2006 LSBC 51
Report issued: December 21, 2006
Citation issued: July 15, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a preliminary application concerning

Michael Lee Seifert

Respondent

Decision of the Hearing Panel

Hearing date: August 3, 2006

Panel: Gordon Turriff, QC, Chair, Ralston S. Alexander, QC, Richard Stewart

Counsel for the Law Society: Maureen Baird
Counsel for the Respondent: Marvin Storrow, QC

The Citation

[1] The citation in this matter was issued July 15, 2005. The Schedule to the citation, providing particulars of the Respondent's conduct was amended on March 31, 2006.

[2] The citation alleges that the Respondent's conduct between January, 1994 and July, 1995 was in contravention of Chapter 7, Rule 1 (Ruling 1, or Ruling 2 of the *Professional Conduct Handbook*).

Motion to Strike the Citation

[3] On July 10, 2006, the Respondent made a motion to strike the citation (the "Motion to Strike") as a result of the Law Society's unreasonable delay in issuing and prosecuting this citation.

Motion for Production of Documents

[4] Prior to the hearing of the Motion to Strike, the Respondent made a number of motions for the production of documents. These reasons are with respect to the Respondent's latest motion ("the Respondent's Motion"), made July 28, 2006, to compel the Law Society to deliver a copy of the report of Mary Clare Baillie which was delivered to the Law Society in November of 2004 ("The Baillie Report").

[5] The Law Society opposes the Respondent's Motion and asserts a claim of solicitor/client privilege over this report.

The Law Society's Duty of Disclosure

[6] The Respondent says that the Law Society is obliged to follow the high standard of disclosure set out in the Supreme Court of Canada decision of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 where the Court said that the Crown has a legal duty to disclose all relevant information to the defence ("the *Stinchcombe* Standard").

[7] The Respondent says that, taking into account the facts of this case, the Panel should order full

disclosure of the Law Society's investigation of the Respondent, which includes the Baillie Report.

[8] The Law Society refers to Rule 4-25 of the Law Society Rules, and acknowledges that the Law Society has a common law obligation to provide a high level of disclosure.

[9] The Law Society does not acknowledge that its common law duty requires adherence to the *Stinchcombe* Standard.

[10] The Law Society refers to the Supreme Court of Canada decision of *May v. Ferndale Institution*, [2005] 3 S.C.R. 809. In that decision, the Supreme Court said that the *Stinchcombe* Standard does not apply in an administrative setting.

[11] The *May v. Ferndale* decision can be distinguished on its facts. The hearing of this citation is a quasi-judicial proceeding, not a purely administrative proceeding. This particular case against the Respondent alleges professional misconduct. The determination of this citation could result in serious consequences to the Respondent, including the loss of his ability to practise, and damage to his professional reputation.

[12] On this application the Panel does not have to decide if the *Stinchcombe* Standard applies to the disclosure required by the Law Society. Both the Respondent and the Law Society agree that the Law Society is not obliged to disclose privileged documents.

Solicitor/Client Privilege

[13] The Law Society and the Respondent both agree that adherence to the *Stinchcombe* Standard does not require the Law Society to disclose privileged communications.

[14] The Baillie Report is clearly a privileged communication between Ms. Baillie and the Law Society.

[15] However, the Law Society's right to claim privilege over the Baillie Report is not absolute.

[16] In the case of *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 the Supreme Court of Canada held that:

> The substantive rule laid down in *Descôteaux* is that a judge must not interfere with the confidentiality of communications between solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation". ... It is, therefore, incumbent on a judge to apply the "absolutely necessary" test when deciding an application for the disclosure of such records. (paragraph 15)

[17] See also similar statements made by the Court in:

> *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809
>
> *R. v. McClure*, [2001] 1 S.C.R. 445
>
> *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. (209)

Waiver and Privilege

[18] The Respondent says that by expressly placing in issue the reasonableness of, and the explanation for the delay of its investigation, the Law Society has implicitly waived any privilege over the information, etc.

[19] The Respondent relies on the decision of *Doman Forest Products Ltd v. GMAC Commercial Credit Corp.,* 2004 BCCA 512, which cited with approval the statements of McLachlin J., (as she then was) in *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 BCLR 218 (SC) at 220:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost.

[20] See also *Bank Leu Ag v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (SCJ):

> When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice. (paragraph 5)

[21] The Respondent says that the Law Society has raised an affirmative defence to the issue of inordinate delay, by *voluntarily* placing in issue the reasonableness of, and explanation for, the lengthy delay in the Seifert investigation, while at the same time asserting a reliance on legal advice in an attempt to support its contention that the delay was not undue, unreasonable or unexplained. The Respondent says that, in this circumstance, there is a waiver with respect to all such advice, including the Baillie Report.

[22] The Law Society explains the reason it has referred to the Baillie Report is to provide the Panel with a narrative of what occurred in the investigation. The Law Society says further that:

> (a) the receipt of the opinion is a fact in that narrative or chronology;
>
> (b) not to refer to it would, in its submission, fail to fully detail the time-line of October, 2003 to November, 2004, when Ms. Baillie handled the Law Society's ongoing investigation into the Respondent's conduct;
>
> (c) at the end of November 2004, Ms. Baillie had prepared her legal opinion. After receiving this report, Stuart Cameron, Director of Professional Regulation, asked Todd Follett, Law Society Counsel, to prepare an opinion for the Discipline Committee (paragraph 37 of its written submissions).

[23] The Law Society submits that a mere allegation as to the state of affairs on which a party may have received legal advice does not warrant setting aside solicitor/client privilege. Rather, a party must voluntarily inject into the suit the question of its state of mind.

[24] The Law Society submits further that this typically occurs when a litigant relies on legal advice as an element of his claim or defence.

[25] The Law Society uses the example of the case of *Apotex Inc. v. Canada (Minister of Health)*, 2003 FC 1480, aff'd (2004) 34 C.P.R. (4th) 289 (C.A.) and *Doman (supra)* where a litigant relied on the legal advice it received as an affirmative defence.

[26] This Panel agrees with the Law Society when it says that the fact that the Law Society received and reviewed the Baillie Report is not an element of the claim or the defence. Rather, it is simply part of the narrative of what occurred, which must be considered by the Panel in its determination.

[27] The Panel concludes that the Law Society has not waived its claim of privilege over the Baillie Report.

[28] If, however, during the hearing of the Motion to Strike, the Law Society seeks to make reference to the

Baillie report in a different way than it has described, the Respondent may renew his application for the production of that report.

The Fairness and Consistency Test

[29] In the case of *S. & K. Processors (supra)*, the Court says that privilege may be waived without intention where consistency and fairness require.

[30] The Panel finds that fairness and consistency in this case do not require the production of the Baillie Report. The Respondent has not met his onus to satisfy this Panel that production of the Baillie Report is "absolutely necessary."

Decision

[31] The Panel therefore dismisses the Respondent's application for the production of the Baillie Report.

Costs

[32] The Law Society is entitled to its costs of the application.