NOVA SCOTIA COURT OF APPEAL

Citation: ***Potter v. Nova Scotia Barristers' Society, 2005 NSCA 149***

Date: 20051118
Docket: CA 257156
Registry: Halifax

Between:

Dan Potter

Appellant/Applicant

v.

Nova Scotia Barristers' Society, Stewart McKelvey Stirling Scales, Blois Colpitts, 2317540 Nova Scotia Limited, SolutionInc Ltd., Futureed.Com Ltd., Knowledge House Inc., 2532230 Nova Scotia Limited, and The Attorney General of Nova Scotia

Respondents

Judge:	Justice Linda Lee Oland
Application Heard:	November 3, 2005, in Halifax, Nova Scotia, in Chambers
Held:	Application for stay granted with costs and disbursements.
Counsel:	Dan Potter in person for the applicant/appellant Kimberley H.W. Turner, Q.C. and Heather Totton for the respondent, Nova Scotia Barristers' Society John F. Rook, Q.C. for the respondent, Stewart McKelvey Stirling Scales

Decision:

[1] This is an application by Dan Potter for a stay of the order of Scanlan, J. dated October 24, 2005 which directs Stewart McKelvey Stirling Scales, a law firm, to abide by subpoenas issued to it by the Nova Scotia Barristers' Society. The decision of Justice Scanlan is reported as *Stewart McKelvey Stirling Scales v. Nova Scotia Barristers' Society*, 2005 NSSC 258.

Background

[2] In the fall of 2003, National Bank Financial (the "Bank") brought an action against, among others, Mr. Potter, Blois Colpitts, Stewart McKelvey Stirling Scales ("SMSS"), and Knowledge House Inc. SMSS had acted for Mr. Potter and for Knowledge House. Mr. Colpitts was a partner of SMSS.

[3] The Bank's statement of claim alleged that Mr. Potter, Mr. Colpitts, and other individuals, all of whom were principals of or related to Knowledge House, conspired and acted jointly and in concert with the intent to manipulate the public market in shares of that company, thereby perpetrating a fraud on the capital markets and, specifically, on the Bank. It alleged breaches of various provisions of the *Criminal Code* relating to fraud and of provisions of the *Securities Act* relating to disclosure. It claimed that SMSS and each of its partners were liable for any damages caused to it by the fraudulent misrepresentation and conspiracy to which Mr. Colpitts was a party.

[4] SMSS self-reported through John MacL. Rogers, its managing partner, who sent a copy of the statement of claim to the Nova Scotia Barristers' Society (the "Society"). In late September 2003 its Director of Professional Responsibility, Victoria Rees, responded that the Society's Investigative Subcommittee had decided to treat the matter as a complaint but did not require any response at the time. In early December 2003, she wrote Mr. Rogers requesting that the law firm retrieve and preserve for future access all materials generated by or received by it relating to or touching upon the allegations made against Blois Colpitts in the Bank's action, and asking that an inventory be prepared. Her letter indicated that Mr. Colpitts was the only person within the firm whose conduct might be the subject of investigation.

[5] Over a year later, in February 2005, Ms. Rees wrote again to Mr. Rogers. She advised that the Society was now proceeding with its investigation of the complaints against Mr. Colpitts in relation to the Bank's action and asked for an inventory of the materials held by the firm in order to determine which the Society would ask to be provided to it. No inventory had been supplied following her initial letter. Correspondence then ensued between the Society and counsel for SMSS regarding the Society's authority, pursuant to the *Barristers' and Solicitors' Act*, R.S.N.S. 1989, c. 30 as amended to obtain confidential and privileged information in the course of the Society's investigation. The matter was still under discussion when the *Legal Profession Act*, S.N.S. 2004, c. 28 (the "*Act*") came into force on May 31, 2004.

[6] On July 22, 2005 the Society's Complaints Investigation Committee issued two subpoenas which required Mr. Rogers to appear before it. One ordered him to bring documents or materials which originated with, was received by, or was copied to Blois Colpitts in relation to any of his involvement in, activities with or representation of, among others, Knowledge House and Mr. Potter, during a certain period. The second ordered him to bring all documents in his possession with regard to communication between Mr. Colpitts and the officers, directors and/or insiders of Knowledge House and, among others, Mr. Potter.

[7] Counsel for SMSS contacted the various companies and individuals named in the subpoenas. He enclosed copies of the subpoenas and asked whether the company or individual consented to SMSS complying with them by producing the documents they specified. Mr. Potter advised that he opposed the production of any privileged solicitor-client material.

[8] Thereafter SMSS applied for directions with respect to its response to the subpoenas, as well as for a declaration that the *Act* did not authorize the Complaints Investigation Committee to issue subpoenas to compel the production of privileged solicitor-client communications. Justice Scanlan agreed that the *Act* did not contain provisions which explicitly authorized that Committee to compel the production of privileged communications. He held, however, that the legislation afforded protection to clients when such information is provided to the Society during an investigation of one of its members. He ordered the law firm to provide the material sought and dismissed its application for a declaration. His order reads in part:

2. Stewart McKelvey Stirling Scales shall abide by the Nova Scotia Barristers' Society's subpoenas and in so doing must provide privileged and confidential information to the Society.

3. Any privilege associated with such information is not waived and is maintained through the provisions of Sections 77(1)(3)(4) and (5) of the *Legal Profession Act* of Nova Scotia.

4. In complying with the subpoenas, Stewart McKelvey Stirling Scales will be deemed to not be in breach of any duty that it owes to its clients to not disclose privileged and confidential information and that Section 77(2) of the *Legal Profession Act* of Nova Scotia shall apply.

[9] Mr. Potter seeks a stay of that order pending the disposition of his appeal. The hearing of the appeal has been set down for April 10, 2006.

[10] For the reasons which follow, I would grant the stay.

Analysis

The test for a stay

[11] The test for a stay as set out in *Fulton Insurance Agencies Ltd. v. Fulton* (1990), 100 N.S.R. (2d) 341 (C.A.) is well established. In the words of Hallett, J.A.:

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

In my view, Mr. Potter has satisfied all three components of the so-called primary test and it is not necessary to consider the secondary test.

The primary test

(I) An arguable issue

[12] The test for an arguable issue was set out by Cromwell, J.A. in *MacCulloch v. McInnes, Cooper and Robertson,* [2000] N.S.J. No. 238 (C.A.) at § 4 as follows:

> The appellants must show that there is an arguable issue raised on appeal. This is not a difficult threshold to meet. What is required is a notice of appeal which contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal: see Freeman J.A., in **Couglan et al v. Westminer Canada Ltd.** (1993), 125 N.S.R. (2d) 171. It is not my role as a Chambers judge hearing a stay application to enter into a searching examination of the merits of the appeal or to speculate about its probable outcome but simply to determine whether the arguable issue threshold has been reached.

[13] In his decision, Justice Scanlan rejected the submission that the Complaints Investigation Committee cannot compel the production of privileged communications in the absence of express authority in the *Act*. While he acknowledged that there were no express provisions in that statute in that regard unlike, for example, the legislation in Ontario which clearly empower the investigating body to obtain privileged information, he held that the *Act* provided safeguards for clients whose privileged information is provided to the Society during an investigation. He referred to s. 77 which reads:

> 77 (1) Any person who, in the course of carrying out duties under this Act, becomes aware of information or a document that is confidential or is subject to

> solicitor-client privilege, has the same obligation respecting disclosure of that information or document as the member of the Society from whom the information or document was obtained.
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> (2) A member of the Society who, in accordance with this Act, provides the Society with information or a document that is confidential or is subject to solicitor-client privilege is deemed not to have breached any duty or obligation that the member would otherwise have had to the client or to the Society respecting disclosure of that information or document.
>
> (3) Any person who, during any court proceeding respecting a matter arising under this Act, becomes aware of information or a document that is confidential or is subject to solicitor-client privilege, shall not use, produce or disclose the information for a purpose other than that for which it was obtained.
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> (4) In any court proceeding respecting a matter arising under this Act, the court may exclude members of the public from the proceeding where the court considers that the exclusion is necessary to prevent the disclosure of information or a document that is confidential or is subject to solicitor-client privilege.
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> (5) In giving reasons for judgment in any court proceeding respecting a matter arising under this Act, the court shall take all reasonable precautions to avoid including in those reasons any information before the court that is confidential or is subject to solicitor-client privilege.

[14] I am satisfied that an arguable issue has been raised in this appeal. The decision under appeal is the first in which the authority of the Complaints Investigation Committee pursuant to the *Act* has been considered. I agree that the appeal raises issues of public importance concerning the rights of clients in regard to solicitor-client privilege, a legal right which is fundamental to our justice system, and concerning the Society's requirement for access to privileged communication to fulfill its public interest mandate of ensuring the competence of its members and protecting the public.

[15] From my review of the decision and the materials filed on this application, including the jurisprudence provided by each of Mr. Potter and counsel for each of the Society and SMSS, I am persuaded that the grounds of appeal contain realistic grounds which appear to be of sufficient substance to be capable of convincing a panel of this court to allow the appeal.

(ii) Irreparable harm

[16] The types of irreparable harm claimed here are: (a) the adverse effect on Mr. Potter and in particular, his reputation, should the Society ultimately make a finding against Blois Colpitts; (b) the release and materials by the Society of materials in its possession to the police or to the Securities Commission, whether voluntarily or under compulsion; and c) the release to the Society of confidential information contained in the material and the use made of it cannot be undone, should the appeal succeed.

[17] In order to appreciate Mr. Potter's arguments, it is important to reiterate that the essence of the Bank's claim against Blois Colpitts, Mr. Potter, Knowledge House and others is one of stock manipulation. That litigation has been underway for some time, is ongoing, and has attracted much media attention. The Society has adopted the Bank's statement of claim with its allegations of fraudulent misrepresentation and conspiracy misrepresentation against Mr. Colpitts as the complaint against him; that is, it did not prepare a new or separate complaint which specified, for example, breaches of the Legal Ethics Handbook which governs the conduct of lawyers in Nova Scotia. The police and the Securities Commission may also investigate the circumstances of the collapse of the value of Knowledge House shares, in regard to possible offences under the *Criminal Code* and the *Securities Act*.

[18] I will deal with each of Mr. Potter's submissions in turn. The first type of irreparable harm alleged arises from the possibility that, after completion of its investigation of him and following any proceeding before its hearing committee which is held as a result of that investigation, the Society may take disciplinary action against Mr. Colpitts. Mr. Potter says that should this come to pass, his reputation will be negatively affected. This is because the Bank's statement of claim which the Society has adopted as the complaint against its member alleges, among other things, conspiracy. Mr. Potter claims that his reputation within the business community and with the public at large would be irreparably harmed.

[19] Whether the remedy sought is an injunction or a stay, in general the same principles apply: *RJR MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 at § 46. That decision, which has been referred to as the "authoritative discussion of the principles relating to stays pending appeal" (see *MacPhail v. Desrosiers* (1998),

165 N.S.R. (2d) 32 (NSCA in Chambers) at § 13), discussed the definition of irreparable harm thus at § 59:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). (Emphasis added)

[20] The fact that harm might be suffered is not sufficient to satisfy the second component of the primary test for a stay. The harm must be have an irreparable quality. In this regard, *Dalhousie Faculty Assn. v. Dalhousie University*, 2001 NSCA 103 [In Chambers] is illustrative. In that case an arbitrator had reversed the university's decision to refuse an assistant professor tenure but the award was quashed on appeal and the professor dismissed. The Faculty Association then applied for a stay pending appeal. In denying the application, Hallett, J.A. explained why any harm would not be irreparable:

> 15 If the appeal is successful, Dr. Mathieson will be able to explain to research granting bodies and others interested in his career, including potential employers, that he was wrongfully dismissed by the University and it was that wrong that caused him to default in performance of his research. Under such circumstances, any fair minded person would recognize that it was through no fault of his that his research project was not completed if that is the case. Likewise, a gap in his C.V. can be quickly and satisfactorily explained. If the appeal succeeds his reputation will be restored. There is no evidence that another researcher is working on a similar project. It is pure speculation that some other researcher will get ahead of him as a result of any delay in his research.

[21] I agree that if, after the Complaints Investigation Committee completes its investigation of Blois Colpitts it is decided that a disciplinary hearing should be held, and if Mr. Colpitts should be disciplined at its conclusion, an adverse impact on Mr. Potter's reputation in the business community and with the public at large could result. However, that is not the end of the analysis. It is impossible to know whether or not, in relation to the matters alleged in the Bank's statement of claim,

any charges or allegations of statutory breaches will be laid against or made against Mr. Potter. Moreover, if any should be, such charges or allegations may not be sustained when ultimately determined; any harm he may have suffered would then be removed and his reputation restored. In either of those scenarios, Mr. Potter would be vindicated. Accordingly, I am not persuaded that whatever harm Mr. Potter's reputation might suffer if the Society should discipline Mr. Colpitts before the conclusion of the Bank's action, constitutes irreparable harm to Mr. Potter.

[22] The second kind of irreparable harm claimed by Mr. Potter relates to the provision of confidential information by the Society to another investigating body. This argument rests on the possibility that, in the course of its investigation of Blois Colpitts, the Complaints Investigation Committee may become of the view that Mr. Colpitts and/or others may have committed a criminal offence or breached a statute other than the *Act*. Mr. Potter argues that in those circumstances, the Society may volunteer or consider itself compelled to disclose confidential information in its possession which may concern him, to other investigators, and that this would cause him irreparable harm.

[23] The Society's "Reporting Matters to the Police Policy" reads in part:

> 1. Where a Discipline Subcommittee has reasonable grounds to believe that a member has committed a serious criminal offence, the Chair shall immediately report that belief in writing to the Executive Committee.
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> 2. The Executive will consider the Report and the information upon which it is based and determine if, in accordance with this policy, the police should be advised of the matter.
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> 3. Generally, matters will not be referred to the police until the conclusion of the formal hearing.
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> 4. However, if on receipt of the Report of the Discipline Subcommittee, the Executive concurs that there are reasonable grounds to believe the member has committed a serious criminal offense and determines that there is an ongoing threat to the public, the matter will generally be referred immediately to the police with sufficient information to outline the basis of the Society's belief. Documentation in the Society's files, which is not on the public

> record, is confidential, and can only be released in response to a search warrant.
>
> . . .
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> 9. Privileged communications between a member and the member's client will not be disclosed unless the Society has obtained waivers of solicitor/client privilege or the Society is ordered to disclose by the Court. (Emphasis added)

[24] It is to be observed that any reporting relates to solely the member under investigation by the Society. The member in this case is Mr. Colpitts, not Mr. Potter. As a result, Mr. Potter's concerns are largely answered by this policy. I acknowledge that should the Society refer a matter in regard to Mr. Colpitts, there may be a possibility that it could tangentially affect Mr. Potter. However, s. 77 of the *Act* in combination with this policy establishes that the Society is well aware of the care required in regard to privileged communications which may come into its possession and that there are substantial safeguards in place. Moreover, in post-hearing submissions requested by me, the Society advised that if a disciplinary hearing could potentially involve the disclosure of privileged information, the holder of the privilege would be given notice and permitted to make submissions.

[25] I now turn to the final type of irreparable harm alleged by Mr. Potter. His affidavit in support of his application for a stay sets it out this:

> 6. Unless the application to stay the order for judgment is granted, that the Nova Scotia Barristers' Society will obtain possession of the subject documents forthwith and it is my opinion and belief that, the Society will immediately begin accessing and reviewing privileged and confidential documents with the result that many if not all such documents will have been accessed and reviewed before the Appeal is determined. In these circumstances, in the event that the Appeal is successful, it is plain and obvious that I will have suffered irreparable harm.

SMSS, which made submissions on this application for a stay, summarized Mr. Potter's position succinctly thus in its factum:

> Simply put, Appellant submits that, if the documents which are the subject matter of the subpoenas are delivered to the [Complaints Investigation Committee], the privilege for which he contends is lost. Furthermore, if the *Legal Profession Act*

> is to be interpreted restrictively and the privilege cannot abrogated by inference, there can be no legal basis for compelling the delivery of privileged communications. In effect, the Appellant is submitting that, absent a stay, the appeal is moot. [Para 9 SMSS factum]

[26] Mr. Potter relies upon *White v. E.B.F. Manufacturing Ltd.*, [2005] N.S.J. No. 27 (C.A. in Chambers) at § 24 where Cromwell, J.A. stated:

> I accept that, in general, the disclosure of confidential information required by a court order which is subsequently set aside on appeal constitutes irreparable harm: **Business Depot Ltd. (c.o.b. Staples) v. 2502731 Nova Scotia Ltd. (carrying on business as Mailboxes Etc.)**, [2004] N.S.J. No. 185 (Q.L.) (N.S.C.A. Chambers) and **O'Connor v. Nova Scotia** (2001), 193 N.S.R. (2d) 8 (N.S.C.A. Chambers) at paras. 14-17. Such harm may result either because the content of the information, once released, may cause harm that cannot be cured by a damage award or simply because the disclosure, once made, cannot be undone. . . . (Emphasis added)

Moreover, in *O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)* (2001), 193 N.S.R. (2d) 8 (C.A. in Chambers), a stay application which involved the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, Cromwell, J.A. considered the risk of harm in the specific context of an access to information case where an order granting access is under appeal. He stated:

> 14. . . . In that situation, the risk if a stay is not granted pending appeal is that the information will be released and thereafter, if the appeal succeeds, that release will be found to have been unlawful. In my view, such wrongful release may constitute irreparable harm in at least three ways.
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> 15. First, the release of the information may injure the persons affected by its release in ways which cannot be compensated by money.
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> 16. Second, once access to information is granted, it cannot be undone if the order for access is subsequently reversed on appeal. The harm is irreparable in the sense that a legal wrong has been committed which cannot be compensated or reversed. In some cases, the injury resulting from disclosure will be minimal, but that does not detract, in my view, from the proper characterization of the wrongful disclosure as constituting irreparable harm. As Cory and Sopinka JJ. said in **RJR - MacDonald, supra**, irreparable refers to the nature of the harm rather than its magnitude. The essence of the concept is a wrong which cannot be undone or cured. The unlawful disclosure of information, even where it does not injure

> anyone, is a wrong which cannot be undone or cured and is, therefore, capable of being "irreparable" for the purposes of a stay pending appeal.
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> 17. Third, the disclosure of the contested information will generally render the effects of a successful appeal nugatory. There is ample authority for the proposition that where that is the result of the refusal of a stay pending appeal or judicial review, irreparable harm has been shown: see, for example, **National Financial Services Corp. v. Wolverton Securities** (1998), 160 D.L.R. (4th) 688 (B.C.C.A. Chambers) at § 29 and 32; **Suresh v. Canada (Minister of Citizenship and Immigration)** (1999), 176 D.L.R. (4th) 296 (Fed. C.A. Chambers) at pp. 305 - 307; **Gaudet v. Ontario (Securities Commission)** (1990), 38 O.A.C. 216 (Div. Ct.); **Re Hayles and Sproule** (1980), 29 O.R. (2d) 500 (Ont. Div. Ct.). (Emphasis added)

[27] The Society correctly points out that in *White*, supra the application for a stay was dismissed when it was determined that the information would retain its confidential status and would be used only for a limited purpose. It argues that the situation is the same here in that all information received by it will remain privileged. It points to safeguards within the *Act* and, in particular, s. 77 which was set out earlier in this decision. The Society also emphasized that § 3 of Justice Scanlan's order stipulated that any privilege associated with the privileged and confidential information to be provided to the Society by SMSS was not waived, but rather was maintained under the *Act*.

[28] The Society submits that the argument that the effects of a successful appeal would become moot, which constitutes irreparable harm, was rejected by Glube, C.J. *in Nova Scotia (Department of Environment and Labour, Occupational Health and Safety Division) v. Annapolis Valley Regional School Board*, [2001] N.S.J. No. 254 (C.A.). in Chambers With respect, I do not agree that this was the basis of that decision.

[29] There the Director, Occupational Health and Safety took the position that, under the relevant legislation, he could not conduct an investigation of the workplace unless the teacher who had refused to work there asked him to do so, and that she had not. Following an appeal, the Occupational Health and Safety Appeal Panel ordered him to investigate. The Director applied for a stay pending the hearing of his appeal of its decision. While his argument in regard to irreparable harm relied on *O'Connor*, supra – if the stay were not granted and the appeal allowed, the investigation would have been completed; the Director would

have performed a legal wrong which could not be reversed and possibly render the decision moot – it appears that Glube, C.J. decided the application on other grounds. In her view, an investigation would not amount to a wrong which cannot be undone or cured and that allowing it to proceed would hurt no one, except perhaps the teacher and she could appeal any unfavourable decision of the Director.

[30] As for *O'Connor*, supra the Society observes that the application in that access to information decision concerned documents relating to a review of government programs. Those documents were not subject to solicitor-client privilege and there is no indication that, if released, they would be or were to be kept confidential. While the factual distinction raised by the Society is valid, I am not satisfied that the types of irreparable harm set out in that decision and in particular, its § 16 regarding harm which cannot be undone and § 17 regarding the effect of a successful appeal being made nugatory, do not apply here.

[31] If, in accordance with Justice Scanlan's order, privileged communications are delivered to the Society, and if his decision should be reversed on appeal, legal wrongs will have been committed that cannot be undone. The Complaints Investigation Committee will have received and will have had access to material for which it had no legal authority to compel production. Moreover, SMSS will have surrendered privileged material which concerns its clients to that Committee, without any legal basis for having done so. Finally, Mr. Potter's appeal which argues that the Complaints Investigation Committee has no such authority will have been futile and made nugatory. In my view such consequences constitute irreparable harm.

(iii) Balance of convenience

[32] The third component of the primary test in *Fulton Insurance*, supra requires the applicant to satisfy the court that if the stay is not granted, he would suffer greater harm than the respondent. SMSS first informed the Society of the matters which form the basis of its complaint against Mr. Colpitts in September 2003. After receiving assurances from the law firm concerning the safekeeping of the material, the Society did not take further steps regarding that material until it wrote SMSS requesting them in February 2005. There is no suggestion that its member who is the subject of the Society's investigation is actively practising or that there

is any reason to believe that there is any risk or danger to the public in the period before the hearing of the appeal.

[33] If, however, the appeal should be successful, Mr. Potter will have lost his right to deny the Complaints Investigation Committee access to privileged documents. The balance of convenience clearly favours the applicant for a stay.

Conclusion

[34] I would exercise my discretion and grant a stay of the order of Scanlan, J. dated October 24, 2005 pending the disposition of the appeal in this matter. Costs fixed at $1,000. plus disbursements as agreed or taxed shall be in the cause.

[35] I wish to express my appreciation for the thorough memoranda of law which were filed for this application and for the vigorous and helpful submissions which were made before me in Chambers.

Oland, J.A.