

2006 LSBC 43

Report issued: November 9, 2006

Citation issued: February 15, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a ruling on an objection concerning

Donald Wayne Skogstad

Respondent

Decision of the Hearing Panel

Hearing date: November 2, 2006

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

Counsel for the Law Society: Jean Whittow, QC and Efrem Swartz

Counsel for the Respondent: Christopher E. Hinkson, QC

Background

[1] By way of background, the Respondent had acted for a client, F., a principal of V. V. was a Turks and Caicos Islands charitable trust. The trust was constituted on December 31, 1997. In order to constitute itself as charitable, the trust named four eligible beneficiaries, but placed restrictions on their eligibility to receive distributions from the trust. For example, one of the named beneficiaries was the International Red Cross, of Geneva, Switzerland, "which should not receive distributions unless they have been named as an eligible beneficiary each year for ten consecutive calendar years, and have spent at least US\$1,000,000,000.00 by the year 2004". The Trustee could appoint other beneficiaries to receive distributions, with the intention of lawfully distributing income to the individuals for whose benefit the trust was established.

[2] Counsel for the Law Society put the following question to the Respondent in cross-examination:

There never was any intention that the charities receive any distribution from the trust, was there?

[3] The Respondent's counsel objected on the basis that, in order to answer that question, the Respondent would have to divulge information that is confidential or subject to solicitor/client privilege, namely the instructions provided by his client F., now deceased.

[4] For the purposes of this decision, the Panel may refer to "information that is confidential or subject to solicitor/client privilege" as "Privileged Information".

[5] Following the objection, the Panel on its own motion, pursuant to Rule 5-6(1) and (2), ordered that members of the public be excluded from the Hearing to enable the Respondent to answer the question, while maintaining his client's confidentiality or privilege.

[6] The Respondent, through counsel, asked for an adjournment to enable the Panel's ruling to be considered by a Court of competent jurisdiction.

[7] The Panel was invited to provide reasons.

[8] The Panel ruled that the Respondent can answer the question and, by doing so, would not breach any duty or obligation that would otherwise be owed to the client not to disclose the Privileged Information. The Panel determined that Section 88 of the *Legal Profession Act*, and in particular subsections (1), (2) and (3), provide for an "umbrella" that protects the client's privilege while permitting the evidence to be used in this disciplinary hearing, which is a hearing constituted under the *Legal Profession Act*.

[9] It is the Panel's decision that testimony given by the Respondent does not constitute any breach or waiver of solicitor/client privilege; rather, the scheme of the *Legal Profession Act* maintains an "umbrella" of privilege for the benefit of the client, while enabling the evidence to be used in the hearing into the Respondent's conduct.

[10] As a starting point, the Panel refers to *Lavallee, Rackel & Heintz v. Canada* [2002] 3 S.C.R. 209, as quoted by Scanlan, J. in *Stewart McKelvey et al. v. Nova Scotia Barristers' Society* 2005 NSSC 258 at paragraph 28:

. . . Madam Justice Arbour was considering the principles of solicitor-client privilege which she described at page 240 as being:

a principle of fundamental justice and civil right of supreme importance in Canadian Law.

Madam Justice Arbour referenced the fact since *Hunter* [1984] 2 S.C.R. 145 courts had striven to strike an appropriate balance between privacy interests on the one hand and exigencies of law enforcement on the other hand. In the criminal law context Madam Justice Arbour said that the balancing exercise is not particularly helpful because:

. . . privilege, properly understood, is a positive feature of law enforcement, not an impediment to it.

Madam Justice Arbour quoted Justice Cory in saying:

. . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis.

[11] This Panel is of the view that the solicitor/client privilege does not "yield", but rather is maintained for the benefit of the client by the provisions of Section 88 of the *Legal Profession Act*.

[12] The Panel respectfully adopts the reasoning of Gerow, J. in *Greene v. Law Society of British Columbia et al.* [2005] B.C.J. 586, at paragraph 52, where Her Ladyship states:

While the petitioner argues there is a distinction between the Society's review of a file resulting from a complaint and a practice review since the client who makes a complaint waives privilege, I do not agree that there is a distinction. A client who makes a complaint to the Society does not waive privilege. There is no such distinction recognized in the *Act* or the *Rules*. In my view, the client's privilege is preserved and the client's interests are protected both where the file is inspected because of a complaint and where the file is inspected during a practice review.

[13] It is the Panel's view that this reasoning is equally applicable in a hearing, it being common ground that

F. was not a complainant.

[14] In conclusion, we adopt paragraph 53 of Gerow, J.'s decision:

Accordingly, I conclude that the impugned provisions [of the *Legal Profession Act*] do not violate the *Constitution* or the *Charter* as they do not unnecessarily infringe on the privacy rights of clients or **solicitor client privilege**. (emphasis added)

[15] It is our decision that the Respondent can answer the question in paragraph [2] above. By so doing, the Respondent is deemed conclusively not to have breached any duty or obligation that would otherwise be owed to the client, in particular the duty or obligation not to disclose communications that are confidential or are subject to solicitor/client privilege. Further, answering the question and any other questions that would, but for the umbrella of privilege, constitute a breach of the client's privilege will not constitute a breach of the client's privilege. The client's privilege is maintained by the exclusion of the public from the hearing, and will continue to be maintained by anonymizing any reasons or other public documents, in a manner similar to how the client's company, V, was anonymized in the Citation.