SUPREME COURT OF NOVA SCOTIA
Citation: ***Colpitts v. Nova Scotia Barristers' Society,*** 2019 NSSC 125

Date: 2019-04-17
Docket: Hfx No. 484982
Registry: Halifax

Between:

R. Blois Colpitts

Applicant

v.

Nova Scotia Barristers' Society

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 27, 2019 in Halifax, Nova Scotia
Final Written Submissions:	April 3, 2019
Written Decision:	April 17, 2019
Subject:	Whether a Rule 85 confidentiality order should be issued?
Summary:	A practising lawyer was convicted of serious criminal offences. The Society scheduled a hearing to determine whether he ought to be able to continue practising law while he appealed his convictions. He and the Society came to a private agreement that he would voluntarily withdraw from practice, consequently the hearing was indefinitely adjourned. The Society gave notice to him some months later, that its investigation resulted in two formal charges, and it was proceeding with a disciplinary hearing against him. The lawyer was of the view that the earlier agreement precluded the Society from commencing disciplinary proceedings against him until his criminal appeals had been determined. He sought a judicial review of the Society's actions, including

specifically the notice of the two formal charges against him. In the interim, he sought a confidentiality order that would apply to the upcoming judicial review and for the duration thereafter until his criminal appeals had been decided.

Issues: (1) Was the order necessary to prevent a serious risk to an important public interest? And if this was so:

(2) Do the salutary effects of the granting of confidentiality order outweigh the deleterious effects thereof?

Result: (1) The court found it difficult to envisage an important public interest here, but even if it can be said that there is a serious risk to an important public interest here;
(2) The salutary effects of a confidentiality order were found to be minimal at best, whereas the deleterious effects are significant. Confidentiality order refused.

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Counsel:	Christopher I. Robinson, for the Applicant Bernadine MacAulay, for the Respondent

By the Court:

Introduction[1]

[1] In his capacity as a practising lawyer, instead of proceeding to a hearing pursuant to section 37 ("Suspension of certificate or imposition of conditions") of the *Legal Profession Act*, c. 28 SNS 2004 ["LPA"] to investigate a complaint (C-6226) against him, Mr. Colpitts entered into a written interim agreement ("the Agreement") with the Nova Scotia Barristers Society ["the Society"] dated March 27, 2018. The Agreement required him to voluntarily withdraw from practising law, pending the outcome of his appeal against his conviction (and later sentences) for two very serious fraud offences.[2]

[2] Mr. Colpitts claims that this Agreement *guaranteed* him that, provided he remained a non-practising member of the Society:

1. there would be no further publicity about his voluntary withdrawal from practice,[3] and the existence and terms of the Agreement;
2. there would be no further disciplinary proceedings regarding his involvement with Knowledge House Incorporated ["KHI"] until his appeals of his convictions and sentences were completed;[4]

[3] This decision addresses the issues raised by the first point; a Judicial Review scheduled for May 29, 2019, will address the issues raised by the second point.[5]

[4] After his July 28, 2018 sentencing to 4 ½ years custody in a federal penitentiary, the Society referenced "Complaint C – 6226" in its October 17, 2018 letter to Mr. Colpitts:

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[1] There is presently in existence an interim non-publication order by Justice Campbell dated February 8, 2019, which continued to the March 27, 2019 hearing herein and which I orally confirmed continued until otherwise ordered by a court of competent jurisdiction. It reads: That the Applicant shall be referred to in all court documents by the pseudonym "XYZ" and the court file in this matter shall be sealed in the interim, pending a full hearing of the confidentiality motion scheduled for February 28, 2019 [adjourned to March 27, 2019 2:00 p.m.] I specifically asked counsel whether I must hear both this interim motion and the Judicial Review if I hear the interim motion – both confirmed that different judges could hear the motion and the Judicial Review.

[2] See, 2018 NSSC 40 (released March 9, 2018) and 2018 NSSC 180 (released July 28, 2018), respectively.

[3] Other than as permitted in clause 9 of the Agreement

[4] I understand these are scheduled to be heard by the Court of Appeal over eight days in the Fall of 2019. When the decision might be available thereafter is difficult to say, however 6 to 12 months is not an unreasonable estimate. Moreover, consequent to that result, the parties could then seek leave to appeal to the Supreme Court of Canada.

[5] The proper ambit of judicial review was discussed in a recent case dissimilar on its facts: *J.W. v. Canada (Attorney General)*, 2019 SCC 20, at paras 99-101 per Moldaver and Côté JJ.

> Given that neither of the two triggering events described above have occurred, *the Agreement remains in* place and your interim voluntary withdrawal from practice continues. *The complaint, however, has not been resolved*. In addition to the powers set out in section 37(1) of the Act, the Committee has a number of powers that it may exercise during or after an investigation as set out in section 36(2) of the Act, including the power to authorize the Executive Director to lay a charge against a member of the Society (s. 36(2)(d)). *The Agreement does not abridge the Committee's powers under section 36 (2)*.
>
> [My italicization]

[5] The Complaints Investigation Committee ["CIC"] recommended to the Executive Director that he be formally charged pursuant to section 36 of the LPA ("Powers of Complaints Investigation and Fitness to Practice Committees"). Mr. Colpitts had been given an opportunity to respond to the CIC's "opinion that evidence that can reasonably be believed may present a likelihood of a finding of professional misconduct or conduct unbecoming against you, in accordance with Regulation 9.4.3 (e)", which was based upon his conduct underlying the criminal convictions and sentences.

[6] On November 27, 2018 Mr. Colpitts received a copy of a formal charge referencing "Complaint C – 6226".[6]

[7] Mr. Colpitts has filed a Notice of Judicial Review requesting review of that November 27, 2018 decision of Tilly Pillay, Q.C., acting in the capacity of Executive Director of the Society.

[8] In the interim, and the subject of this written decision, Mr. Colpitts has filed (most recently) on February 7, 2019, an amended Notice of Motion seeking: "an order of confidentiality pursuant to Civil Procedure Rule 85 such that the Applicant may only be identified by a pseudonym, and a publication ban be applied to the proceeding".

[9] Simply stated, Mr. Colpitts says that he had a "standstill" agreement with the Society to prevent any further disciplinary proceedings against him arising from his criminal convictions, and to protect his privacy, including preventing the public from even knowing about the existence of the Agreement, pending the outcome of his criminal appeals.

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[6] A comparison of Exhibits "A" and "G" of Ms. Victoria Rees' affidavit is helpful.

[10] If he is not granted the confidentiality order sought, he says that *even if* he is successful in the Judicial Review,[7] the publicity of the Judicial Review itself will undermine what he seeks – *inter alia*, that the public not be permitted to be aware that Mr. Colpitts was formally charged that he:

> failed to discharge with integrity, duties he owed to other lawyers, his clients, the court, the profession and the general public, and conducted himself in a way that reflected adversely on the integrity of the profession, the legal system and the administration of justice… [And] breached his duty to avoid engaging in questionable conduct… he failed at all times to observe the standard of conduct that reflected credit on the profession and the system and the administration of justice generally and which inspired the confidence, respect and trust of clients, those with whom he worked in the community, and acted in a manner which demonstrated a significant departure from what is expected of an honest lawyer.

[11] The Society says that the confidentiality order Mr. Colpitts seeks is based on an argument of preserving his own personal "privacy, for privacy's sake", there being no other material purported important *public* interest identified by him. Moreover, even if the court concludes there is an identifiable important public interest to be protected here, the salutary effects thereof are significantly outweighed by the deleterious effects of a confidentiality order.

[12] In my opinion, even if Mr. Colpitts was successful in the Judicial Review, any decision of that court would have to be subject to a complete publication ban, because any lesser form of confidentiality, such as redaction, or anonymizing Mr. Colpitts' identity, would be ineffective in keeping private Mr. Colpitts' identity given the telltales of his identity that would be indirectly revealed by what would otherwise be only general information.

[13] I conclude that no confidentiality order should be granted here.

[14] I will explain this in greater detail.

Background

[15] As evidence before me I had: the affidavits of: Victoria Rees, Director of Professional Responsibility for the Nova Scotia Barristers Society; and Mr. Colpitts.

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[7] In his Notice for Judicial Review, he claims as relief "that the [Society"] abide by the terms of the Agreement; that the [November 27, 2018] Decision be rescinded; and that no further disciplinary or other action be taken regarding the Applicant until the Appeal is determined".

[16] Only Ms. Rees was cross-examined. I found her truthful and reliable. I accept her affidavit evidence and her answers on examination by counsel.

[17] In his affidavit Mr. Colpitts states that his understanding of, and purpose in negotiating, the Agreement "was to address all matters of concern to the Society relating to the Complaint and the Convictions, and to place them all in abeyance until the Appeal was determined". He says: "I would not have negotiated and then entered into the Agreement were it possible that the Society after the Agreement was signed – would or could be free to re-initiate their disciplinary process respecting the substance of the Complaint and move the matter to a new hearing, with the attendant notices to the public that are required, prior to the determination of my Appeal."

[18] While I did not have the opportunity to see Mr. Colpitts testify, and the Agreement may be said to be ambiguously drafted, I am sceptical that he likely genuinely believed that the Agreement was intended to have the broad and final effect he claims. He had the benefit of skilled legal counsel to assist him regarding the section 37 proceeding and the drafting of the Agreement. I am also sceptical that a mere two weeks after Mr. Colpitts' conviction, the Society intended, without more express language to that effect, to preclude itself in all circumstances from proceeding with disciplinary hearings until Mr. Colpitts' criminal appeals were finally concluded.

[19] Ms. Rees' testimony was to the effect that the sections 36 and 37 *LPA* processes are different, and that, to the best of her recollection, in her 30 years' experience at the Society, section 37 hearings (suspension of, or conditional, right to continuing to practice law) have always preceded section 36 disciplinary proceedings; however, depending on the circumstances of an individual case, a section 36 proceeding could precede a section 37 proceeding. She noted that the section 37 proceeding involves a confidential hearing, but the results are typically made public. Her testimony suggested that while the Agreement emanating from the section 37 proceeding could be viewed to be "final", if one were taking a narrow view of the entire processes available to the Society – it is more accurately considered as an "interim" step in the circumstances of this case, because the CIC still has the authority to go on to a section 36 disciplinary hearing process, after which Mr. Colpitts could still be disbarred, even if he was acquitted of the criminal charges.

[20] Mr. Colpitts was a practising lawyer when he committed, and still so later, when on March 9, 2018, he was convicted of, conspiracy to commit (s. 465 *Criminal Code* ["CC"]):

1. fraud over $5000 contrary to s. 380(1)(a) CC; and
2. fraud that affects the public market price of shares for sale to the public contrary to s. 380(2) CC – both in relation to the collapse of Knowledge House Incorporated ["KHI"].

[21] After the conclusion of the criminal proceedings in Supreme Court, Tilly Pillay, Q.C, Executive Director of the Society, determined that there were reasonable grounds for an investigation pursuant to Regulation 9.2.3 of the Regulations made pursuant to the LPA. A notice, dated March 23, 2018, issued from the CIC which set March 28, 2018 as the hearing date.

[22] That Notice included the recital:

> And Whereas on the basis of the decision of Justice Coady and your criminal conviction, the [CIC] has resolved to hold a hearing pursuant to section 37(1) of the *Legal Profession Act to determine whether it is in the public interest to suspend your practicing certificate or impose conditions or restrictions on your practice.*
>
> [My italicization]

[23] On March 27, 2018, an interim Agreement was reached by the Society and Mr. Colpitts. That agreement contained the following wording:

> And Whereas, Mr. Colpitts has requested an adjournment of the hearing to be held pursuant to section 37(1) and the [CIC] has agreed to grant the adjournment subject to certain conditions set out in this interim Agreement.
>
> NOW Therefore, [the Society] and Mr. Colpitts agree as follows:
>
> 1. The section 37(1) hearing pursuant to Complaint C – 6226 is hereby adjourned and may be reconvened at Mr. Colpitts' option on a date not sooner than one week after May 22, 2018, and not more than eight weeks after May 22, 2018, in accordance with the terms hereof. The date shall be fixed by the [CIC] upon consultation with Mr. Colpitts and his counsel. If Mr. Colpitts chooses not to reconvene the section 37(1) hearing the provisions of this Agreement shall remain in place.
> 2. Effective April 6, 2018 Mr. Colpitts shall voluntarily cease the practice of law on an interim basis as contemplated by this Agreement…
>
> …

> 8. Mr. Colpitts has indicated his intent to appeal… If the appeal is allowed and the two convictions are set aside, Mr. Colpitts will be relieved of all of the undertakings and obligations contained in this Agreement. Upon that order of the Court of Appeal coming into effect he will also be entitled to engage in the unrestricted practice of law without the need for any further order of the [CIC] or the Society. The Society shall advise in similar fashion to paragraph 9 below this development.
>
> 9. On April 9, 2018 the Society shall only post, on its website, the following notice:
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>> In consultation with [the Society], [Mr. Colpitts] has voluntarily withdrawn from the practice of law effective immediately on an interim basis until further notice. Mr. Colpitts' practice at RBC Law Inc. has been assumed by Warren Chornoby of RBC Law Inc. and clients may continue to, contact Mr. Chornoby relating to their matters. . .
>
> 12. The terms of this Agreement shall remain strictly confidential except to the extent that Mr. Colpitts and Mr. Chornoby are required to communicate with clients of RBC Law Inc."[8]

[24] The reference in para. 8 that "if the appeal is allowed and the two convictions are set aside,… he *will* also be entitled to engage in the unrestricted practice of law without the need for any further order of the [CIC] or the Society" could be read as supporting Mr. Colpitts' position that the parties intended that the time interval during which the Agreement was to remain operative included the final determination of the criminal charges by the Nova Scotia Court of Appeal, and therefore the Society had agreed to forestall any and all disciplinary action against Mr. Colpitts until then. Presumably, if his convictions were upheld, the Society could then proceed with a formal charge and disciplinary hearing.

[25] However, it is also significant that the Notice of Hearing under section 37 of the *LPA* read in part: "And Whereas the Complaints Investigation Committee met on March 22, 2018 and had for its consideration the complaint of Tilly Pillay, QC, the decision of Justice Coady, as well as submissions provided by your counsel, Jane Lenehan, and Gavin Giles, Q.C., a proposed practice supervisor for you; And Whereas… [the Committee] has resolved to hold a hearing pursuant to section 37(1) of the [*LPA*] *to determine whether it is in the public interest to suspend your*

[8] It was not suggested in the evidence that the Society had previously entered into such "confidential" agreements – perhaps they have. However, I note that courts are generally reluctant to uphold confidential agreements entered into by statutory bodies without valid public interest reasons to do so - Eg see cases involving the *National Bank*, the *Nova Scotia Securities Commission* and the *Barthe Estate*- 2011 NSSC 240; 2012 NSCA 99 at paras. 5 and 11; 2015 NSCA 47 at paras. 127-135.

practicing certificate or impose conditions or restrictions on your practice; …". In my view, the Society was concerned with the immediate issue of whether Mr. Colpitts should be permitted to continue practising law – not whether he should be disciplined.

[26] Mr. Colpitts' affidavit states that his understanding of, and purpose in negotiating, the Agreement "was to address all matters of concern to the Society relating to the Complaint and the Convictions, and to place them all in abeyance until the Appeal was determined". He says: "I would not have negotiated and then entered into the Agreement were it possible that the Society after the Agreement was signed – would or could be free to re-initiate their disciplinary process respecting the substance of the Complaint and move the matter to a new hearing, with the attendant notices to the public that are required, prior to the determination of my Appeal."

[27] In its October 17, 2018 letter the Society clearly set out its reasoning why it did not consider the Agreement precluded its resort to section 36 of the *LPA*, which led to the formal charges against Mr. Colpitts:

> Given that neither of the two triggering events described above have occurred, the Agreement remains in place and your interim voluntary withdrawal from practice continues. *The complaint, however, has not been resolved*. In addition to the powers set out in section 37(1) of the Act, the Committee has a number of powers that it may exercise during or after an investigation as set out in section 36(2) of the Act, including the power to authorize the Executive Director to lay a charge against a member of the Society (s. 36(2)(d)). *The Agreement does not abridge the Committee's powers under section 36(2).*
>
> [My italicization]

Mr. Colpitts' position

[28] His position is well captured by his written arguments:[9]

> On March 27, 2018 the Society and Mr. Colpitts entered into an Agreement that directly referenced the Complaint and the Convictions, the sole purpose of which was to hold all further action on part of the Society – with respect to the Complaint and the Convictions – in abeyance until Mr. Colpitts' appeal of his convictions was determined.

[9] Both the February 20 and April 2, 2019 briefs are referenced herein.

> The Agreement read 'the terms of this Agreement shall remain strictly confidential except to the extent that Mr. Colpitts and Mr. Chornoby are required to communicate with clients of RBC Law Inc.'
>
> On November 27, 2018 the Society issued a "new" complaint (i.e. the Decision that is the subject of the Judicial Review) against Mr. Colpitts, which contains the fact of the convictions and uses verbiage that is essentially identical to that found in the Complaint … and in conjunction with the November 2018 complaint, the Society has also decided to publish a notice of hearing (the 'Notice', which is also part of the Decision) – the Society has agreed not to publish the Notice pending determination of the Judicial Review. Mr. Colpitts' evidence is clear: the entire purpose of the Agreement was abeyance and confidentiality; and he would not have entered into it were it understood that the Society had the ability to simply repackage the Complaint under a different guise and publish a new notice of hearing.
>
> …
>
> If the Confidentiality Order is granted, the only matter the public will not have access to, will be a hearing about the efficacy and scope of a confidential agreement; an agreement which has never been in the public domain, and but for the Society's decision to breach it, never could have been made public. In the event the Court determines that the Decision under review is permitted, the Society's disciplinary process will then unfold, with all the public access to information that the *Legal Profession Act* and its Regulations prescribe. Holding the Judicial Review in private will in no way derogate from the Society's responsibility to the public vis-à-vis its disciplinary process in general, or Mr. Colpitts in particular.

[29] While it is necessary for me to understand this background in order to make a decision regarding the claimed order for confidentiality, I am acutely aware that the determination of whether the Agreement precludes the Society from proceeding with the formal charges against Mr. Colpitts will be determined by the Justice presiding over the Judicial Review hearing on May 29, 2019.

[30] I am to concern myself with the legal implications of Mr. Colpitts' contention that if the confidentiality order is not granted, and the Judicial Review proceeds with him being publicly identified, that publicity will reveal that the Society has formally charged him and was intending to conduct a disciplinary hearing regarding his involvement with KHI.[10]

[10] The Society has voluntarily suspended the disciplinary process started by the November 27, 2018 charges, pending the outcome of the Judicial Review.

The relevant law[11]

[31] Civil Procedure Rule [”CPR”] 85 reads in part:

Order for confidentiality

85.04

(1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

(a) sealing a court document or an exhibit in a proceeding;

(b) requiring the prothonotary to block access to or recording of all or part of a proceeding;

(c) banning publication of part or all of a proceeding;

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in the heading.

(3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from the courtroom, under section 37 of the Judicature Act, may make an order for confidentiality to aid the purposes of the exclusion.

Notice of motion for confidentiality order

85.05

(1) A party who makes a motion for an order for confidentiality, or to exclude the public from a courtroom, must give reasonable notice to representatives of media, unless a judge orders otherwise.

(2) The notice to media representatives may be given by using the service provided by all courts in Nova Scotia for giving notice to the media through the internet.[12]

[32] There is general authority for the order requested by Mr. Colpitts.

[33] A so-called confidentiality order may be granted if, on the basis of the individual factual circumstances of the case, and the application of relevant

[11] I have canvassed the law generally in *CUPE Local 108 v. Nova Scotia Police Review Board*, 2019 NSSC 54.
[12] I am reliably advised that an automated advisory from the Courts of Nova Scotia website’s Publication Ban Media Advisory service was sent, but no recent requests have been received in response thereto.

legislation, Rules, and the jurisprudence in relation to associated issues, it is appropriate to do so.

[34] At this point it may be most helpful to set out a brief summary of the "test", or requirements before such Rule 85 orders should be granted.

[35] Importantly, it must be remembered that the precise wording of the test in any particular case requires an adaptation of the rights and interests engaged in the case to the analytical framework arising from cases such as*: Dagenais v. Canadian Broadcasting Corp*., [1994] 3 SCR 835; *R. v. Mentuck*, [2001] 3 SCR 442; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 SCR 522.[13]

[36] The binding and persuasive jurisprudence collectively require me to consider the following questions[14]

1. Is the order necessary to prevent a serious risk to an important public interest (which must be real, substantial and well-grounded in evidence) because reasonable alternative measures would not alleviate the risk?[15]; and if so

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[13] The general test has been stated by the Supreme Court of Canada in the criminal context - *Dagenais v. CBC,* [1994] 3 SCR 835 and *R. v. Mentuck*, [2001] 3 SCR 442; but more appropriately in this context the principles arise from *Sierra Club of Canada v Canada (Min. of Finance)*- see Justice Oland's reasons in *Osif v. The College of Physicians and Surgeons of Nova Scotia*, 2008 NSCA 113, at paras. 14-18; and more recently Justice Fichaud's reasons in *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc*., 2014 NSCA 98, at paras. 24-26.

[14] Most prominent among the authorities are the following, which were cited by the Society: *Dagenais v. Canadian Broadcasting Corporation,* [1994] 3 SCR 835; *R. v. Mentuck*,, 2001 SCC 76; *Sierra Club of Canada v. Canada (Min of Finance)*, 2002 SCC 41; and *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group*, 2014 NSCA 98 per Fichaud JA; and *Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2013 NSSC 32, per Hood J. Mr. Colpitts cited: *Towers, Perrin, Forster & Crosby v. Cantin*, [2000] O.J. No. 3514 (SC) a case involving an alleged breach of a "non-competition" clause in a commercial context which also incidentally involved a confidentiality order; *JA v. Canada Life Assurance Co*., [1989] O.J. No. 1119 (Ont. HC) a case in which damages were claimed for a breach of confidentiality, namely taking blood tests without consent leading to the rejection of life insurance in which the plaintiffs wished to preserve their anonymity*; 887574 Ontario Inc. v. Pizza Pizza Ltd*., [1994] O.J. No. 3112, which involved a motion for an order that material relating to an appeal from commercial arbitration be sealed on grounds of confidentiality; and *G. v. College of Teachers (British Columbia)* , 2004 BCSC 626, (at paras. 27 and 32) where a teacher who was the subject of disciplinary action was granted anonymity as the court found the presumption of openness of court proceedings was overcome by the need to protect the overriding public interest that G received a fair hearing on his appeal, and considering the effect the publication of his name would have on his children and the school at which he worked. I note here that other similar cases in British Columbia came to different conclusions based on their facts*: Mitchell v British Columbia College of Teachers*, 2005 BCCA 76; *Mr. R. v. British Columbia College of Teachers*, [2004] B.C.J. No. 2146 (SC) at paras. 21 and 26.

[15] As noted in *Sierra Club* at para. 57: "Finally, the phrase 'reasonably alternative measures' requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question".

2. Do the salutary effects of the confidentiality order, outweigh the deleterious effects thereof?

[37] This was succinctly stated by Justice Binnie in *F.N. (Re)*, [2001] 1 SCR 880, at para. 10 as: " [the open court rule only yields] when the public interest in confidentiality outweighs the public interest in openness". I add here that the persuasive and evidentiary onus is on the party seeking the confidentiality order.

What then is the important public interest that is at stake put forward by Mr. Colpitts?

[38] The claimed interests are identified in Mr. Colpitts' affidavit.

[39] He references it variously:

> • I negotiated and signed the Agreement based on *my understanding* that the subject and *purpose of the Agreement was to* address all matters of concern to the Society relating to the Complaint and the Convictions, and to *place them all in abeyance until the Appeal was determined*.
>
> • [The April 9, 2018 public notice placed by the Society on its website advising of Mr. Colpitts' voluntarily withdrawing from the practice of law effective April 6, 2018] and *the resulting publicity has had a negative impact on the business of RBC Law Inc.,* notwithstanding that the firm remains active and continues in the practice of law through the other lawyer working at the firm.
>
> • In the event the Decision [taken by Tillay Pillay, QC on November 27, 2018] which I have applied to have judicially reviewed, is allowed to stand, the breach of confidence due to the public announcement of a new hearing by the Society at this juncture *would cause significant further harm to the business of RBC Law Inc*.… Further, in the event this Judicial Review proceeding, or any aspect of it, were to be made public, then my entire purpose in commencing the Judicial Review will have been destroyed. *The damage I am seeking to prevent through the Judicial Review application, is the breach of confidentiality and resulting publicity that would occur if the Decision is allowed to stand*, and the notice of hearing were to be published prior to the determination of my Appeal.

[40] In his February 20, 2019, brief at paras. 10-20, Mr. Colpitts says that making public the confidentiality agreement, would destroy the very subject matter of the litigation itself – i.e. he elaborates that:

> While we certainly argue that any *publicity generated by the Judicial Review would cause considerable damage to Mr. Colpitts and RBC Law Inc*. (with "serious harm" being another of the exceptions carved out by the courts- see *Towers*) -it is the parties, and *most particularly Mr. Colpitts' agreed right to privacy and confidentiality itself that is at stake here*… It is not the result of the

> Judicial Review that this confidentiality motion is concerned about; rather it is concerned with the preservation of the privacy that both the parties actively and thoroughly engaged throughout the process that culminated in the Agreement, which a publicly held judicial review hearing will destroy.… Simply put, the Agreement was all about avoiding publicity and ensuring privacy, and the Society now seeks to cast that privacy aside by starting a new public process… *If the Review hearing happens in public, then it doesn't matter what the decision of the Court will be, because the very privacy Mr. Colpitts is trying to preserve through the Review, will be destroyed by the Review*.
>
> [my italicization]

[41] In summary, Mr. Colpitts is alleging that the "important interest" to be protected is: the preservation of the privacy as set out according to the terms of the private Agreement; and the effects of not issuing a confidentiality order include direct and indirect financial and reputational consequences to Mr. Colpitts.

[42] I am not convinced that there is a serious risk to an important public interest to be protected here, but for my purposes in this motion, I will continue my analysis of the effects, if the confidentiality order is not granted.

Why the salutary effects of the sought-after confidentiality order are outweighed by the deleterious effects thereof

[43] Firstly, let me address the financial and reputational consequences aspect.

[44] Regarding the reputational consequences, that is a legal argument constructed of straw. The plethora of public civil and criminal proceedings culminating with the publishing of Justice Coady's decisions on conviction and sentence, and the attendant publicity in the media, will remain in the public domain.

[45] Moreover, even if Mr. Colpitts' conviction appeal is successful – so successful that he is acquitted – that does not mean that the Society, in its regulatory role to oversee the conduct of lawyers, should be, and is necessarily precluded from proceeding with the charges against Mr. Colpitts.

[46] Criminal fraud convictions require proof beyond a reasonable doubt. At the hearing held by the Society, only proof on a balance of probabilities is required to render a finding that warrants discipline.

[47] What needs to be proved by the Society is also different than at a criminal trial. It need not prove fraud as defined in the *Criminal Code*, but rather must prove the regulatory charges - i.e. that Mr. Colpitts:

> conducted himself in a way that reflected adversely on the integrity of the profession, the legal system and the administration of justice"; and "breached his duty to avoid engaging in questionable conduct… in a manner which demonstrated a significant departure from what is expected of an honest lawyer.

[48] Mr. Colpitts' argument is primarily one concerned with the timing of a disciplinary hearing. He hopes that the hearing can be put off to a point after his appeal is determined by the Nova Scotia Court of Appeal. His "privacy" is to be preserved until some point in the future when it may become a non-issue. But that decision will not necessarily be the end of his criminal odyssey. That court could find error and order a retrial. Whatever the decision of the court, the losing party may seek leave to appeal to the Supreme Court of Canada.

[49] All the while, at least until the appeal is determined by the Nova Scotia Court of Appeal, Mr. Colpitts will remain convicted and sentenced to a federal penitentiary term, and his reputation will continue to be depleted thereby. I infer that even after an acquittal, his reputation will materially continue to suffer.

[50] Regarding the financial consequences, I look to Justice Fichaud's comments in *Resolve Business*, as it involved a requested confidentiality order in litigation with a financial context. Therein he stated:

> 26 To summarize the test's two branches, the judge determines whether
>
> (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and
>
> (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. *For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties*, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.
>
> …

> 36 The first branch of *Sierra Club*'s test is satisfied. There is a real and substantial risk to an *important commercial interest that can be expressed in terms of a public interest in confidentiality*, and there is no reasonable alternative, short of a confidentiality order, that would preserve the interest in question.
>
> [My italicization]

[51] As in *Resolve Business*, in cases of private litigation, an important private commercial interest can sometimes involve an important *public* interest in confidentiality- but that is not the situation here.

[52] The commercial interest that Mr. Colpitts has in the Society not proceeding with the disciplinary hearing related to his criminal convictions, is not of the same quality as the parties who presented in *Resolve Business*. The Society is the regulating body for lawyers in Nova Scotia. In this respect it is an integral component in maintaining confidence in the "rule of law" in Nova Scotia. When and how it deals with Mr. Colpitts affects not only the public's perception of his case, but their perception of whether the Society is properly, and without discrimination, fulfilling its mandate. The important interest that Mr. Colpitts presents, is not in essence a general principle of public significance, but rather more akin to one personal to him.[16]

[53] If there is an important public interest here, it must be in relation to his breach of privacy claim.

[54] Next, let me briefly address the privacy interest and "privacy consequences".

[55] No precedent has been presented for anonymizing a lawyer's identity in similar circumstances. To the contrary, in *Law Society of Saskatchewan v E.F.A. Merchant, QC*, 2008 SKCA 128 (leave to appeal denied [2008] S.C.C.A. No. 538) the court stated:

> 77 *Parties almost invariably conduct litigation using their real names.* This is, among other things, a feature of the principle that courts and court proceedings are presumptively open to the public. *Any step away from that deeply rooted practice should be taken with considerable care*. A judge faced with an attempt to litigate by way of concealed identity should not move in that direction merely

[16] Notably, any claimed "negative impact on the business of RBC Law Inc." and "significant further harm to the business of RBC Law Inc." (in his affidavit) will be an effect of no confidentiality order being issued, is unsupported by any evidence. While I accept that some financial disadvantage likely has been, and may yet be occasioned to RBC Law Inc., I find that it is overwhelmingly associated with civil and criminal litigation that preceded his March 2018 involvement with the Society.

because the parties agree to take such an approach. *Courts have an independent obligation to take their own view of such initiatives.*

78 There are, of course, some statutory proscriptions which prevent the names of parties to judicial proceedings from being revealed. See for example: *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 110. There is also some case law which recognizes that, in appropriate circumstances, the interests of a litigant in preserving his or her anonymity might outweigh the community's interest in maintaining openness and transparency in the litigation process. See, for example: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 1999 BCCA 53; (1999), 169 D.L.R. (4th) 441. However, the heavy trend of precedent is against allowing professionals in disciplinary proceedings to litigate anonymously or under anything other than their real names. See: *Mitchell v. The British Columbia College of Teachers*, 2004 BSCS 264, (2004), 26 B.C.L.R. (4th) 147 at para. 13.

79 No convincing reason has been advanced in this case for initializing the names of the parties. Mr. Hunter suggests his name should be masked in order to conceal from Ms. Wolfe the fact he is a litigant in this matter. This is said to be necessary in order to avoid prejudicing his interests in his ongoing dispute with Ms. Wolfe. However, this is an unpersuasive rationale in that Ms. Wolfe initiated the underlying proceedings by way of her complaint to the Law Society and, as a result, can be presumed to be following this litigation with some interest. Maintaining the description of Mr. Hunter as "MH" in a style of cause featuring the Law Society and "EM and M Law Firm" will do nothing meaningful to prevent her or her counsel from discovering that Mr. Hunter is involved in this appeal. Further, and more importantly, so long as the confidentiality of file information subject to solicitor-client privilege is maintained, Mr. Hunter has not demonstrated how, or in what way, using his full name will compromise his interests vis a vis Ms. Wolfe.

80 *As to Mr. Merchant and Merchant Law Group, the Court has been referred to no precedent in this jurisdiction for a court masking the names of lawyers or law firms involved in litigation with the Law Society*. It appears that each of the reported court decisions where the Law Society has been a party has used the lawyer's or law firm's proper name in the style of cause. This is so even in those cases which have gone to court prior to a determination by the Law Society of improper conduct on the part of a lawyer or law firm. *This is similar to the approach apparently used in other jurisdictions.* WestlawCarswell and Quicklaw examinations of styles of cause reveal only five reported British Columbia cases, one reported Alberta case and two reported Manitoba cases where the name of a solicitor involved in litigation with a law society appears to have been concealed. None of those decisions offers an explanation as to why the lawyer's identity was not revealed. Notably, when one of the Manitoba cases was taken on appeal to the Court of Appeal, the Court said its proceedings ought to be "open" and refused to hear an appeal from "an anonymous appellant." See: *Law Society of Manitoba v. A Member of the Law Society of Manitoba* (1989) 57 D.L.R. (4th) 304 (Man.

> Q.B.); *The Law Society of Manitoba v. Member of Law Society of Manitoba et al.* (1989) 59 Man. R. (2d) 79, 1989 CarswellMan 219 (C.A.). The WestlawCarswell and Quicklaw databases also suggest *there is no Ontario case with a style of cause which conceals the name of a lawyer involved in litigation with the law society in that province.*
>
> 81 *None of this is to say a lawyer's or a law firm's interest in anonymity could never outweigh the larger community's interest in transparency*. However, Mr. Merchant and Merchant Law Group have not demonstrated why an exceptional approach is warranted on the facts of this case. They suggest that initializing Mr. Merchant's name and the name of his firm is necessary to avoid jeopardizing Mr. Hunter's "interests and his continuing dispute with [Ms. Wolfe]". As explained above, this is ultimately an unconvincing rationale insofar as Mr. Hunter is concerned. In any event, it is not clear why a circumstance which might suggest that Mr. Hunter should be able to conceal his name should translate into a situation where his lawyers should be entitled to conceal their names.
>
> [My italicization]

[56] Even if I were to accept that the claimed important *public* interest to be protected here[17] may be broadly construed as including the public interest in retaining the confidentiality negotiated between Mr. Colpitts and the Society in the Agreement,[18] that public interest is not a compelling one in the circumstances. The privacy afforded by the Agreement, sits on a spectrum much closer to a private interest than an important public interest.[19]

[57] An examination of the Agreement, reveals that Mr. Colpitts agreed to voluntarily withdraw from practising law although "as owner of RBC Law Inc. [he] may attend to matters of the business of RBC Law Inc. so long as those matters do not involve direct contact or communication with the clients of RBC Law Inc. for the purposes of client's legal matters.", pending the outcome of his appeal of his criminal convictions. In return, the Society believed it had acted responsibly by removing any otherwise existing risk to the public from his continued unrestricted practice.[20]

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[17] That is, without a confidentiality order there is a risk which poses a serious threat that is real, substantial and well-grounded in evidence to that important public interest- see *Sierra Club*, at paras. 53-57 per Iaccobucci J.

[18] Which, if he is successful at the Judicial Review, *may* also incidentally make confidential Mr. Colpitts' argued-for requirement that the Society defer any disciplinary investigation of Mr. Colpitts until his criminal appeals are finally determined.

[19] See for example the comments of Justice Stinson in *Law Society of Upper Canada v. Telecollect Inc.,* [2001] O.J. No. 4059 (SC), at paras. 51 – 54.

[20] See paragraph 18 of Mr. Colpitts' sworn February 7, 2019 affidavit.

[58] While the Agreement contained a "strictly confidential" provision, in its express terms it is wholly concerned with procedural matters and does not contain any substantive information that could be construed as deserving of the court's protection due to its sensitive and private nature. The Agreement merely provides that Mr. Colpitts voluntarily withdraw from practice in response to an investigation by the Society arising from his conduct associated with KHI.

[59] I am not satisfied that there is, as claimed, a serious privacy "public interest" in maintaining the confidentiality of that Agreement.

[60] The salutary effect of the confidentiality order would be to protect a private interest, though it arguably could be articulated as a form of public interest. The order would protect Mr. Colpitts' reputation, such as it is, by sheltering him from the public knowing that the Society had formally charged him on November 27, 2018, based on the underlying conduct that resulted in his criminal convictions, and intended to proceed to a hearing.

[61] The deleterious effects of the confidentiality order are significant.

[62] The Society has a supervening obligation to act in the public interest, and protect the public. It viewed this responsibility as involving the interim measure of having Mr. Colpitts cease to be a practising member of the Bar, and a longer-term measure of following through with disciplinary proceedings against Mr. Colpitts.

[63] If the confidentiality order is granted[21] (and presuming the Society is not precluded from taking further action) the public will be left with the impression that in relation to Mr. Colpitts, no disciplinary action is being considered. As a self-regulating group, the Society has a significant responsibility to ensure transparency in its proceedings in furtherance of properly fulfilling its mandate. The impression that no disciplinary hearings have been undertaken in relation to Mr. Colpitts would undermine confidence in the Society, and the administration of justice generally.

[21] While I have considered that a conditional confidentiality order as follows could be issued – that only makes confidential all information regarding the Agreement and Judicial Review hearing until and if the Court decides that the Society is not precluded from proceeding to a disciplinary hearing with the attendant publicity that is required – I expect that Mr. Colpitts would seek to appeal that result and a stay precluding the Society from proceeding, moreover, I understand Mr. Colpitts to argue that any publicity about further disciplinary proceedings ("win" or "lose") is to be avoided until his criminal appeals are finally decided. Even this form of confidentiality order is not justifiable.

Conclusion

[64] It should be a truly "important" public interest that is deserving of protection before a confidentiality order issues from a court –but the claimed interest here, (namely, that there is a *public* interest in retaining the confidentiality negotiated between Mr. Colpitts in the Society and the Agreement), is lacking in such importance.

[65] Remember that I have concluded that, as Mr. Colpitts has presented his position, the only effective means of protecting this interest is a publication ban – which would necessarily require any decisions made by the court and possibly the Society (if it is permitted to proceed with the section 36 hearing), be withheld from the public, until Mr. Colpitts' criminal appeals are finally determined, whenever that may be.

[66] Even if the public interest identified was sufficiently important to be deserving of some protection, I conclude that the salutary effects of the confidentiality order are minimal at best and the deleterious effects are significant.

[67] The deleterious effects of a confidentiality order by the court, would flow from the Court's anonymizing Mr. Colpitts' identity and banning publication of the Judicial Review decision and materials, as well as the Society's handling of the disciplinary process of a high profile lawyer who had been found guilty beyond a reasonable doubt of sustained, serious, and fraudulent conduct in a notorious local case – merely because he has appealed his convictions and sentences, and the Society initially agreed to let him voluntarily withdraw from practice before a scheduled section 37 hearing could proceed.

[68] Issuing a confidentiality order as sought here (or in any other form I can envisage which would effectively address Mr. Colpitts' concerns) would deprive the public of the transparency of proceedings that is central to the legitimacy of a self-regulating body such as the Society and would tend to undermine confidence in the Society and the administration of justice generally.

[69] The open court rule should only yield when the public interest in confidentiality outweighs the public interest in openness. Mr. Colpitts has the evidentiary and persuasive burden to demonstrate this. He has not done so, and I must dismiss his motion for a confidentiality order pursuant to Rule 85.

Costs

[70] Mr. Colpitts argues for "no award of costs – or a minimal [$750] award." The Society says costs should be determined following the completion of the Judicial Review.

[71] Mr. Colpitts has suggested that if the court refused him a confidentiality order, "then my entire purpose in commencing the judicial review will have been destroyed".[22]

[72] The hearing lasted a half-day. I find it appropriate to assess costs now. Bearing in mind the provisions of Rule 77 and Tariff "C", which I find applicable and suggests costs between $750 - $1,000, I am satisfied that it would do justice as between the parties, to impose costs in the amount of $1,000 payable forthwith by Mr. Colpitts to the Society.

Rosinski, J.

[22] See paragraph 23 of his affidavit. His counsel reiterated this position as his submissions.