VI01756

Victoria Registry

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Chief Justice McEachern **June 3, 1993**

The Honourable Mr. Justice Hutcheon

The Honourable Mr. Justice Goldie **Vancouver, B.C.**

BETWEEN:

KAROL FLORIAN MADERA

APPLICANT

(APPELLANT)

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

THE SOCIETY

(RESPONDENT)

T.P. O'Grady, Q.C. and

S. Beach appearing for the Appellant

E.D. Crossin appearing for the Respondent

McEACHERN, C.J.B.C.: The issue raised in the factums on this appeal is whether Law Society counsel on a Credential's Hearing can compel the applicant for call and admission, to be the first witness for the Law Society.

1 **During the course of the appeal a new issue arose, namely, whether the proceedings before the Credential's Committee were well founded because they were commenced as a question of whether the applicant should be enrolled and that became transformed at or before the start of the hearing into a question of fitness for call and admission.** Notwithstanding counsel's request that we pronounce on this question, I would decline to do so because I do not think we have an adequate record on which to reach a conclusion on that question.

2 **What happened at the hearing may briefly be stated as follows. First the Chairman opened the hearing by announcing that the issue was fitness for call and admission and counsel agreed that the applicant would go first. He then called a great many character witnesses following which his counsel closed the case for the applicant without the appellant giving evidence.** The precise language in which these matters were stated is as follows:

MR. O'GRADY: That concludes the Applicant's case in relation to the issues of character and of reputation and fitness to be called to the Bar. We submit with great respect that we have now discharged the burden cast upon the Applicant by the Act and Regulations.

MR. CHAIRMAN: Yes? Mr. Crossin?

MR. CROSSIN: Yes, I am calling the Applicant, please.

MR. O'GRADY: With great respect, we submit that the Applicant should not be called upon to give evidence at this time as he has knowledge of the case against him and has had an opportunity to be confronted by his accusers and that that is required as a matter of ordinary fairness, that he must know the case against him before he can be called upon to be questioned.

I take it my learned friend intends to question him in-chief, but even that I submit is -- it is something that exceeds the bounds of fair play and ordinary justice.

MR. CHAIRMAN: Is that your submission?

MR. O'GRADY: Thank you very must.

We have an argument here on the merits of the case concerning -- if Ms. Beach might be permitted to argue the technical aspects of this?

3 Following submissions the Chairman made a ruling:

RULING OF THE PANEL.

This is an objection by the Applicant to his being called as the first witness for the Law Society in this hearing.

Section 35(2) of the Legal Professions

Act provides that quote:

"A panel may:

(a) compel the Applicant to give evidence under oath."

It is argued on behalf of the Applicant that this compellability under the Act is limited both as to scope and to timing so that it cannot be used in a way which is unfair to the Applicant. In particular it is argued that it would be unfair to compel the Applicant to give evidence prior to any other case having been made for the Law Society.

The Applicant says that it is unfair because he has not had an opportunity at the time he is being compelled to give evidence to know, to hear in evidence what "his accusers", in his words, have to say.

The panel accepts and adopts the proposition that it is necessary for it to act in a way which is not unfair to the Applicant and which is consistent with the rules of natural justice in this inquiry. It does not, however, conclude that it would be unfair to require the Applicant to give evidence at the calling of the counsel for the Law Society at this point in the hearing.

The principal, one of the principal arguments made for the proposition that the Applicant ought not to be called was that it was tantamount to not allowing him to know the case has to meet. In our view that is not the case and we would obviously consider any application made on the Applicant's behalf later in the hearing if at some stage there is evidence which he is of the view he had not had an opportunity to meet.

That is our ruling.

Against that ruling the applicant has brought this appeal.

4 I wish to recognize at the outset that Mr. Crossin takes the position that this Court should not presume to decide this issue even though leave has been given because it is an appeal against a ruling given in the course of a hearing. He says we should await the completion of the hearing and the pronouncement of a decision before we undertake to hear appeals. Mr. Crossin suggested that great mischief might result if this Court assumes interlocutory supervision over the conduct of hearings. I agree that the Court will not generally pronounce on questions arising in mid-hearing, and I would expect the Court to do so only in the most extraordinary circumstances. For the reasons I am about to state, however, I do not find it necessary to dispose of this appeal on that basis.

5 **The ruling against which this appeal is brought is stated by the chairman of the panel to be whether or not the applicant was fit to be called and admitted as a member of the Law Society.** While conceding that the Law Society has the right to compel the applicant to give evidence at some time during the hearing and that the applicant would have a right to give proper rebuttal evidence Mr. O'Grady argues that it contravenes natural justice to require the applicant to give evidence before he knows precisely what his accusers have said about him under oath. I cannot accede to that submission. **Very full and complete particulars including the names of witnesses were given and original statements or affidavits were furnished. With respect to many of the particulars given by counsel for the Law Society the conduct to be inquired into was very specifically described.**

6 **In my view the applicant did know both generally and in many cases specifically what the witness would likely say.** It may transpire as the hearing continues that the election of counsel for the Law Society to compel the appellant to give evidence as the first witness in the Law Society's case constitutes unfairness. If that occurs then , of course, the applicant will have remedies by way of judicial review or appeal at the end of the hearing based upon a breach or breaches of natural justice. We are not able to predict that result at this stage of the hearing and I would not accede to Mr. O'Grady's submissions based on the natural justice.

7 Alternatively, Ms. Beach argued for the applicant that the exercise of this right of compellability at the opening of the case for the Law Society breached the applicant's s.7Charter right of liberty to pursue admission to the Law Society by means that were not in accordance with fundamental justice.

8 In my judgment as compellability is admitted we are concerned here more with hearing tactics that constitutionally protected rights. I am not persuaded that the exercise of the right of compellability by requiring the applicant to give evidence before the other witnesses can properly be said to be contrary to the principles of fundamental justice. I am not persuaded that the hearing panel erred. **I would accordingly dismiss the appeal and remit the matter to the Credential's Panel to proceed with the hearing as it may be advised.**

HUTCHEON, J.A.: **I agree.**

9 GOLDIE, J.A.: **I agree with what has been proposed by My Lord the Chief Justice.** I wish to add, however, a word or two of my own.

10 While my colleagues would leave the point open, in my view the assertion of a right of appeal to this Court at this stage of a hearing and in the circumstances that have been described to us is misconceived. I am loathe to accept that s.58 of theLegal Profession Act permits an issue of this kind to come here directly.

11 In my view, the proper course to follow where a procedural ruling is said to be in excess of jurisdiction or offends natural justice is an application under theJudicial Review Procedure Act. It is the Supreme Court of British Columbia alone that has the supervisory power over inferior tribunals derived from the great prerogative writs. To review the interlocutory ruling here Mr. O'Grady accepted that seeking an order in the nature of prohibition was an option. As an interlocutory measure I would think it is the only option. An appeal may thereafter be taken to this Court but in my view we are being asked to do what only the Supreme Court of British Columbia should be called upon to do.

12 In all other respects I agree with the disposition proposed by My Lord the Chief Justice.

McEACHERN, C.J.B.C.: **The appeal is dismissed.**

"The Honourable Chief Justice McEachern"

"The Honourable Mr. Justice Goldie"