2023 LSBC 01
Hearing File No.: HE20220033
Decision Issued: January 30, 2023
Citation Issued: October 26, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

WILIAM LORNE MACDONALD

RESPONDENT

DECISION OF THE MOTIONS ADJUDICATOR ON AN APPLICATION FOR ANONYMOUS PUBLICATION

Hearing date:	January 19, 2023
Motions Adjudicator:	Michael F. Welsh, KC
Discipline Counsel:	Robert W. Cooper, KC Stephanie Stephenson
Counsel for the Respondent:	Amy Peck

OVERVIEW

[1] The Respondent applies under Rule 4-20.1 for an order that the citation be published such that it does not identify the Respondent. The Law Society opposes the Respondent's application.

[2] The basis for the application is that it is not in the public interest to identify the Respondent, principally as it will cause "grievous harm" to certain public and private companies in which the Respondent has a prominent role, and to a well-known charity of which the Respondent is chair of the board, and to those it serves. The Respondent also alleges that it will create a "catastrophic loss" to the Respondent personally and to his reputation. I use these quoted terms verbatim from the Respondent's affidavit.

[3] The citation is lengthy and heavily redacted and for ease of reading, I will summarize rather than reproduce it.

[4] The first set of allegations, respecting three clients, fall into a category entitled *Assisting in, Encouraging, and/or Facilitating Dishonesty, Crime or Fraud* and are particularized as:

(a) making false or inaccurate representations to another lawyer;

(b) assisting in, encouraging and/or facilitating dishonesty, crime or fraud in the use of the Respondent's trust account;

(c) failing to reasonably inquire in the face of objectively suspicious circumstances where the Respondent knew or ought to have known that his trust account was being used to obtain proceeds of a fraudulent scheme to manipulate the securities market;

(d) permitting funds to flow through the Respondent's trust account in objectively suspicious circumstances and in the absence of legal services;

(e) assisting in a fraudulent scheme to manipulate the securities market; and

(f) failing to withdraw as lawyer when the Respondent knew or ought to have known that he was assisting the client in fraud or other illegal conduct.

[5] The second set of allegations, respecting seven clients, fall under the heading *Trust Transactions in the Absence of Legal Services*. They comprise:

(a) failing to be on guard against becoming the tool or dupe of an unscrupulous client;

(b) failing to provide substantial legal services;

(c) failing to make reasonable inquiries about the clients' transactions and related matters and the reasons for the payments of funds from the Respondent's trust account;

(d) failing to make a record of the results of any inquiries the Respondent did make; and

(e) failing to properly supervise his staff who received or disbursed funds from trust without adequate documentation and in the absence of substantial legal services.

[6] The third set of allegations, respecting five clients, are headed *Client Identification and Verification Requirements* and are for an alleged failure to properly obtain, record and verify client identification information.

FACTUAL BACKGROUND

[7] The Respondent has provided an affidavit from which the following are presented as facts. None are disputed by the Law Society.

[8] The Respondent has been a member of the British Columbia bar since 1999 and has practised exclusively as a solicitor in the areas of corporate finance and securities. In most recent years, he has practised in his own firm and before that, in association with other law corporations. These practices have been in North Vancouver.

[9] The Respondent has most recently wound down his practice and closed his firm's physical office. He now has no employees and practises part-time.

[10] The Respondent has involvement with three public companies and four private companies, some of which are in the process of going public, and in that pre-public stage, are seeking to raise capital for that process. The nature of his involvement in most is not specified in the evidence for this application.

[11] The one company for which particulars are provided is currently private and is in education technology, designing virtual reality based educational programs for children with special needs, particularly autism. The Respondent describes it as his "passion project". He raises concerns that publication may have a "ruinous impact" on its ability to further develop its educational systems, raise capital and enter into joint ventures or license partners in order to fulfill its goal of helping children and their families.

[12] The Respondent submits that the other companies will also have negative publicity attach to them with disruption of business activities, reduction of share value, negative shareholder perception and reduction on ability to raise capital. For the private ones, the Respondent submits that it will impede their ability to go public.

[13] The charity is described as a "marquee charity" of a famous organization widely known in Vancouver, across British Columbia and beyond. The Respondent is a long-time director and now chair and submits that he has built many relationships with key stakeholders, sponsors and donors. The Respondent raises concerns that publication will have "irreparable impacts" on the charity including negative publicity, a reduction in funding and donations and an impairment of relationships with key donors and sponsors of which he is the sole and key contact.

[14] The Respondent has a professional conduct record (PCR). It comprises a finding of professional misconduct in 2019 for misappropriation of trust funds totalling $1,977.20 for which he was suspended for two months and paid costs of $1,000. The hearing of the citation proceeded on what was then a conditional admission in which the Respondent admitted to the professional misconduct and the sanction imposed. It arose from his "zeroing" remaining trust account balances on nine inactive client files on one occasion in 2015 by issuing fee invoices for file maintenance and storage, each for the exact amounts on the file, and then never sending those invoices to the clients involved. That type of conduct was found in the well-known decision of *Law Society of BC v. Sas*, 2016 LSBC 03 to constitute misappropriation. The panel found a number of mitigating factors including a genuine but mistaken belief of the respondent that he could properly do this, his full acceptance of responsibility, his remorse and cooperation and the return of the funds to the clients. The decision is cited at 2019 LSBC 28.

APPLICABLE LEGAL PRINCIPLES

[15] The parties agree on the rules and law applicable to this application.

[16] The rules are 4-20 and 4-20.1. Rule 4-20 provides that the Executive Director must publish on the Law Society website the fact of the direction to issue a citation, that citation's content and status, and except as allowed under Rule 4-20.1, the identity of the lawyer cited. To fall within the exception in 4-20.1, the lawyer must bring an application and the motions adjudicator must be satisfied that:

(a) there are extraordinary circumstances; and

(b) those extraordinary circumstances outweigh the public interest in the publication of the citation with the lawyer's identity.

[17] Two recent decisions describe the legal principles to apply to an analysis under these rules. They are *Law Society of BC v. Sager*, 2022 LSBC 49 and *Law Society of BC. v. Kates*, 2022 LSBC 55. They may be distilled as:

(a) the applicant must show extraordinary circumstances, those extraordinary circumstances must outweigh the public interest in publication of the citation and the order sought must be necessary to prevent the potential risk;

(b) any decision made under Rule 4-20.1 is an exercise of discretion, which depends on the facts of the particular case; and

(c) there is a strong presumption in favour of open courts, including openness of discipline proceedings carried out by a regulator such as the Law Society, and this presumption is not overturned by public scrutiny, embarrassment and intrusion on privacy, that is necessarily a part of this type of disciplinary proceeding.

[18] Referencing *Fan v. Chana*, 2011 BCCA 516 at para. 61, *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 21 and section 8 of the *Interpretation Act*, RSBC 1996 c. 238, the Law Society submits, and I accept, that the exercise of the motions adjudicator's discretion is always guided by the requirement that it be exercised in a principled and consistent manner in the interests of justice. This consideration must be informed by the object of the rules in harmony with the scheme and the intention of the *Legal Profession Act*, SBC 1998 c. 9.

SUBMISSIONS OF THE PARTIES

[19] The Respondent notes first that none of the allegations in the citation have anything to do with the companies with which the Respondent is involved or the charity of which he is board chair.

[20] The Respondent emphasizes the potential negative consequences noted earlier that publication can have for these other entities, each of which has its own reputational interests. This submission focuses particularly on how it will affect the one private company, the Respondent's "passion project", and the charity.

[21] The Respondent also points to the profoundly serious nature of the allegations, particularly those that allege facilitating dishonesty, crime or fraud. The

Respondent submits that it is important to remember that these are only unproven allegations at this point, but that frequently members of the public fail to distinguish between allegations and findings of crime or misconduct and so the allegations themselves are harmful to the reputational interests of the parties with whom the Respondent is involved.

[22] As to his PCR and whether that finding of misappropriation is relevant to an analysis of whether extraordinary circumstances exist with these new allegations, the Respondent differentiates between public perception of the seriousness of what occurred in that case and what is alleged here.

[23] In sum, the Respondent focuses on the potential financial and reputational harm to these third parties from publication rather than on his own financial and reputational interests, although he does in his evidence state that publication will have catastrophic effects on him as well.

[24] The Law Society's submissions emphasize that any analysis must start with the role of the public interest duty of the Law Society and the importance of the open court principle. Without transparency in the Tribunal's processes, as well as its decisions, the Law Society will lose public confidence in its effectiveness as a disciplinary body. It quotes from *Law Society of Upper Canada v. Watson*, 2012 ONLSHP 53 at para. 48:

> The openness of court proceedings principle is the cornerstone of our justice system. The long line of cases dealing with this principle enunciates the factors that a court/tribunal must consider when it intends to abrogate from this general openness principle. It must not be done lightly and it must be exercised with caution. The transparency and openness of our system serve to ensure that the interests of the public and freedom of expression enshrined in the *Charter of Rights and Freedoms* are upheld.
>
> [emphasis added]

[25] The Law Society also points to a paucity of evidence that publication will, or to any likelihood could, harm these third-party companies or the charity with which the Respondent is voluntarily involved, and the paucity of evidence of the nature of his involvement and his importance to their continued well-being. It submits that the Respondent's statements in his affidavit are not evidence but, instead, forcefully stated opinion only.

[26] The Law Society also points out that as noted in the review panel decision of *Law Society of BC v. Doyle*, 2005 LSBC 24 at para. 38, these companies and charity have an interest in knowing of these allegations:

> In relation to individual members of the public and the profession, the Review Panel finds that the public interest and the Society's interest are served when individual members of the public and the profession who might have dealings with the Respondent know with whom they are dealing, including full knowledge of his professional circumstances including his discipline record. [emphasis added]

[27] The Law Society also submits that the Respondent's role in the companies and the charity do not outweigh the public interest in publication. It quotes from the *Sager* decision in which the lawyer, who is mayor of West Vancouver, sought anonymity, arguing in part that publication would impede his work as mayor and cause harm to the residents of that city. The motions adjudicator stated at para. 41:

> I reject the proposition that the Respondent's newly elected role as Mayor makes him more deserving of anonymity or somehow puts him in a different category than the average lawyer. Lawyers, by profession, have a public profile and many take on positions that are in the public eye. The Law Society cannot be seen as creating different categories of transparency – especially those that may hold public or high-profile offices.

[28] Lastly, again referencing a similar situation in *Sager*, the Law Society submits that any potential harm to the Respondent's reputation has already occurred as a result of the prior published decision finding the Respondent committed professional misconduct by misappropriating funds.

ANALYSIS AND FINDINGS

[29] While I accept some potential exists that publication of the Respondent's identity may have a negative effect on the reputation and finances of these companies and charity, I find it speculative to say that it is any more than a possibility. As counsel for the Law Society has noted, there is little if any evidence of what might happen, or how or why it could happen, or how to determine whether the negative effects would come from publication as opposed to a range of other risk factors.

[30] As a result, I cannot find a sufficient evidentiary basis to found the Respondent's submitted concerns about this.

[31] In reaching this conclusion, I am not deciding if and under what circumstances substantial damage to the reputational interests of a third party with whom a lawyer is associated may constitute an exceptional circumstance. It is not appropriate to do so based on speculation and so I leave that issue for an occasion where there is a sound evidentiary foundation on which to decide it.

[32] I also find no evidence to show that even if "catastrophic" personal and professional loss might be relevant to the analysis, which again I do not decide, publication will create such a situation for the Respondent. I find nothing in the evidence to take this beyond the public scrutiny, embarrassment and intrusion on privacy that is necessarily a part of these disciplinary proceedings.

[33] In making this finding, I do not need to consider the issue of relevancy of the Respondent's PCR. I accept the Respondent's submission that the nature and severity of the present allegations against him is of a greater scale of magnitude than those that led to the prior admitted finding of professional misconduct. Given those differences, (unlike the situation in *Sager*), its relevance and potential effect on his reputation in relation to the present allegations need not be decided on this application.

[34] Consequently, the application is dismissed.