, if not, how the agreement could be enforced. The Panel was dealing with a situation in which the matter under investigation was the alleged breach of an undertaking under s. 36 and it was being offered something less than that as an interim remedy to address the risk to the public. In these circumstances I am unable to say that the Panel's decision to suspend rather than accept Dr. Larre's offer was unreasonable.

Did the Inquiry Committee Err by Effectively Delegating its Authority to a Third Party?

[33] Counsel for Dr. Larre submitted that the Inquiry Committee Panel effectively delegated its authority to Dr. Hedrick. He submitted that in considering whether extraordinary action was necessary to protect the public it relied exclusively on Dr. Hedrick's report and considered only whether Dr. Larre's alleged failure to comply with the Undertaking made it necessary to suspend him.

[34] In my view, the issue on this appeal is not the ability of the College to employ s. 36 as a vehicle for resolving complaints against its members. Nor is the question for determination whether Dr. Larre in fact breached the Undertaking and Consent by refusing to resign. That is a decision for the Discipline Committee.

[35] The question for consideration on this appeal is whether the Inquiry Panel erred in its application of the very limited decision making powers under s. 35(1) concerning the interim suspension of Dr. Larre.

[36] In my view the Inquiry Committee did not improperly delegate its powers under s. 35 to a third party. The Inquiry Committee was entitled to rely on the report of Dr. Hedrick's as part of the evidence which it considered in making its decision to act under s. 35(1). In my opinion, the Inquiry Committee had before it, in the form of the complaints, the report of Dr. Hedrick and the refusal to resign, an evidentiary foundation sufficient to enable it to conclude that

immediate action was necessary. It applied the correct evidentiary test as set out in ***Hannos*** in making that determination.

Did the Inquiry Committee Err by Purporting to Find a Breach of Undertaking by Dr. Larre?

[37] In my opinion, the Inquiry Committee Panel did not purport to find a breach of undertaking. It is clear from the record and its decision that it fully appreciated that the question whether or not Dr. Larre had breached the undertaking was one for a Discipline Hearing. All that the Inquiry Committee Panel determined was that there was a sufficient case presented to warrant taking action under s. 35 pending that determination.

[38] Mr. Hinkson made it clear to the Panel that the issue whether Dr. Larre refused to comply with the undertaking depended upon resolution of the question whether Dr. Hedrick's recommendation was reasonable and that the Inquiry Panel was not in a position to resolve that question. He also made it clear that the Inquiry Panel was not being asked to decide whether Dr. Larre was or was not incompetent.

[39] In my opinion the Inquiry Committee Panel applied the correct test by asking itself whether there was a prima facie case that Dr. Larre breached the undertaking, not whether it was proven that he did. The panel was satisfied a prima facie case had been made out with regard to the alleged breach as well as the urgency and degree of risk posed by Dr. Larre. At page 4 of its decision the panel stated:

> The panel is of the view that the materials presented before the panel at the extraordinary hearing met or exceeded the standard of proof from Madam Justice Allan with respect to both Dr Larre's refusal to comply with the terms of his Undertaking and Consent as well as the nature of the risk to the public that his practice appears to represent.

CONCLUSION

[40] Despite his very able submissions, Mr. Hinkson has failed to persuade me that the Inquiry Committee erred in law or that its decision was unreasonable.

The appeal is dismissed.

"B.M. Joyce, J."
The Honourable Mr. Justice B.M. Joyce