

Victoria, B.C.

Called to the Bar: September 13, 1983

**Discipline Hearing Committee:** December 9-11, 1986, April 27, 1987

T.A. Davies, Chair, D.W.H. Tupper, Q.C., and S.J. Shabbits

### **Summary**

The member, while defending a client on prostitution-related charges, applied for and obtained a subpoena against a provincial cabinet minister although he had no basis for a reasonably-held belief that the minister could give material evidence in support of the defence. In so doing, the member deliberately deceived the Justice of the Peace issuing this subpoena. He was found guilty of professional conduct.

### **Facts**

Between February 12 and February 21, 1985 the Victoria police conducted authorized taps of two business telephones of T.H. Productions, an escort service. Based on those wiretaps and on police surveillance, Crown Counsel authorized charges against T.H. Productions' co-owner, Ms. B, who ran the T.H. switchboard and received and banked customers' credit card slips.

B was charged with having procured escorts to elicit sexual intercourse with customers; for purpose of gain, having exercised direction over the movement of escorts to aid and abet them to engage in prostitution; and for having lived wholly or in part on the avails of prostitution.

Arrested on May 7, 1985, B immediately retained the member as counsel. She was released from custody on her undertaking the next day. B did not want to plead guilty and asked the member to proceed with the defence. She indicated that she wished to avoid the publicity the case had already generated and preferred that the member deal with the media.

On the day of B's bail hearing, the member had read a newspaper column which referred to, but did not identify, "a very important person" involved with the T.H. Productions escort service. The article also referred to use of a VISA card. A few days later, the member heard a court clerk mention Mr. M, a provincial cabinet minister.

The member received all merchant copies of T.H. Production VISA slips provided by B after her arrest. He discovered that M's name was in fact on a slip dated February 26, 1985. The member consulted an escort who identified M as a customer with whom she had engaged in sexual activity. She did not say that M was with anyone at the time she met him.

The member contemplated calling M as a defence witness. He viewed M as someone highly credible who could testify as to the content of his telephone conversation with B and support the defence theory that B did no more than take requests for "escorts simplicitor". Hearing rumours from reporters that another cabinet minister, Mr. S, may have been with M on the night of February 26, the member considered calling him as well.

On October 1 a Victoria newspaper columnist suggested that a subpoena to a provincial cabinet minister must be served at least 40 days prior to a legislative sitting. From this article and a copy of Erskine May's book on parliamentary practice, the member concluded he had only three days to issue and serve subpoenas on M and S if he wanted to ensure their presence as defence witnesses at trial.

The same day he appeared before a Justice of the Peace and obtained the subpoenas. Through his submission he intended the Justice of the Peace to conclude that S could give material evidence for the defence. The Justice of the Peace did draw this conclusion.

At the time, the member had no information other than hearsay from various members of the press that S had been in M's company on or about February 26. Times were vague. No newspaper had printed anything.

No person had given the member a source to check. S had not been linked to T.H. Productions by the escort who had been with M, the other escorts, the remaining VISA slips, the member's client, or Crown Counsel. S was a totally innocent bystander.

The media immediately reported issuance of the subpoenas. It was the first time that S had been publicly implicated in the T.H. Productions affair.

On October 30, counsel for S applied to have the subpoena quashed or set aside. On November 8 Justice McKay of the Supreme Court set aside the subpoena and drew the member's conduct to the attention of the Law Society.

### **Decision**

By his own evidence before the Discipline Hearing Committee, the member had no basis for a reasonably-held belief that S was likely to give material evidence in support of the defence. He should not have asked for a subpoena against S and in so doing deliberately deceived the Justice of the Peace who issued it. This was dishonest and discreditable conduct by one officer of the court to another.

The Hearing Committee was satisfied that the member had no malicious intent to cause harm. He was, however, indifferent to or careless of the harm that could result to S and his family from being linked to this emotionally-charged case.

The Committee found the member guilty of professional misconduct.

### **Penalty**

The Hearing Committee, determining that the member had seriously misconducted himself and had demonstrated throughout this case a lack of understanding and concern for his responsibilities as an officer of the court, recommended a six-month suspension and payment of one-half the costs of the hearing.

The member did not consent to the Hearing Committee's jurisdiction to impose penalty, so the Committee referred its findings of fact, verdict and recommendations on penalty to the Benchers.

After a hearing on June 5, 1987, the Benchers ordered that the member:

1. be suspended for six months beginning July 1, 1987;
2. pay one-half the costs of the hearing, to a maximum of \$5,000.

The member appealed the decision of the Hearing Committee to the B.C. Court of Appeal on the basis that the Committee had erred in several of its findings and that there existed bias or the reasonable apprehension of bias by the Committee against the member. The Court of Appeal dismissed the appeal on all grounds in a judgment rendered November 14, 1988.

An application for leave to appeal to the Supreme Court of Canada taken by the member was dismissed on March 2, 1989.

For the Law Society, A.G. Henderson and G.B. Gomery  
The member on his own behalf.