

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** D.L.W. v. Nova Scotia Barristers' Society, 2010 NSCA 40

**Date:** 20100430

**Docket:** CA 325970

**Registry:** Halifax

**Between:**

D. L. W.

Appellant/Applicant

v.

Nova Scotia Barristers' Society

Respondent

**Judge:**

The Honourable Justice M. Jill Hamilton

**Application Heard:**

April 26, 2010, in Chambers

**Held:**

Applicant's motion for a stay pending the disposition of the appeal is dismissed with costs to the respondent.

**Counsel:**

Appellant in person

Kimberley Turner, Q.C., for the respondent

**Decision:**

[1] The applicant, D.L.W., a practicing lawyer, applies for a stay pending disposition of his appeal, of that part of the March 3, 2010 resolution (“Resolution”) of the Complaints Investigation Committee (“Committee”) of the Nova Scotia Barristers’ Society (“Society”) which ordered him to cooperate with Michael Brooker, Q.C. in a review of his law practice. In his notice of appeal D.L.W. seeks to have this court overturn the Resolution on the grounds that the Committee erred at law (1) when it found he refused to cooperate with Michael Brooker regarding a review of his practice and (2) when it ordered a review of his practice when there was no reason to do so.

[2] The relevant events prior to the Resolution are as follows. The Acting Executive Director of the Society, Victoria Rees, commenced an investigation into the conduct of D.L.W. on February 16, 2010. Her unchallenged affidavit indicates why she started an investigation.

13. The decision to commence an investigation was based upon information received by the Society between November 2009 and February 2010. This information included:

- (a) Concerns raised by a client regarding D.L.W.’s excessive delay, non-response and failure to keep her informed, and suspicion of alcoholism;
- (b) Reports from Society staff regarding their communications with D.L.W. when staff attempted to mediate the client complaint;
- (c) A report from Society staff that D.L.W. had contacted the Society in December 2009 to seek assistance with his practice, based upon the advice of a Judge;
- (d) Communications between D.L.W. and Society staff regarding documents which needed to be executed by D.L.W. in order to proceed with the proper transfer of client files from a member who was resigning his membership; and
- (e) Information from Patrick Cassidy, Q.C., a member of the [Committee] asked to contact D.L.W. to offer guidance and

assistance, regarding interactions with D.L.W. when he attempted to speak to him about staff concerns.

[3] On the same day, February 16, the Committee met. It reviewed information similar to that which Ms. Rees relied on to commence an investigation. It considered whether it should order D.L.W. to attend before the Committee pursuant to s. 36(2)(a) of the **Legal Professions Act**, S.N.S. 2004, c. 28, but finally resolved that it had reasonable and probable grounds to believe D.L.W. was practicing law in a manner contrary to the public interest and ordered a review of D.L.W. law practice (“Practice Review”) pursuant to s. 36(2)(g).

[4] By what now appears to have been a coincidence, D.L.W. attended at the Society’s offices on February 16, shortly after the Committee’s meeting. A meeting between D.L.W. and Ms. Rees took place during which she advised him of the Practice Review that the Committee had ordered. Later that day she sent a letter to him confirming the Practice Review and advising that Michael Brooker, Q. C., had been retained to conduct the review.

[5] Commencing February 17, Mr. Brooker attempted to arrange to conduct the Practice Review at D.L.W.’s office on Monday, February 22. Several emails were exchanged between Mr. Brooker and D.L.W. about this as D.L.W.’s office phone was out of service. By email on February 19, D.L.W. indicated no one would be at his office on February 22 to meet with Mr. Brooker:

Please be advised again that no one will be available to meet with you at my office at any time on Monday, February 22, 2010. My secretary was asked to do so but she will be in Kissimmee, Florida and absolutely refused to return.

Personally, I will be watching the Olympics on television as planned and will not be available to meet.

For your information, I intend to initiate and(sic) an Injunction Application enjoining you from carrying out your proposed trespass on my property forthwith. I will serve you with notice of same and referring this request to the Court, hereby ask you to refrain from further activity until a Supreme Court of Nova Scotia adjudication is rendered on the entire matter.

[6] D.L.W. commenced an action in the Supreme Court on February 19 against the Society, the Society president, members of the Committee, Mr. Brooker and several of the Society's staff, alleging harassment, torture and demeaning conduct.

[7] By letter to Ms. Rees dated February 22, Mr. Brooker outlined his unsuccessful attempts to arrange to review D.L.W.'s practice to that date.

[8] On February 23 the Committee met. It resolved to hold a hearing pursuant to s. 37(1) to determine if it was in the public interest to suspend D.L.W.'s practicing certificate or impose conditions or restrictions on his practice. The s. 37(1) hearing commenced February 26, but was adjourned to March 3 at D.L.W.'s request.

[9] At the March 3, seven-hour, s. 37(1) hearing, evidence was given on behalf of the Society by Ms. Rees, Danielle Daigle, Acting Compliance Officer in the Professional Responsibility Department of the Society, and Mr. Brooker. D.L.W. cross-examined these witnesses and testified himself. Arguments were presented. The Committee decided not to suspend D.L.W.'s practice certificate as sought by the Society, but found that conditions should be imposed on his practice:

**AND WHEREAS** the [Committee] has determined that the evidence strongly suggests that D.L.W. failed to cooperate with the practice review ordered by the [Committee] on February 16, 2010, but that this finding does not meet the threshold required to impose a suspension of D.L.W.'s practicing certificate;

**AND WHEREAS** the [Committee] has determined that it is in the public interest to impose conditions on D.L.W.'s practicing certificate;

and imposed the following conditions, among others which are not at issue:

2. That D.L.W. cooperates with a practice review, to be conducted by Michael Brooker, Q.C., during March 16 – 18, 2010. D.L.W.'s cooperation must include:
  - a. Confirming with Mr. Brooker and Elaine Cummings, Acting Director of Professional Responsibility, no later than March 5, 2010, the exact date of the practice review, which is to be either March 16, 17 or 18, 2010;
  - b. Providing Mr. Brooker with the five (5) items of information requested in his letter to D.L.W. dated February 17, 2010, which is

page 21 of Exhibit 1 entered into evidence at the March 3, 2010 Section 37(1) Hearing. These items are as follows:

- i. Client file list for the past three years (open and closed);
- ii. 2008 and 2009 work in process records;
- iii. 2008 and 2009 monthly financial statements;
- iv. 2008 and 2009 monthly trust statements, and;
- v. List of files, accounting records and trust records regarding the files D.L.W. has received from [a resigning member].

[10] After complying with one of the other conditions, on March 17, 2010, D.L.W. commenced his appeal to this court. Ms. Rees' affidavit indicates that on the same day, D.L.W. advised counsel for the Society that he considered his appeal put a stop to the actions ordered by the Resolution and that he would not be available to meet with Mr. Brooker until the court dealt with his appeal.

[11] In response, the Committee met and determined to reconvene the s. 37(1) hearing on April 7. At D.L.W.'s request, this date was adjourned to April 15. On April 14, D.L.W. filed the notice of motion presently before me. At D.L.W.'s request, the Committee agreed to adjourn the reconvening of the s.37(1) hearing until his motion for a stay pending disposition of his appeal is determined.

[12] The relevant provisions of the **Act** are as follows:

**35** The conduct, practice or professional competence of a member of the Society may be the subject of an investigation pursuant to this Part...

- (b) upon receipt of information by the Society that, in the opinion of the Executive Director, establishes reasonable grounds for an investigation.

...

**36 (2)** The Complaints Investigation Committee may do one or more of the following things during or after an investigation:

(a) require a member of the Society to attend before it for purposes of assisting with the investigation or for any other purpose consistent with the objects of the professional responsibility process;

...

(g) order a review of the practice of a member of the Society to be carried out by any person or persons;

...

**37 (1)** The Complaints Investigation Committee may, by resolution, where in its opinion it is in the public interest to do so,

(a) suspend a practising certificate; or

(b) impose restrictions or conditions on a practising certificate,

during or following an investigation until the suspension, restrictions or conditions are rescinded or amended by the Complaints Investigation Committee or a hearing panel.

...

**(7)** A lawyer may appeal to the Nova Scotia Court of Appeal on any question of law from a decision of the Complaints Investigation Committee pursuant to this Section, in accordance with Section 49.

[13] The relevant regulations to the **Act** provide:

### **Commence Investigation**

**9.2.3** On receipt of information by the Society that, in the opinion of the Executive Director, establishes reasonable grounds for an investigation, the Executive Director shall commence an investigation.

...

## **9.7 Review of Practice**

**9.7.1** Where the Complaints Investigation Committee has reasonable and probable grounds to believe that a practising lawyer is practising law in a manner contrary to the public interest, the Committee may direct the Executive Director to appoint a reviewer to conduct a review of all of or a portion of the member's practice.

### **Cooperation with Reviewer**

**9.7.2** The member, and the member's employees or associates, shall answer any inquiries and produce for the reviewer all records, files or other information which the reviewer requires for the purpose of the investigation.

...

### **Failure to Comply**

**9.7.6** If the member, or the member's employees or associates, have, in any way, failed to comply with the reviewer's requests for records, files or other information, or have otherwise impeded the review, the reviewer shall report the circumstances to the Complaints Investigation Committee.

### **Review Incomplete**

**9.7.7** If the reviewer has been unable to make or complete the review he or she shall state the reasons therefore.

### **Use of Reviewer's Report**

**9.7.8** The reviewer's report may be made the basis of a complaint against a member and may be used in evidence.

### **Substantial risk**

**9.7.10** Where a review conducted pursuant to this subregulation identifies

- (a) inadequacies in the member's practice, or
- (b) conduct that poses a substantial risk that the member will face disciplinary action in the future,

the Complaints Investigation Committee may provide assistance to the member in order to remedy those inadequacies.

[14] The issue before me today is whether to grant the stay sought by D.L.W. pursuant to **Civil Procedure Rule 90.41**.

[15] The test governing motions for stays in this court was set out in **Fulton Insurance Agencies Ltd. v. Purdy**, [1990] N.S.J. No. 361 (N.S.C.A.), and has been consistently followed since:

In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either

(1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience.

OR

(2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[16] I will not deal with the first factor in the primary test, whether D.L.W. has raised an arguable issue on appeal. I prefer to make my decision based on a consideration of the second and third factors and the secondary test.

[17] The second factor is whether D.L.W. will suffer irreparable harm if the stay is not granted. It is for D.L.W. to satisfy me of this. He has not done so. He has provided no evidence of any irreparable harm he will suffer if I refuse to grant the stay, nor can I think of any. Irreparable harm is harm that is difficult or cannot be compensated with a damage award. If I do not grant the stay, D.L.W. will have to cooperate with Mr. Brooker's review of his law practice. This may involve some



expense to D.L.W. in having his secretary assemble required records and it would result in his losing time that he could otherwise spend practicing law. Both the additional expenses and his loss of time could affect his income. Both can be adequately compensated for with a damage award.

[18] If the Practice Review confirms that D.L.W.'s practice is being conducted properly, that is the end of the matter. If the review indicates some weaknesses in his practice, help may be available to him. After these weaknesses are addressed, the matter will be over. Only if the Practice Review indicates that D.L.W.'s practice is not being properly conducted will further investigation be required. In that case, the Committee's decision will have been justified and any harm suffered by D.L.W. will have been warranted.

[19] The third factor is balance of convenience. D.L.W. has not satisfied me that the balance of convenience favours granting the stay. The harm to D.L.W. of cooperating with a Practice Review, assuming he is conducting his practice appropriately, is relatively minimal as discussed above. On the other hand, if D.L.W. does not cooperate with the Practice Review and there is something seriously amiss in D.L.W.'s practice, there could be serious consequences to the public and the Society would not have been able to properly carry out its legislated mandate.

[20] With respect to the secondary test, there are no exceptional circumstances that would make it fit and just that the stay be granted. The evidence before me suggests the Committee considered relevant evidence before making its Resolution and granted several adjournments to allow D.L.W. time to respond to the Society's process and to apply to court, despite its concerns. Nothing before me suggests it acted in a high-handed or irresponsible manner in ordering that D.L.W. cooperate with the Practice Review.

[21] I would dismiss D.L.W.'s motion for a stay pending disposition of the appeal, with costs payable by D.L.W. to the Society on or before November 30, 2010, in the amount of \$750, including disbursements.

[22] At the hearing of D.L.W.'s motion, I set the time for the hearing of his appeal and the dates for the filing of the required documents:

Appellant's factum - June 18, 2010

Respondent's factum - July 9, 2010

Hearing - Tuesday, November 16, 2010 at 2 p.m.

[23] I recognize that D.L.W. may not wish to proceed with his appeal, given the dismissal of his motion for a stay. If D.L.W. does not wish to proceed with his appeal, he shall advise the Registrar of the court on or before June 1, 2010.

Hamilton, J.A.