2008 LSBC 01
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Douglas Hewson Christie

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: December 17, 2007

Panel: Robert M. McDiarmid, QC, Chair, Gavin Hume, QC, James D. Vilvang, QC

Counsel for the Law Society: Jaia Rai
Appearing on his own behalf: Douglas Christie

Background

[1] At the conclusion of the hearing on Facts and Verdict, this Panel decided that the Respondent had professionally misconducted himself in that, " he knowingly changed Form 21, a subpoena, into three documents, each entitled Subpoena for Documents, intending to compel the recipients to provide documents in a way in which he knew (because he had just a couple of months earlier embarked on a Rule 26 application) was not provided for in the Supreme Court Rules or otherwise in the laws applicable in this jurisdiction. His zeal in pursuing the case on behalf of JK and the plaintiffs caused him to overlook his professional responsibilities" .

Submissions on Penalty

[2] Counsel for the Law Society submitted that the appropriate penalty would be a fine in the amount of $7,500 to $10,000 and costs on a full indemnity basis. A draft bill of costs was submitted showing that the Law Society's costs were approximately $50,000. Counsel for the Law Society further submitted that, had it not been for certain mitigating factors, the Law Society would have been asking for a suspension.

[3] In support of its position, counsel for the Law Society cited the BC cases of *Law Society of BC v. Grant*, [2003] L.S.D.D. No. 7, *Law Society of BC v. Joyce*, [1994] L.S.D.D. No. 131, *Law Society of BC v. Mah Ming*, [1999] LSBC 48, *Law Society of BC v. Nielsen*, 2007 LSBC 35 and *Law Society of BC v. Walters*, 2005 LSBC 39. While those cases were generally of assistance, the facts in each of them were quite different from the facts in this case.

[4] On its facts, the case most similar to this was the case of *Nova Scotia Barristers' Society v. Conrad*, [2002] L.S.D.D. No. 4, paras. 7 and 8:

¶ 7 On February 17, 2000, Deborah Conrad arranged to have subpoenas issued and served on

several medical professionals.

¶ 8 On February 18, 2000, additional subpoenas were issued for files from the QEII Health Sciences Centre and Drug Dependency Services, and accompanying the service of the Subpoenas was a letter from Ms. Conrad to the recipients which contained the following:

> Please note that the subpoena is in relation to your file only, and that you are not required to provide testimony. Specifically, we require your file in relation to the Respondent, C.A.D. ...
>
> Please contact Sheila Prall Dillman of my office at 460-3426 and we will arrange a courier to pick up a copy of the file. Otherwise you are required to attend with your file at the Supreme Court (Family Division) 3380 Devonshire Avenue, Halifax, Nova Scotia, on February 22, 2000.

and at paras. 11 and 12:

> ¶ 11 In a written decision dated April 18, 2000, Justice R. James Williams reviewed the facts with regard to the allegations by Ms. C.A.D. that her ex-husband's lawyer had improperly obtained her personal psychiatric, medical and other files. He then stated his views with regard to obtaining disclosure of such documents by use of a subpoena without the consent of C.A.D. at pages 43 - 44:
>
> > The subpoena is a document emanating from the Court that issues with the Court's authority. A subpoena compels the person receiving it to bring the document to the Court. While it may be that if the parties to a proceeding agree that a document should be disclosed and that it may be filed with the Court, it may be that no harm is caused in suggesting that the record keeper in such a situation need not appear and that the document can be directed to one of the parties, that is not the case here. There is no such consent.
> >
> > Without the consent of C.A.D.'s counsel, the records could not be put forward before the Court without the testimony of the record keepers. There was no consent. Saying the record keepers need not appear in response to the subpoena suggests that this was done to secure their disclosure and not evidence at the trial. It is improper in these circumstances for counsel to suggest to the record keeper that they need not respond personally to the subpoena, that they may turn over the records directly to counsel.
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> ¶ 12 He then made the following findings at pages 50 - 51:
>
> > Ms. Conrad's actions:
> >
> > (1) misrepresented the effect of the subpoena; and
> >
> > (2) deprived C.A.D. of the opportunity to have a Court make the above determinations.

> Ms. Conrad's rationale for her actions collectively amount to the suggestion that it was difficult to get the material; it was important; it was relevant. This sounds very much like " the end justifies the means" . In the observation of legal process, where there is a potential violation of privacy rights, this seldom, if ever, can be the case.

[5] In that case the respondent, Ms. Conrad, was reprimanded by the Nova Scotia Barristers' Society.

[6] Counsel for the Law Society also cited *Law Society of BC v. Ogilvie*, [1999] LSBC 17, which contains a thorough review of the factors that this and all Panels should consider in disciplinary positions.

[7] The Respondent on his own behalf presented seven letters from Judges and lawyers, all attesting to his honesty, integrity and skill as counsel. He also presented letters from his doctor, a long-term friend who is a psychiatrist and his wife and daughter, who commented on the stress the Respondent was under as a result of what he described as a " perfect storm" of stressors, including an extremely heavy case load, a staffing shortage, his having asthmatic bronchitis and whooping cough earlier in the year and, most importantly, his wife having been diagnosed with breast cancer and undergoing chemotherapy. The Respondent also provided letters from 15 people in the community, all attesting to his honesty and contribution to the community.

[8] The Panel also had before it the Respondent's Professional Conduct Record, which has been unblemished for over 30 years.

[9] The Respondent testified on his own behalf to the effect that the whole year in which this transgression occurred was a " nightmare" . He said that the combination of his workload, his illness and especially his wife's cancer had a " numbing effect" . He stated that he felt he was on " auto pilot" .

[10] The Respondent provided evidence of his income, which over the past five years has averaged slightly over $50,000 net before tax.

[11] The Respondent also testified as to the financial costs as well as the time and energy costs he had incurred in defending himself in this proceeding.

[12] The Respondent cited the case of *Law Society of BC v. Goddard*, 2006 LSBC 12. In that decision on penalty the Panel stated at paras. 7 to 9:

> [7] The first duty of the Law Society of BC is to protect the public interest in order to maintain public confidence in the legal profession. Part of the fulfillment of this duty is the disciplining of its members when they breach the responsibilities required of them.
>
> [8] In fulfilling this duty, there is an obligation on the Society to consider the facts of each case individually. In doing so, there is a distinction to be made between the causes of professional misconduct. There are those lawyers who professionally misconduct themselves because they are careless by reason of incompetence, laziness or they are just cavalier about the requirements of practice. The other category of cases where misconduct occurs is when a lawyer becomes overwhelmed with personal circumstances beyond his or her control, which then leads to a breach of his or her professional responsibilities. As referred to in the decision on Facts and Verdict, the Panel accepts that the Respondent's actions were a result of stress as opposed to incompetence or laziness.
>
> [9] Lawyers generally have a very high confidence in their ability to handle pressure. They

must have this confidence because, as professionals, they are the ones to whom members of the general public turn for help in stressful situations. It seems that the longer a lawyer practises, the more likely it is that he or she will be unable to accept that they need assistance to handle the share of trauma that happens in their own lives. ...

[13] The Panel accepts that the Respondent's professional misconduct arose out of stress as well as excessive zeal to help his client, rather than a desire for personal gain.

[14] The Panel has put significant weight on the fact that, aside from one previous disciplinary matter over 30 years ago, the Respondent has no other disciplinary record. Also, the many letters presented were given significant weight by the Panel. The Respondent was frequently described as " passionate" about his work. In many ways, his passion and dedication to his client's cause embody the best qualities of a barrister. However, the passion can never be allowed to overcome a barrister's duty to practise by the rules.

[15] The primary purpose of any penalty imposed must be to best achieve the goal of protection of the public. In attempting to achieve that goal the Panel has considered all of the evidence presented and the cases cited in the context of the factors cited in para. 10 of the *Ogilvie* (supra) decision:

(a) *the nature and gravity of the conduct proven* - The Respondent altered a Court form so that the document purported to have a function that it was never intended to have; that is, to procure production of documents from a third party prior to a hearing without the third party actually coming to Court when the true purpose of the form under the Rules was to compel the party to come to Court and bring the document with them. The Panel regards this as a serious abuse of the Rules of Court. The recipients of the document would be misled as to their true legal obligations. Such a document could cause serious breaches of a person's right to privacy;

(b) *the age and experience of the respondent* - The Respondent is over 60 years of age and has been a member of the bar for 36 years. He has certainly had sufficient experience to enable him to know the proper purpose of the subpoena;

(c) *the previous character of the respondent, including details of prior discipline* - The Panel regards the Respondent's previous character as a strongly mitigating factor;

(d) *the impact upon the victim* - In this case, two of the three recipients of the subpoena did not respond as directed. No actual harm occurred, but the potential for harm was present;

(e) *the advantage gained, or to be gained, by the respondent* - Here, the Respondent stood to gain no personal advantage;

(f) *the number of times the offending conduct occurred* - Three subpoenas were issued. They were all done within a two-and-a-half-month period in relation to the same matter;

(g) *whether the respondent has acknowledged the misconduct* - This factor causes the Panel some difficulty. The Respondent's evidence as to his state of knowledge of the impropriety of this document and to his role in the preparation of the subpoenas has been inconsistent;

(h) *the possibility of remediating or rehabilitating the respondent* - Having heard the Respondent's evidence about how seriously he took this complaint, and having read his wife's letter about the effect of the complaint on the Respondent, and having considered all the reference letters and the Respondent's prior conduct record, the Panel concludes that remediation and rehabilitation are not significant

considerations. The Panel is satisfied the Respondent will not repeat this behaviour;

(i) *the impact on the respondent of criminal or other sanctions or penalties* - As far as the Panel is aware, there are no other sanction or penalties;

(j) *the impact of the proposed penalty on the respondent* - This factor will be dealt with in the portion of the reasons dealing with costs;

(k) *the need for specific and general deterrence* - With regard to specific deterrence, the Panel has, as previously stated, concluded that the Respondent is not likely to re-offend. With regard to general deterrence, the Panel does not believe that inappropriate altering of Court documents is a common occurrence. The Panel is satisfied that all lawyers understand that such conduct is wrong. General deterrence is always an important consideration but is not unusually important in this case;

(l) *the need to ensure the public's confidence in the integrity of the profession* - The public is entitled to be able to trust that, when they receive a document signed by a lawyer appearing to be a Court document requiring them to do something, the document has the legal effect it purports to have. This is absolutely fundamental to the functioning of the Courts and the practice of law. The Court could not function if the public routinely had to question the validity of writs, subpoenas, appointments to examine for discovery, garnishing orders and other Court documents. This is a very significant issue. Fortunately, the problem appears only to arise very infrequently;

(m) *the range of penalties imposed in similar cases* - The Panel has considered the cases cited.

Decision

[16] In all of the circumstances, the Panel has concluded that a fine of $2,500 is the appropriate penalty, payable by June 17, 2008. With regard to the matter of costs, the Panel is satisfied that the time, costs and expenses presented by counsel for the Law Society are reasonable and justified. Generally speaking, full indemnity for those costs should be granted. However, the Panel has considered the financial circumstances of the Respondent. The Panel would not want to create a situation whereby inability to pay costs might create a " de facto disbarment" . The Panel recognizes the Respondent's valuable contribution to our free society and wants to enable him to continue with his work, which he has often done pro bono or for greatly reduced fees. In all of the circumstances, the Panel concludes that costs in the amount of $20,000 should be paid by the Respondent, to be paid by January 15, 2010.