Your Career May Be An Open Book:
Privacy and Regulatory Investigations

By Jason Kully and Gregory Sim

In dismissing an appeal by an Alberta lawyer who alleged that his Charter rights were violated by an order allowing a law society investigator to search his computers, cell phones, and other electronic devices, the Alberta Court of Appeal confirmed that a professional regulator’s statutory investigation powers are broad and that regulated professionals have a low expectation of privacy. Regulatory investigations may permit searches that would otherwise be unauthorized and a breach of an accused’s Charter rights in a criminal investigation.

Law Society of Alberta v Sidhu, 2017 ABCA 224, involved an appeal by a lawyer who was investigated by the Law Society of Alberta after he was criminally charged with transporting drugs into a prison. The Law Society investigator met with the lawyer and, after a series of interviews, demanded that the lawyer produce all records or property related to the investigation in accordance with s. 55(2) of the Legal Profession Act. Specifically, the lawyer was requested to provide access to his computers, laptops, iPads, cell phones, and other electronic devices.

The lawyer refused the request on the basis that s. 55 infringed his section 8 Charter right to be secure against unreasonable search and seizure. The Law Society then obtained an order from the Court of Queen’s Bench upholding s. 55 as constitutionally valid and requiring the lawyer to comply with the investigator’s demand. On appeal of the order, the lawyer again argued that s. 55 was unconstitutional because it violated the Charter. He also argued, at a minimum, that the Law Society should have to satisfy the Court that there were reasonable grounds to believe the search would find the property/information sought, as well as reasonable grounds to believe that the property/information would provide evidence of conduct deserving of sanction.

The Court of Appeal dismissed the appeal. While the Court of Appeal did not rule on whether s. 55 of the Legal Profession Act breached the Charter, the Court found that in the particular case, the investigator’s demand and the Court of Queen’s Bench order met the standards required in a regulatory investigation. The Court of Appeal recognized:

1. The protection of the public is often the most important objective of regulatory statutes and regulators need broad surveillance powers to ensure that their profession is monitored and managed effectively. In the regulatory context, the very purpose of the inspection and production of documents is often to
determine whether an offence has been committed. It would thus be impossible for many administrative searches or seizures in a regulated profession to meet the criminal law standard and require reasonable grounds to believe the search would find the property/information sought and reasonable grounds to believe that the property/information would provide evidence of conduct deserving of sanction.

2. Regulators play an integral role in protecting the public interest, in part because a client may be in a vulnerable position with respect to the client-professional relationship.

3. There is a lower expectation of privacy in the regulatory context because there is an awareness and acceptance that the regulator will be involved in the life and practice of that profession. There are also professional and statutory obligations to comply with regulatory investigations or to self-report. The level of involvement from the regulator is the trade-off that allows individuals to participate in particular professions.

4. The powers of investigation that professional regulators wield extends to aspects of a professional’s personal life that reflect on their integrity, further attenuating any reasonable expectation of privacy a professional may have in either their personal or professional life as both impact on suitability for a profession.

5. The judicial enforcement of the statutory obligation to cooperate with a demand for production provides judicial oversight and an opportunity for a professional to dispute the extent of the order.

The Court of Appeal confirmed that relevance is the overarching standard to apply when determining whether a regulator’s demand for information during an investigation is proper. A regulator wanting to demand access to records and information must ensure the demand is to uncover material that would be relevant to the investigation. A regulator need not meet the criminal law standard of “reasonable grounds”. To support a demand it is sufficient for a regulator to have a “rational suspicion” that the demand will uncover evidence the professional has committed unprofessional conduct.

Consistent with a number of other decisions released by the courts in the last year, Law Society of Alberta v Sidhu is a strong endorsement of the role that regulators play in protecting the public and is recognition of the broad authority that regulators must be afforded to carry out this role.