2006 LSBC 38
Report issued: October 17, 2006
Citation issued: June 19, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and an application pursuant to Rule 4-26 concerning

Douglas Hewson Christie

Respondent

Decision of a Bencher

Bencher: William Jackson

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: Douglas H. Christie

[1] This is an application pursuant to Rule 4-26 by the Respondent. On June 19th, 2006 a citation was issued against the Respondent. It ordered an inquiry into whether the Respondent had done one or more of the following:

i) professionally misconducted himself

ii) conducted himself in a manner unbecoming a member

iii) contravened the Legal Profession Act or a rule made under it

iv) Incompetently carried out duties undertaken by you in your capacity as a member of the Society.

[2] The schedule attached to this citation reads:

1. Your conduct in the course of your representation of the plaintiffs in R v. D. and in particular, your conduct in causing the preparation and delivery of a document entitled "Subpoena for Documents" issued to BMO Bank of Montreal, 3481 Cook Street, Victoria British Columbia for purposes of improperly obtaining documents from a third party to the litigation.

2. Your conduct in the course of your representation of the plaintiffs in R v. D, and in particular, your conduct in causing the preparation and delivery of a document entitled "Subpoena for Documents" issued to Royal Jubilee Hospital Medical Records Department, 1952 Bay Street, Victoria, British Columbia for the purposes of improperly obtaining documents from a third party to the litigation.

3. Your conduct in the course of your representation of the plaintiffs in R v. D, and in particular, your conduct in causing the preparation and delivery of a document entitled "Subpoena for Documents" issued to Mr. R.Y. of [number] South Figueroa, Suite [number], Los Angeles, California for purposes of improperly obtaining documents for a third party to the litigation.

[3] On May 20, 2006, the Respondent wrote asking the Law Society of British Columbia to "particularize" the matter concerning dates of the preparation of the "Subpoena for Documents", a copy of the documents and "that the alleged breach be related to some provision of the *Legal Profession Act* or Law Society Rules."

[4] On June 2, 2006, Ms. Rai, counsel for the Law Society, responded concerning the date of the preparation of the Subpoenas for documents and provided copies. She also wrote, "The Law Society is not alleging that you contravened a specific provision of the *Act*, Rules or *Handbook* but rather, that your conduct as particularized in the three counts amounts to professional misconduct." She further added that every breach of the *Act*, Rules or *Handbook* may not constitute professional misconduct and conversely, professional misconduct may be found in conduct outside the scope of any specific provision of the *Act*, Rules or *Professional Conduct Handbook*. That is a fair summary of the law as laid out in *Law Society of BC v. Walker* 2001 LSBC 25.

[5] After an exchange of letters earlier in the month, on July 17, 2006, Ms Rai wrote to the Respondent replying to an application under Rule 4-25 and providing an amended Index of documents. In this letter Ms. Rai also advised "that it is not the Law Society's position that you merely used the wrong form of Subpoena but it appears you improperly used a Subpoena to compel the production of documents from third parties when you ought to have known that there are specific mechanisms in place in the Rules of Court for that purpose."

[6] On August 2, 2006, the Respondent responded. In that letter he sought clarification of the Law Society's theory of the misconduct and reiterated his request for particularization of the specific sections of the *Act* or Rules contravened.

[7] On August 21, 2006, Ms. Rai responded, basically restating the earlier position of the Law Society.

[8] Accordingly, on September 1, 2006 the Respondent formally applied under Rule 4-26. He sought the following particularization. Firstly, he asked, "Does the Society tend [sic] to take the position that my use of Form 21 was with some dishonest motive seeking to obtain documents to which I would not otherwise be entitled?"

[9] Secondly, he questioned the Law Society's position that whether the documents obtained by the improper procedure were relevant to the case was not important to the determination of any issues in the hearing of the citation. This is a return to the question of what intent the Law Society is alleging that was raised in the first enquiry.

[10] Thirdly, he requested "specification of which of the sections of the *Legal Professions* [sic] *Act* or other rules" are allegedly breached.

[11] Finally, the Respondent asked for "clarification of what the Law Society's position on penalty is."

[12] Under Rule 4-26(5), the President has designated me to make a determination on the application.

Analysis

[13] I have reviewed the concise written submission of Ms. Rai and Mr. Christie. On a literal reading of Rule 4-26, the scope of possible relief from the application is quite narrow. Per subrule (3), I must be satisfied that the allegation in the citation does not give enough detail of the circumstances of the alleged misconduct to give the Respondent reasonable information about the act or omission to be proved and to identify the transaction referred to. If I am so satisfied, I must order discipline counsel to disclose further details of the circumstances.

[14] This narrow interpretation of Rule 4-26 is consistent with the neighbouring Rules, 4-25 and 4-27. Rule 4-25 provides a mechanism for the Respondent to obtain disclosure of evidence such as documents, statements and summaries. Similarly, Rule 4-27 provides for pre-hearing conferences. Amongst the other things the presiding Bencher at such a pre-hearing may order is discovery and production of documents.

[15] The Respondent has consistently sought clarification of the first question in his Rule 4-26 application of September 1, 2006. He wants to know whether the Law Society's theory of liability is that the alleged improper use of the Subpoenas was wilful or negligent.

[16] As I have been unable to find any precedents considering applications under Rule 4-26, I shall refer to various criminal law precedents by analogy. In *R v. McCune* (1999) 131 C.C.C. (3d) 152, our Court of Appeal reaffirmed at paragraph 37 the position that "*R v. Stinchcombe* (1991) 68 C.C.C. (3d) 1 (S.C.C.) does not alter the principle that the Crown's theory of a case is different from a particularized indictment..."

[17] Similarly, the Supreme Court of Newfoundland in *R v. Dalton* (2000) 192 Nfld & PEIR 20, held that it is not necessary for the Crown to prove "its theory" so that particulars may not be ordered so as to limit the scope of the accused's liability for the offence.

[18] As well, in *R v. Govedarow, Popovic and Askow* (1974) 16 C.C.C. (2d) 238 (OCA), affirmed [1976] 2 SCR 308, at page 270, it was held that there was no power in a court to order the Crown to particularize its theory of liability.

[19] I would therefore hold that the Law Society's theory of liability is not properly something that can be particularized under Rule 4-26.

[20] Concerning the second question raised by the Respondent, I hold that the relevance of the documents obtained to that case is also part of the Law Society's theory of liability. If the Law Society established the *actus reus* alleged, the relevance of these documents could bear upon the question of intent and whether the Respondent displayed *males fides* or negligence.

[21] However, again by analogy to criminal law, *R v. Cook* (1997) 114 C.C.C. (3d) 481 (S.C.C.) at pages 492-3 supports the position that the Law Society has control over its own case and may choose to not present certain evidence. It does so at its own risk so long as the existence of the potential evidence is disclosed to the Respondent.

[22] With reference to the third request contained in the Respondent's application of September 1, 2006, the Law Society has consistently taken the position that the four points of inquiry on the first page of the citation are "four possible adverse verdicts available to the hearing panel (letter of August 21, 2006). Again I would hold that the four possible alternate "verdicts" of the hearing panel are not properly within the scope of a Rule 4-26 application. These applications are limited to assuring that the transaction, act or omission is identified.

[23] In passing, I must remark that a better practice would be to specify the section of the *Legal Profession Act* or Rules that has allegedly been breached or to omit the reference completely. It would be ludicrous to suggest that a hearing panel could make a finding that a completely different breach from the transaction alleged had occurred, if disclosed by the evidence. For example, in the case at hand, the hearing panel could not find the Respondent responsible for a breach of the requirement to retain records under Rule 3-68 without violating the Respondent's right to know the case he must meet.

[24] Finally, the Respondent sought particularization of the penalty sought. It is eminently logical and desirable that the parties enter into principled resolution discussions. However, there is clearly no jurisdiction under Rule 4-26 to order the Law Society to provide its position on penalty.

[25] In summary, I am satisfied that the allegations in the citation give enough detail of the circumstances of the alleged misconduct to give the Respondent reasonable information about the act or omission to be proved, and to identify the transaction referred to. Accordingly, I refuse the application.