

THE LAW SOCIETY OF BRITISH COLUMBIA
IN THE MATTER OF THE *LEGAL PROFESSION ACT*, SBC 1998, c. 9
AND
A HEARING CONCERNING
DAVID ALLEN KIDD
RESPONDENT

RULE 4-29 ADMISSION OF MISCONDUCT
AND UNDERTAKING TO DISCIPLINE COMMITTEE

TAKE NOTICE THAT on May 27, 2020, the Discipline Committee considered and accepted a proposal submitted by the Respondent under Rule 4-29 of the Law Society Rules.

Under the proposal, the Respondent admitted misconduct as alleged in Allegations 1(a) through (d) of a citation authorized July 11, 2019, issued July 24, 2019, and amended May 5, 2020 (the “Citation”) and gave his undertaking, for a period of five (5) years, commencing on May 29, 2020:

- (a) not to engage in the practice of law in British Columbia with or without the expectation of a fee, gain or reward, whether directly or indirectly;
- (b) not to apply for re-instatement to the Law Society of British Columbia;
- (c) not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society of British Columbia; and
- (d) not to permit his name to appear on the letterhead of, or work in any capacity whatsoever, for any lawyer or law firm in British Columbia, without obtaining the prior written consent of the Discipline Committee of the Law Society.

As a result, the Citation is now resolved under Rule 4-29 of the Law Society Rules, and the Respondent's admission of professional misconduct and his undertaking will be recorded on his professional conduct record.

In making its decision, the Discipline Committee considered: a letter to the Chair of the Discipline Committee in which the Respondent admitted the disciplinary violation and gave his undertaking not to practise law; an agreed statement of facts; the Respondent's lack of prior professional conduct record; and the Respondent's former member status.

The Respondent has acknowledged that pursuant to Rule 4-29(5) of the Rules, his undertaking not to practise law means that he is a person who has ceased to be a member of the Law Society as a result of disciplinary proceedings, and that section 15(3) of the *Legal Profession Act* applies to him.

Admitted Facts Underlying the Rule 4-29 Admission of Misconduct and Undertaking

Member Background

1. The Respondent was called and admitted as a member of the Law Society of British Columbia (the "Law Society") on January 9, 1987.
2. From October 1991 the Respondent practiced as Crown Counsel in the British Columbia Prosecution Service.
3. At the material time set out in the Citation and until his retirement on February 20, 2019, the Respondent worked as Deputy Regional Crown Counsel in Nanaimo.
4. In February 2019, during the course of the investigation of the complaint in this matter, the Respondent voluntarily withdrew his membership with the Law Society.

Citation and Service

5. The Citation in this matter was authorized by the Discipline Committee on July 11, 2019, and was issued on July 24, 2019. On July 25, 2019, the Respondent was served through his counsel with the Citation.
6. On May 5, 2020, the Law Society amended the Citation and served the Respondent through his counsel with the amended Citation.

Background Facts Concerning the Proceedings in *R v. Darling*

7. On August 20, 2006, KM died in her home in Port Alberni. Her death was ruled a homicide.
8. On September 11, 2015, LD, KM's former boyfriend, was charged with first-degree murder.
9. The initial trial date was set to commence in January 2018, at the Supreme Court of British Columbia, sitting in Port Alberni.
10. In August 2017 pre-trial *voir dire*s commenced in relation to the charge.
11. The *voir dire*s addressed the admissibility of LD's statements made in an undercover operation, referred to as "Mr. Big" operations.
12. In or about October 2017, the trial Crown counsel, took an emergency medical leave.
13. In October 2017, the Respondent attended court to seek an adjournment of the trial on behalf of the Crown.
14. On October 31, 2017, the court granted the Crown's application for an adjournment of the January 2018 trial dates.
15. In or about November 2017, new Crown counsel assumed conduct of the prosecution (the "Newly Assigned Crown Counsel").
16. In late 2017, defence counsel made various applications for disclosure. In December 2017, the court granted certain disclosure orders.

The Respondent's First Meeting with the Family Member

17. In December 2017 or January 2018, the Respondent met with a family member (the "Family Member") of KM ("the First Meeting").
18. The Family Member had found a handwritten document in KM's belongings ("the Writings").
19. The Respondent met with the Family Member at the Port Alberni Courthouse to discuss the trial.
20. The Family Member brought the Writings to the First Meeting.
21. The Family Member presented the Writings to the Respondent during the First Meeting.
22. The Family Member stated to the Respondent that the Writings were written by KM regarding, amongst other things, her relationship with LD.
23. The Respondent saw that the Family Member held the Writings but did not read it or take it from her possession.
24. The Respondent and the Family Member's recollections of the meeting differ.
25. During the Respondent's Law Society interview on November 23 2018, the Respondent stated with respect to the First Meeting, in part:

And in that meeting, I basically laid it out for her, like, "Here's what's happening on the trial; that defence is making numerous applications for disclosure; that they're very effective at doing that; that, as a result, the matter has become a bit of a quagmire. And I don't know how extensive -- I didn't, I didn't want to talk about evidence with her, simply because she's a representative of the family. I don't want to be talking with family members. But I just gave her a general sense that there's numerous applications and, and it's become bogged down in disclosure matters. In that meeting, she said, "Well, I found something that I, I would like to show you." ...

... at that point in time, she had something in front of -- it was in a

package I think, a Glad bag, or something like that. It was some sort of journal or book or, or a notepad. And I told her, "Look, anything you give me, just so you understand, I am pretty much obligated to give to defence. I want you to understand that."

This is a very short and fluid conversation. But at the same time, I'm, like, "What is it...?" And she advised me, "Well, it's, it's, it's an entry by [KM] about how she's made improvements in her life and how she thought it made [LD] jealous."

... And I said, "Look, I don't see how that's relevant."

So, we finished our conversation. She left with the item she had brought with her...

26. During the Family Member's interview with Law Society investigator on January 11, 2019, she stated:

And I was going through some things and I found a, it was a ...lined paper.

...

So when I found the letter, I put it in a, one of those little six by nine brown envelopes. I think I said earlier it was a manila colored but the last time I had a, I was doing a statement but it's the brown ...

Nine by six and folded it, stuck it in there, and I put David Kidd's name on it and I brought it upstairs. So I met with him, I told him that I had this letter that I found that [KM] had wrote... I said it was written in June of 20, 2006

...

...

She died August - yeah, so it was very recent, a very recent, very recent letter, a very recent letter. So I said I brought something here I thought you might like to, like to look at it and he just right away didn't want it. He said there's so much disclosure going on right now, we don't, I just can't, don't wanna deal with anymore, I don't want to deal with it, I, you know it's just gonna fuel the fire, I can't, I just don't want anymore. And he was, he was talking to me like ...please understand, all this is going on, and I didn't tell him anything about the letter.

...

He didn't know anything about the letter.

27. The Family Member left the First Meeting with the Writings.

Subsequent Meeting between the Respondent, the Family Member, and Others

28. On February 20, 2018, the Respondent and Newly Assigned Crown Counsel met with the Family Member and other members of KM's family at the Port Alberni Courthouse ("the February Meeting").
29. During the February Meeting, Newly Assigned Crown Counsel discussed the trial with KM's family.
30. The Respondent stated that he recalled that the Family Member brought the Writings to the February Meeting and presented them to the Respondent at the meeting. During the Respondent's interview with the Law Society investigator, he stated:

...In that meeting, near the end of it [she] produced, again a bag, again, I think it's a Glad bag with something inside of it, and she looked at me and she said, "now?". I recognized that is the same thing she had produced in December.

...

I had forgotten to alert [Newly Assigned Crown Counsel] to this, and I didn't want him to be taken by surprise as I was in December. So I simply told [her], "not right now."

31. The Family Member recalled the February Meeting differently. She stated that she did not bring the Writings to the February Meeting, and that there was no mention of the Writings at that meeting.
32. The Respondent, Newly Assigned Crown Counsel, and the Family Member did not discuss the Writings during the February meeting.
33. Between December 2017 and the February Meeting, the Respondent did not inform Newly Assigned Crown Counsel about the Writings.
34. The Respondent stated in his Law Society interview that he recalled having informed the Newly Assigned Crown Counsel of the Writings immediately following the February Meeting.

35. The Newly Assigned Crown Counsel's recollection was different. Although he recalled having a conversation with the Respondent in the barristers' lounge to talk further about the case following the February Meeting, he did not recall the Respondent advising him of the Writings during that conversation.

April Meeting between the Newly Assigned Crown Counsel and the Family Member

36. On April 19, 2018, the Newly Assigned Crown Counsel met with the Family Member ("the April Meeting").

37. During the April Meeting, the Family Member informed the Newly Assigned Crown Counsel about the existence of the Writings.

38. The Newly Assigned Crown Counsel told the Law Society that he was unaware of the existence of the Writings until the April Meeting.

39. Immediately following the April Meeting, the Newly Assigned Crown Counsel took steps to obtain the Writings from the Family Member.

40. As per the Newly Assigned Crown Counsel's instructions, the RCMP contacted the Family Member to obtain the Writings.

41. The Family Member was unable to locate the Writings after the April Meeting.

42. In May 2018, the Newly Assigned Crown Counsel disclosed the existence of the Writings to defence counsel.

43. A letter dated May 1, 2018, from the Newly Assigned Crown Counsel to defence counsel, stated:

On April 19, 2018 the undersigned attended the Port Alberni Courthouse for a pretrial conference on an unrelated matter. While there, I met with [the Family Member] on the *R v. Darling* matters...

...[she] asked if we could "go off the record"... [she] advised that after the police finished their investigation of the residence of [KM], in 2006, the family cleaned [KM's] belongings out of the house...

Among those belongings were writings of [KM's], which were not found by the RCMP during their search of the residence. They had never been turned over to the RCMP. These writings included a document, authored by [KM] in June of 2006 articulating the dynamic of the relationship between [KM] and [LD] at that time. You will recall that [KM] was killed in August of 2006. My view then, and now, is that the document is relevant. I advised [the Family Member] that there was no "off the record" in this context. I advised [her] that I would arrange for [a police officer] to recover the document from her.

[The Family Member] went on to advise me that she had raised the existence of this document with a "previous prosecutor". She advised that the "other prosecutor" had not seemed interested in receipt of the document and told [her] not to tell him about it because "if he knew about it he would have to disclose it".

...

On Wednesday April 25, 2018, [the Family Member] phoned me. She had an appointment to speak with Sgt [H] at the detachment at 3:30. She wanted to speak to me first. I expressed initial reluctance and said that it was important that she speak to the RCMP and not me. She indicated she wanted to tell me about it first... She advised that the prosecutor she met with was David Kidd. When she met him she had the document and two copies of it with her. She offered it to him and he said "don't give it to me, it will just fuel the fire with [defence counsel]". She left with the documents in her possession. She can no longer find the documents. She remembers speaking to her sister about them and discussing burning them. She doesn't not recall the actual act of burning the documents, but cannot now find them.

... I have never been advised of the existence of this document prior to being advised of it by [the Family Member] on April 19, 2018.

The Stay of Proceedings and Subsequent Court Ruling

44. On June 13, 2018, the Crown directed a stay of proceedings of the case against LD.
45. In July, 2018 the Public Service Alliance commenced a review into the prosecution of the *R. v. Darling* matter.

46. On August 3, 2018, the Honourable Justice Thompson handed down his decision in *R v. Darling*, 2018 BCSC 1327. In this decision, Justice Thompson referred to the Newly Assigned Crown Counsel's May 2018 letter.
47. On October 26, 2018, the BC Prosecution Service issued a media release regarding the outcome of the review.
48. The stay of proceedings was the result of a number of issues with the prosecution of the matter, and not limited to the Respondent's conduct.

Admissions of Professional Misconduct

49. At all material times, the Respondent was aware of his disclosure obligations as set out in the Supreme Court of Canada's decision in *R. v. Stinchcombe*, [1991] 3 SCR 326.
50. At all material times, the Respondent was familiar with the disclosure obligations imposed on Crown Counsel by the Crown Counsel Policy Manual.
51. The Respondent ought to have known that the Writings were potentially relevant in the *R. v. Darling* matter.
52. The Respondent ought to have known that the Writings were not clearly irrelevant in the *R. v. Darling* matter.
53. The Respondent's actions with respect to the Writings were contrary to the Crown's published policy manuals.
54. The Respondent has admitted that between approximately December 2017 and May 2018, in the course of his employment as Deputy Regional Crown Counsel, and in relation to the *R. v. Darling* file (Port Alberni Supreme Court Registry 36905-2), he failed to discharge all responsibilities honourably and with integrity, contrary to one or more of rules 2.1-1(b), 2.2-1, and commentary [1] of rule 5.1-3 of the *Code of Professional Conduct for British Columbia*, by doing the following:

- (a) failing to take reasonable steps in relation to the Writings that he ought to have known should be disclosed to the accused, including steps to ensure that:
 - (i) he understood the nature of the Writings;
 - (ii) prosecutors who had conduct of the file were informed about the Writings in a timely fashion;
 - (iii) appropriate police officers were advised about the Writings;
 - (iv) the Writings were preserved; and
 - (v) the Writings were disclosed to the accused;
- (b) suppressing what he ought to have known should be disclosed to the accused;
- (c) failing to advise the newly assigned prosecutor on the file about the Writings that had been presented to him in relation to the case in a timely fashion; and
- (d) failing to keep a record of his knowledge, handling, and dealings with and in relation to the Writings that had been presented to him in relation to the case.

55. The Respondent has admitted that the above conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.