

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

Donald Wayne Skogstad

Respondent

Decision of the Hearing Panel

Written Submissions: October 18, 2006

Panel: Robert W. McDiarmid, QC, Chair, Thelma O'Grady, Ralston S. Alexander, QC

Counsel for the Law Society: Jean P. Whittow, QC

Counsel for the Respondent: Christopher Hinkson, QC

[1] This is an application brought before the Hearing Panel on behalf of the Respondent who seeks that the Panel quash the citation against the Respondent, or alternatively direct that the proceedings be stayed.

[2] The application was argued, with the consent of both parties, by way of written submissions to the Panel.

[3] The Panel reviewed the following documents:

1. Submissions on behalf of the Member including as attachments:

- (a) Exhibit A - letter July 9, 2002, LSBC to Mr. Ziskrout;
- (b) Exhibit B - letter September 10, 2002, LSBC to Mr. Ziskrout;
- (c) Exhibit C - letter November 12, 2002, Respondent to LSBC;
- (d) Exhibit D - letter December 10, 2002, Respondent to LSBC;
- (e) Exhibit E - Notice of Passing of F. on September 4, 2006.

2. Submissions on behalf of the Law Society:

- (a) Appendix "A" - citation dated February 15, 2005 with amended schedule.

3. Affidavit of Stuart Cameron, sworn October 16, 2006.

4. Letter from LSBC counsel, Ms. Whittow, to LSBC dated October 16, 2006.

5. Reply on behalf of the Member, to which was attached a copy of a 49 page transcript of an interview between Larry Dirk of LSBC and F. on Wednesday, September 14, 2002.

6. Letter from LSBC counsel, Ms. Whittow, to LSBC dated October 18, 2006.

[4] The Panel also reviewed authorities provided to it by counsel.

[5] The Respondent asserts that there has been unreasonable delay in these proceedings and, further, asserts that this delay prejudiced him, largely because of F.'s death. It is submitted on behalf of the Respondent that F. would have been an "extremely material witness". This is a case where liability is an issue, says the Respondent, and the deceased F. was a good friend and former client of the Respondent and had a unique perspective regarding the Respondent's credibility. Further, the Respondent asserts that F. was in the best position of all witnesses to testify to the full extent the Respondent's involvement in the matter that is the subject of the citation, and, as a consequence, the Respondent's ability to defend his credibility has been irreparably damaged by the death of F. The Respondent also submits that he is constrained from disclosing his conversations with F., because those conversations are subject to solicitor/client privilege, which has not been waived.

[6] In addition, the Respondent submits that the delay has impacted the Respondent's marriage and financial and physical well-being, caused ongoing damage to the Respondent's reputation, and the viability of the Respondent's legal practice has diminished as a consequence of delay. Further, the Respondent has been prevented by the Law Society from contributing to the legal profession by acting as a principal for an articulated student.

[7] The Respondent alleges that the delay occurs during the time of the initial complaint to the hearing of the citation, which is to say, March 21, 2001 until October 23, 2006, a period of 67 months. The Respondent alleges that, during that time, at least four years (49 months) of delay is attributable to the Law Society, and that the delay was unreasonable or inordinate, causing prejudice and jeopardizing the fairness of the hearing.

[8] As cited by both counsel, the applicable law is set out in *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307. In particular, it is the part of the *Blencoe* decision dealing with administrative law principles that is applicable.

[9] Where delay impairs the Respondent's ability to answer the complaint because an essential witness has died, delay may be invoked by the Respondent if it prejudices the fairness of the hearing. Delay without more will not warrant a stay of proceedings. The Respondent is required to demonstrate proof of prejudice, which must be of such sufficient magnitude as to impact upon the fairness of the hearing. Additionally, if the Respondent suffered such significant duress and stigma from an unacceptable delay, that may amount to an abuse of process even when the fairness of the hearing has not been compromised. However, few lengthy delays would meet that threshold because, to do so, such a delay would have to bring the entire citation hearing process into disrepute.

[10] To find an abuse of process, the Panel must be satisfied that the damage to the public interest in the fairness of the Law Society's discipline process, should the hearing of this citation proceed, exceeds the harm to the public interest if the hearing of the citation did not proceed. Cases of this nature will be extremely rare.

[11] The delay must have been unreasonable or inordinate, looking at contextual factors. In addition, the delay must cause actual prejudice of such magnitude that the public sense of decency and fairness is affected.

[12] The amended schedule alleges that numerous persons, characterized as "Investors", deposited funds in total over \$1 million into the Respondent's trust account to the credit of V. It is alleged that the investment scheme was fraudulent and that the Respondent assisted V. in the fraud.

[13] The deceased, F., was a principal of V. F. was interviewed by a Law Society investigator, Larry Dirk.

[14] The explanation of delay is set out in the Affidavit of Stuart Cameron. The Affidavit deposes that the complaint was received from a complainant, W., on March 19, 2001. The Affidavit deposes between that date and October 22, 2001, the Law Society's investigators were working on investigating the complaint. On October 22, 2001, the Law Society received a second complaint from K. Work continued on investigating the W. complaint, although for reasons which were not given, no response from the Respondent to the K. complaint was requested until March 12, 2002.

[15] Investigations continued through 2002. These investigations included requesting further answers from the Respondent.

[16] In December of 2002, the Respondent asked to have until February 20, 2003 to respond to an audit report done as part of the investigation. That audit report indicates that investors recruited by an individual identified as G. forwarded in excess of \$1 million to the Respondent, whereas investors recruited by the deceased, F., forwarded \$224,000. On February 10, 2003, a third complaint file was opened by the Law Society, and on November 25, 2003 a fourth complaint file was opened by the Law Society.

[17] The Respondent's former lawyer, Mr. Ziskrout, by letter of March 20, 2003, confirmed that there would not be any allegations respecting delay from the time the Law Society sent a letter to the Respondent in September of 2002 until May 15, 2003. However, a review of the Cameron Affidavit reveals that the Respondent had not responded to all complaints until his letter of March 29, 2004.

[18] It appears to the Panel that, from the date of the initial complaint until March 29, 2004, there was no unreasonable or inordinate delay, looking at contextual factors. The delay was as a result of what the Panel would characterize as normal investigation, combined with three additional complaints since the original complaint, combined with the Respondent requesting time for response.

[19] Following the response of the Respondent by his letter of March 29, 2004, the Law Society retained Hordo & Bennett as counsel.

[20] One of the counsel wrote to the Respondent on October 22, 2004, and received a reply on November 30, 2004. The citation was directed to be issued on December 2, 2004. It was in fact issued on February 15, 2005.

[21] The hearing of the citation was initially set for October 17 - 21, 2005. As a result of the Respondent retaining new counsel, that date was changed and in May of 2005 the hearing date was set for December 5, 2005. On Friday, December 2, 2005, the Respondent applied for an adjournment of the hearing because of the serious illness of his father. The adjournment was granted, and on February 28, 2006 at a pre-hearing conference the citation was set for hearing for two weeks commencing October 23, 2006.

[22] The Respondent argues that of the 67 months that have elapsed since the first complaint file was opened, Mr. Skogstad is only responsible for 18 months of that time period, and 49 months (over four years) of delay remains. The Respondent also argues that, even though the last adjournment (which occurred in December of 2005) took place at the request of the Respondent while the witness F. was still alive, the fact that F. died between then and now does not mean that it is just the most recent delay that should be considered in the assessment of prejudice. Obviously, one argument would be that if the hearing had proceeded in December of 2005 when it was initially set, F. would have been alive. The Respondent argues, in effect, that had the delay prior to December 5, 2005 not taken place, the hearing would have concluded in any event before F. died.

[23] One of the bulwarks of the Respondent's argument is that the Respondent cannot testify as to

instructions he received from F. because he is constrained by solicitor/client privilege. He says that, apart from any testimony to be offered by F., the Respondent cannot obtain a waiver of privilege, and so cannot testify about instructions he received from F., and, because of F.'s death (and thus the obvious inability to obtain such a waiver), that represents a serious prejudice to the Respondent.

[24] This Panel finds that there was nothing particularly unreasonable or inordinate in the delay, looking at contextual factors. This is a complex case. Investigation carried on throughout the relevant time-frame. There have been a few delays, some as a result of gaps at the Law Society which have not been explained, some as a result of the Respondent either failing to reply in a timely way, or seeking adjournments. The delay from September 10, 2002 until July 23, 2003 rested largely with the Respondent. Any delays since October 17, 2005 (the date initially set for hearing of the citation) rest largely with the Respondent. Other delays are as a result of the additional complaints, and the investigation of those complaints.

[25] The Panel finds that the delay was not, in the circumstances, unreasonable or inordinate looking at contextual factors.

[26] The Panel is also not satisfied that the delay will cause much actual prejudice, and certainly not to the magnitude that the public sense of decency and fairness is affected.

[27] The Respondent is able to testify as to instructions he received from the deceased F., without waiver of privilege. Although the hearing is open, the Panel will utilize the statutory power it has to close the hearing to enable any testimony as to privileged matters to be protected. Sections 87, 88 and 89 of the *Legal Profession Act* provide the legislative framework (bolstered by common law, constitutional protections) that permits the Law Society to hear evidence of privileged matters for use in proceedings against the Respondent while maintaining that privilege so that it is not breached and cannot be used against the holder of the privilege (see *Greene v. Law Society of BC et al.*, 2005 BCSC 390). The Hearing Panel is mindful of the importance of maintaining solicitor/client privilege, and will ensure that the hearing is conducted in order to achieve this end.

[28] To sum up:

- (a) the Panel is not satisfied that the delay is unreasonable or inordinate, looking at contextual factors, including in particular the fact there were four complaints received between March 19, 2001 and November 25, 2003;
- (b) approximately two years of the delay can be attributed at least partially to the Respondent;
- (c) the public interest mandates the serious allegations set out in the citation be dealt with by a hearing;
- (d) the Respondent has not demonstrated that he suffered significant duress and stigma from an unacceptable delay such that the delay amounts to an abuse of process;
- (e) although it is conceded that the fairness of the hearing may be compromised somewhat as a consequence of the death of F., F. does not appear to have been responsible for the bulk of funds received by the Respondent;
- (f) the Respondent can testify as to instructions received by F. while maintaining privilege over those communications;
- (g) This is not one of those extremely rare cases where damage to the public interest in the fairness of the Law Society's discipline process would be impacted if the hearing of this citation should proceed, rather the public interest mandates that the hearing do proceed.

[29] The application to quash the citation against the Respondent or alternatively direct that the proceeding be stayed is dismissed. The hearing will proceed as scheduled on October 23, 2006.