

2000 CarswellOnt 681, 47 O.R. (3d) 361, 184 D.L.R. (4th) 165, 131 O.A.C. 369



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Wilder v. Ontario (Securities Commission)

Lawrence D. **Wilder** and Cassels Brock & Blackwell, Applicants and Ontario Securities Commission, Respondent
and The Law Society of Upper Canada, Intervenor

Ontario Court of Justice (General Division) [Divisional Court]

MacFarland J., Southey J., Swinton J.

Heard: February 15, 2000

Judgment: March 10, 2000

Docket: Toronto 755/99

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Counsel: *L.L. Fuerst* and *L. Thacker*, for Applicants.

J.L. Naster and *I.R. Smith*, for Respondent.

E. Morgan, for Intervenor.

Subject: Securities; Corporate and Commercial

Securities and commodities --- Offences — Practice and procedure

In course of client's prospectus review, lawyer wrote to Securities Commission referring to series of favourable due diligence results conducted by independent parties — Commission issued notice of hearing to determine whether it was in public interest to reprimand lawyer, alleging references to due diligence results were deliberately misleading — Lawyer and intervening law society brought application for judicial review seeking order prohibiting commission from proceeding with hearing on grounds law society had exclusive and exhaustive powers over regulation of professional conduct of lawyers — Application dismissed — Commission was not usurping role of law society as it did not seek to discipline lawyer for professional misconduct but rather to remedy breach of Securities Act and control own process — Nothing inconsistent existed between Law Society's role in regulating legal profession and commission's proposed exercise of jurisdiction in circumstances — Nothing in Law Society Act makes lawyer immune from proceedings by commission solely because he is acting in professional capacity — Commission did not seek to control access to practice before it but merely exercised its public interest jurisdiction to determine whether individual should be reprimanded — Commission acted as quasi-judicial tribunal conducting its enforcement process, and did not interfere with independence of bar in political sense — Proceeding by commission did not undermine rule of law — Securities Act, R.S.O. 1990, c. S.5 — Law Society Act, R.S.O. 1990, c. L.8.

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Securities and commodities --- Commissions and exchanges — Hearings and appeals — Jurisdiction — General

In course of client's prospectus review, lawyer wrote to Securities Commission referring to series of favourable due diligence results conducted by independent parties — Commission issued notice of hearing to determine whether it was in public interest to reprimand lawyer, alleging references to due diligence results were deliberately misleading — Lawyer and intervening law society brought application for judicial review seeking order prohibiting commission from proceeding with hearing on grounds law society had exclusive and exhaustive powers over regulation of professional conduct of lawyers — Application dismissed — Commission was not usurping role of law society as it did not seek to discipline lawyer for professional misconduct but rather to remedy breach of Securities Act and control own process — Nothing inconsistent existed between Law Society's role in regulating legal profession and commission's proposed exercise of jurisdiction in circumstances — Nothing in Law Society Act makes lawyer immune from proceedings by commission solely because he is acting in professional capacity — Commission did not seek to control access to practice before it but merely exercised its public interest jurisdiction to determine whether individual should be reprimanded — Commission acted as quasi-judicial tribunal conducting its enforcement process, and did not interfere with independence of bar in political sense — Proceeding by commission did not undermine rule of law — Securities Act, R.S.O. 1990, c. S.5 — Law Society Act, R.S.O. 1990, c. L.8.

Cases considered by *Swinton J.*:

Reference re Secession of Quebec, [161 D.L.R. \(4th\) 385](#), [228 N.R. 203](#), [55 C.R.R. \(2d\) 1](#), [\[1998\] 2 S.C.R. 217](#) (S.C.C.) — applied

Statutes considered:

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Preamble — considered

Law Society Act, R.S.O. 1990, c. L.8

Generally — referred to

s. 35(1) [en. 1998, c. 21, s. 21] — considered

s. 40 [rep. & sub. 1998, c. 21, s. 21] — referred to

s. 44 [rep. & sub. 1998, c. 21, s. 21] — referred to

Securities Act, R.S.O. 1990, c. S.5

Generally — considered

Pt. XXII [am. 1994, c. 11, ss. 373-375] — considered

s. 1.1 [en. 1994, c. 33, s. 2] — referred to

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s. 27 — considered

s. 122 [rep. & sub. 1994, c. 11, s. 373] — considered

s. 122(7) [en. 1994, c. 11, s. 373] — considered

s. 127 [rep. & sub. 1994, c. 11, s. 375] — considered

s. 127(1) [rep. & sub. 1994, c. 11, s. 375] — considered

s. 127(1) ¶ 6 [en. 1994, c. 11, s. 375] — considered

s. 128 [rep. & sub. 1994, c. 11, s. 375] — referred to

s. 128(1) [rep. & sub. 1994, c. 11, s. 375] — considered

s. 128(3) [rep. & sub. 1994, c. 11, s. 375] — considered

APPLICATION by lawyer for judicial review seeking prohibition order against Securities Commission.

Swinton J.:

1 This is an application for judicial review seeking an order in the nature of prohibition to prevent the respondent, the Ontario Securities Commission, from continuing proceedings commenced by Notice of Hearing pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, against the applicant, Lawrence D. Wilder, and for an order in the nature of certiorari quashing the Notice of Hearing as against him. After hearing argument on behalf of the applicants and the intervenor, the Law Society of Upper Canada, the Court dismissed the application, with an endorsement stating that reasons would follow.

The Facts

2 The applicant, Lawrence Wilder, is a barrister and solicitor and a partner in the law firm of Cassels Brock and Blackwell ("Cassels"), which is also an applicant in these proceedings. He is a member of the securities law practice group at that firm.

3 Between September, 1995 and August, 1998, YBM Magnex International Inc. was a client of Cassels. As a partner of Cassels, Mr. Wilder provided legal services to YBM during that period. He is not and never has been an officer, director, shareholder or promoter of YBM.

4 On November 1, 1999 a Notice of Hearing was issued by the Ontario Securities Commission pursuant to its public interest jurisdiction in s. 127(1) of the *Securities Act*. Mr. Wilder was named as one of the respondents, along with YBM Magnex International Inc., various officers and directors of YBM, and its underwriters. With respect to Mr. Wilder, it was stated that the Commission would hold a hearing to consider whether, in the opinion of the Commission, it was in the public interest to make an order pursuant to s.127(1)6 of the Act to reprimand him, as well as a number of other persons. The Notice went on to state that if the Commission determined that any of the named parties, including Mr. Wilder, had not complied with Ontario securities law, staff will request the Commission to consider whether an application should be made to the Superior Court pursuant to s. 128 of the Act.

5 The Notice made reference to the Statement of Allegations by staff of the Commission, also dated November

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1, 1999. That document sets out a detailed set of allegations in 24 pages. The key allegation against Mr. Wilder is found in a section entitled "Conduct Contrary to the Public Interest", paragraph 57:

(f) that Wilder made statements in a letter dated July 4, 1997 to Staff of the Commission that in a material respect, and at the time and in light of the circumstances under which the statements were made, were misleading or untrue or did not state a fact that was required to be stated or that was necessary to make the statements not misleading; specifically, statements concerning the results of due diligence conducted in respect of YBM. In so doing, Wilder acted in a manner contrary to the public interest.

6 The letter was signed by Mr. Wilder and submitted to the staff of the Commission in the course of a prospectus review. The following paragraphs are quoted in the Statement of Allegations:

As discussed above, the Confirming Accountant will be in a position to deliver its report to you no later than Tuesday, July 8, 1997. Based upon the results reported to date, we believe that the report will represent **a continuation of the series of favourable due diligence results pertaining to the business of YBM conducted by independent parties. This stands in stark contrast to the rumors and innuendo to which YBM has been subject and which, based upon the information provided to us to date, have not been subject to any outside scrutiny or independent verification whatsoever.**

As discussed previously, the Company, its advisors, as well as the underwriters and their advisors have made every effort to address each concern raised to date in order to complete this financing and allow the Company to complete its acquisition transaction which is crucial to its continued success. Needless to say, YBM's ability to proceed with this financing despite the efforts of all the parties concerned and referenced herein would have serious and lasting negative consequences to the Company and its shareholders. We respectfully submit that such an occurrence would not be in the public interest **in view of the extensive due diligence completed to date and the uniformly positive results thereof.** (emphasis added in the Statement of Allegations)

7 The Statement of Allegations sets out a summary of information not disclosed by Mr. Wilder. Essentially, it is alleged by OSC staff that the letter contains a misleading misstatement of material facts, in that Mr. Wilder knew that YBM had not been the subject of a "series of favourable due diligence results pertaining to the business of YBM conducted by independent parties".

The Commission's Jurisdiction

8 The issue on this application for judicial review is not whether the allegations of OSC staff that Mr. Wilder misled them are well-founded or not. The issue is whether the Commission has jurisdiction to commence and continue these proceedings against Mr. Wilder pursuant to s. 127(1) of the *Securities Act*. In determining that issue, the Court has proceeded on the basis that the allegations in the Statement of Allegations are capable of proof.

9 Part XXII of the *Securities Act* is entitled "Enforcement" Section 122 sets out offences under the Act and provides in s. 122(7) that no proceeding under this section, to prosecute a violation of the Act, shall be commenced except with the consent of the Commission.

10 Section 127, which is in issue here, is under the same Part. It provides a mechanism for administrative enforcement through the exercise of the Commission's public interest jurisdiction: It was enacted in 1994 (S.O. 1994, c. 11, s. 375), and states:

(1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

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1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
2. An order that trading in any securities by or of a person or company cease permanently or for such period as is specified in the order.
3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
 - i. be provided by a market participant to a person or company,
 - ii. not be provided by a market participant to a person or company, or
 - iii. be amended by a market participant to the extent that amendment is practicable.
6. An order that a person or company be reprimanded.

11 Finally, s. 128(1) permits the Commission to apply to the Superior Court for a declaration that a person or company has not complied with or is not complying with Ontario securities law, while s. 128(3) sets out the remedial powers of the Court.

The Interpretation of s. 127(1) of the Act

12 The applicants and the intervenor argue that s. 127(1) should be interpreted so as not to apply to lawyers while acting in their professional capacity. In the alternative, they argue that if the section does apply in these circumstances, it is unconstitutional and should be read down.

13 The purpose of the *Securities Act* is to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in those markets (s.1.1). It is the responsibility of the Commission to carry out those objectives in exercising the powers conferred on it by the Act.

14 There is nothing in the wording of s. 127(1)6 which would indicate that it does not apply to lawyers. Indeed, the term "person" is used here, in contrast to terms such as "market participant" in other clauses. Moreover, the applicants concede that lawyers are subject to the other enforcement provisions of the Act found in ss. 122 and 128, arguing that this creates no problem because the sections are enforced through the courts.

15 Normally, words in a statute would be interpreted as having the same meaning throughout, leading one to conclude that "person" in s. 127(1)6 is meant to include lawyers acting in their professional capacity, just as the other sections do. However, the applicants argue that the background and purpose of s. 127(1)6 is inconsistent with a grant to the Commission of a power to discipline lawyers for professional misconduct, which is how the Commis-

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sion's proceedings here are characterized. Support for this proposition was found in earlier proposals to amend the securities legislation put forth in 1990, which sought an express power for the Commission to discipline professionals ("Proposals for Amendments to the Securities Act in the Areas of Investigations, Enforcement and Remedies" (1990), 13 O.S.C.B. 405). These proposals generated opposition from various law firms, as well as the Law Society of Upper Canada, which expressed concern about the impact on the independence of the bar and the regulatory role of the Law Society. Further proposals were then forthcoming from the Commission relating to professionals, which were more circumscribed than those proposed initially ("Proposals to Amend the Enforcement Provisions of the Securities Act" (1991), 14 O.S.C.B. 1907). These were never enacted, and from this, the applicants ask this Court to infer that there is no power to discipline lawyers acting in their professional capacity under s. 127(1) in its current form.

16 In my view, this conclusion does not follow. When the *Securities Act* was amended in 1994, it gave the Commission a general power, in s. 127(1), to reprimand a person or company, along with other powers, such as the power to order a market participant to submit to a review or to require reports, prospectuses and releases to be provided, withheld, or amended. The predecessor to s. 127(1), found in s. 27 of the Act prior to the amendments, permitted the Commission to reprimand only a registrant. Thus, it appears that with the enactment of s. 127(1) in its current form, the Legislature intended to broaden the powers of the Commission to make orders in the public interest and chose words which do not preclude their application to lawyers.

17 The applicants and intervenor nevertheless argue that the *Law Society Act*, R.S.O. 1990, c. L.8 evidences an intention to leave the governance of the legal profession in Ontario to the Law Society. Indeed, in its factum, the Law Society submitted that it had exclusive and exhaustive powers over the regulation of professional conduct of lawyers.

18 Moreover, it was argued that it would be contrary to the public interest to interpret the *Securities Act* as giving the Commission the power to discipline lawyers, since this would have a chilling effect on the ability of members of the public to obtain independent legal representation. Reference was made by the applicants and intervenor to the experience of lawyers before the United States Securities and Exchange Commission ("SEC") in support of the argument that the threat of proceedings by an administrative tribunal before which a lawyer practises will undermine clients' confidence in the lawyer's independence and will threaten solicitor-client confidentiality. The SEC, pursuant to Rule 2(e) (17 C.F.R. s. 201.102(e)(1)), can deny the privilege of appearing before it to a person found to have engaged in "unethical or improper professional conduct", as well as one who has engaged in a wilful violation of federal securities law.

19 There is nothing inconsistent between the Law Society's role in regulating the legal profession and the Ontario Securities Commission's proposed exercise of jurisdiction in the circumstances of this case. The Law Society and the Ontario Securities Commission both exercise public interest functions, but the public interests which they seek to protect are not the same. The Law Society has an important role to govern the legal profession in the public interest, and to ensure that members of the profession do not engage in professional misconduct or conduct unbecoming a barrister and solicitor. In carrying out its role, it has been given extensive disciplinary powers pursuant to s. 35(1) of the Act, as well as the power to order a member to institute new systems or procedures, to obtain or continue treatment or counselling or to participate in professional education (see, for example, ss. 40 and 44).

20 The Ontario Securities Commission also has an important public interest role, that of protecting investors and the proper functioning of Ontario's capital markets. Ensuring proper disclosure and maintaining the integrity of its processes are an important part of this role. Here, it is alleged that Mr. Wilder intentionally misled Commission staff during the course of a prospectus review by writing the letter quoted earlier. Nothing in the *Law Society Act* indicates that a lawyer should be immune from proceedings by the Ontario Securities Commission under s. 127(1) where others would not be immune, solely because he is acting in a professional capacity. In proceedings such as these, the Commission is not usurping the role of the Law Society, as its objective is not to discipline the lawyer for professional misconduct; rather, its concern is to remedy a breach of its own Act which violates the public interest in

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fair and efficient capital markets, and to control its own processes.

21 While the applicants and intervenor made reference to the chilling effect on the independence of counsel appearing before the SEC, it is important to recognize that the OSC is not claiming powers here like those possessed by the SEC. The OSC is not seeking to control access to practise before it, as can the SEC under Rule 2(e); rather, it purports to exercise its public interest jurisdiction to determine whether an individual should be reprimanded because of alleged misconduct. As a matter of statutory interpretation, s. 127(1)6 can apply to a lawyer acting in a professional capacity.

The Constitutional Issue

22 The applicants and intervenor rely, in the alternative, on a constitutional argument. They argue that the Rule of Law is a fundamental principle of the Canadian constitution. One of the primary ways in which the Rule of Law is protected is through the independence of the judiciary, and they argue that an independent bar, subject only to self-regulation or judicial oversight, is integral to the independence of the judiciary. Thus, they argue that the Ontario Securities Commission can not exercise disciplinary power over lawyers as a matter of constitutional law, and, therefore, s. 127(1)6 should be read down so as not to apply to lawyers acting in a professional capacity.

23 The preamble to the *Constitution Act, 1982* provides that "Canada is founded upon principles that recognize the supremacy of God and the rule of law". The Supreme Court of Canada has also recognized the fundamental importance of the rule of law in the Canadian constitutional order. For example, in *Reference re Secession of Quebec* (1998), 161 D.L.R. (4th) 385 (S.C.C.) at 417, the Court states that:

The principles of constitutional law and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at p. 142, 16 D.L.R. (2d) 689, is "a fundamental postulate of our constitutional structure" ... At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their own affairs. It provides a shield for individuals from arbitrary state action.

In an earlier passage, the Court noted that the principles are not made explicitly a part of the written constitution, but they assist in the interpretation of its text (at 410).

24 The proposed proceeding against Mr. Wilder does not represent an encroachment on the independence of the bar. It is noteworthy that the applicants and the intervenor take the position that the allegation against Mr. Wilder could properly be before the courts — for example, through invoking the procedures in ss. 122 and 128 of the Act. They argue that the OSC, in contrast, is insufficiently independent to hear Mr. Wilder's case. This argument ignores the fact that the OSC acts as a quasi-judicial tribunal in conducting its enforcement proceedings. Such proceedings do not constitute state interference in the independence of the bar "in the political sense", as suggested by the applicants and intervenor. All that the Commission seeks to do here is to ensure that lawyers, among others, do not mislead the Commission, in the way that Mr. Wilder is alleged to have done. This exercise of jurisdiction by the Commission will not interfere with the ability of lawyers who practise securities law to continue to provide excellent and vigorous representation to their clients.

25 Thus, the Commission's proposed proceeding does not interfere with the independence of the bar, nor can it be said to undermine the rule of law. Therefore, there is no reason to interpret s. 127 so as not to apply to lawyers acting in their professional capacity, and the application for judicial review is dismissed. Costs to the Ontario Securities Commission are payable by the applicants on a party and party scale in an amount to be assessed. There shall be no costs to the intervenor.

MacFarland J.:

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I agree.

Southey J.:

I agree.

Application dismissed.

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