

2016 LSBC 39  
Decision issued: November 23, 2016  
Citation issued: May 9, 2016

**THE LAW SOCIETY OF BRITISH COLUMBIA**

**In the matter of the *Legal Profession Act*, SBC 1998, c. 9**

**and an application under Rule 4-35 concerning**

**DONALD FRANKLIN GURNEY**

**RESPONDENT**

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**DECISION OF THE PRESIDENT'S DESIGNATE  
ON AN APPLICATION FOR DISCLOSURE OF THE  
CIRCUMSTANCES**

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Written submissions:	September 30, 2016 October 13, 2016 October 18, 2016
President's Designate:	Nancy Merrill, QC

Discipline Counsel: Counsel for the Respondent	Alison Kirby Paul Jaffe
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- [1] On September 30, 2016 the Respondent brought an application pursuant to Rule 4-35 for disclosure of the details of the misconduct alleged in the citation issued May 9, 2016.
- [2] On November 3, 2016, the parties were advised that the application was dismissed with reasons to follow. These are those reasons.

## BACKGROUND

- [3] As a result of a compliance audit of the Respondent's practice, a Law Society auditor made a referral to the Professional Regulation department of the Law Society.
- [4] On May 9, 2016, a citation was issued against the Respondent alleging that he had used his trust account to receive and pay out \$25,845,489.87 for one client "without making reasonable inquiries about the circumstances, including the subject matter and objectives of his retainer, and without providing any substantial legal services in connection with the trust matters" and that this "constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*."
- [5] On June 29, 2016, counsel for the Respondent requested particulars of what the Respondent failed to do and particulars in support of the allegation that he did not provide any substantial legal services.
- [6] Counsel for the Law Society provided a response to the Respondent's request for particulars on June 29, 2016. That response referred counsel for the Respondent to the disclosure of the Law Society's case that had already been made to the Respondent. As well, examples to support the position of the Law Society with respect to the allegation that the Respondent performed no substantial legal services in connection with the subject transactions were provided.
- [7] On approximately July 20, 2019, the Law Society served a Notice to Admit on the Respondent. Counsel for the Respondent provided his Response to the Notice to Admit on August 8, 2016.

## ANALYSIS

- [8] Pursuant to Rule 4-35(3) as the President's designate I must be satisfied that the allegations contained in the citation do not provide enough detail of the circumstances of the alleged misconduct to give the Respondent reasonable information about the act or omission to be proven and to identify the transaction referred to, before I order the Law Society to disclose further details of the circumstances.
- [9] Counsel for the Respondent submits that, given the wording of the citation, considerable speculation must necessarily ensue as to the case the Respondent must meet. As a result, he is not able to prepare a full answer and defence.

- [10] Counsel for the Respondent further submits that the citation improperly exposes the Respondent to a penalty based on a policy debate as opposed to a legal determination, and relies on the decision of Gonthier, J, in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606:

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion.

- [11] Counsel for the Respondent takes the view that, due to the substantial nature of the Notice to Admit coupled with the scope of the admissions sought and the many documents attached, it did not assist in particularizing the alleged misconduct, but rather, had “the opposite effect.”
- [12] Counsel for the Law Society submits that the citation contains both sufficient details of the circumstances of the alleged misconduct and reasonable information about the alleged misconduct to identify the transactions, and cites *Violette v. New Brunswick Dental Society*, 2004 NBCA 1, 10 Admin LR (4th) 1, where the Court of Appeal held that, in formal disciplinary proceedings, “the duty to supply particulars does not correspond to that imposed under criminal law.”
- [13] It is further submitted that the Law Society is not required to allege that the Respondent violated a specific Law Society Rule or provision in *BC Code of Professional Conduct* and that the Code is not exhaustive.
- [14] I find that further particulars have been delivered by the Law Society both in the letter to counsel for the Respondent of June 29, 2016 and in the extensive Notice to Admit dated July 20, 2016.
- [15] In *Law Society of BC v. Christie*, 2006 LSBC 38, the Bencher in considering a similar application under Rule 4-35 [then Rule 4-26] agreed that there was no requirement to allege that a respondent contravened a specific provision of the *Act*, *Rules* or *Handbook* and that professional misconduct may be found in conduct outside the scope of any specific provision of the *Act*, *Rules* or *Professional Conduct Handbook*.
- [16] Consistent with the *Christie* case, the Respondent is not entitled to the theory of the Law Society’s case, which appears to be what the Respondent is seeking.

- [17] I am satisfied that the allegations contained in the citation, together with the letter from counsel for the Law Society dated June 29, 2016 and the Notice to Admit dated July 20, 2016 provide the Respondent with sufficient details of the circumstances of the alleged misconduct and reasonable information about the act or omission to be proven and to identify the transaction referred to.
- [18] The Respondent's application for particulars is dismissed.