

**LAW SOCIETY TRIBUNAL
HEARING DIVISION**

Citation: *Law Society of Upper Canada v. Keshen*, 2016 ONLSTH 86

Date: May 19, 2016

Tribunal File No.: LCN64/15 and LCN116/15

BETWEEN:

The Law Society of Upper Canada

Applicant

- and -

Douglas Jack Keshen

Respondent

Before: David A. Wright (Chair)
Janis P. Criger
John F. Spekkens

Heard: April 26, 2016, in Toronto, Ontario

Appearances: Susan Heakes and Anne-Katherine Dionne, for the Applicant
Robin Parker and Daniel Naymark, for the Respondent

Summary:

KESHEN – Disclosure – The Society had already made extensive disclosure to the Lawyer – The hearing was expected to take a total of about 10 weeks – It arose out of the Lawyer’s representation of Aboriginal complainants who, as children, had been separated from their families and sent to residential schools – A staff member in the Society’s Intake Department had travelled to Dryden and Kenora, where the hearing would be held, to answer questions about the Society or the complaints process – The Society had produced only materials from its Investigations, Discipline and Intake Department – The Lawyer’s motion for further disclosure was granted in part – The Society must disclose all potentially relevant documents in its possession, once the Lawyer has established an evidentiary foundation showing the potential relevance of a category of documents – The Society should make reasonable efforts to inquire as to the existence of communications to or from the complainants or the third parties identified in the Notice of Motion, that fell within the established categories, in all departments that might be expected to have them – For the following categories of information, the Society was ordered to disclose any communications and make reasonable efforts to locate documents outside the Intake, Investigation and Discipline Departments: a) any communications with the complainants, not already disclosed, that related to the Lawyer or their residential school claims; b) any communications with the identified third parties that related to the Lawyer, any of the complainants or the solicitation of complaints against lawyers involved in residential school claims; and c) any communications that related to the solicitation of complaints against the Lawyer or lawyers who served residential school claimants.

REASONS FOR DECISION ON MOTIONS TO STRIKE PARTS OF A MOTION RECORD AND FOR DISCLOSURE

THE CONTEXT OF THIS DECISION

[1] David A. Wright (for the panel):– The Law Society alleges that the Lawyer, Doug Keshen, committed professional misconduct in his work for 33 survivors of residential schools for Aboriginal children. It alleges that Mr. Keshen, among other things:

- did not serve his clients properly;
- assigned tasks to staff that he should not have;
- took clients’ money from his trust account to pay his fees without sending a bill;
- charged unfair legal fees; and
- did not handle settlement monies correctly.

[2] This is a bigger and more complicated case than most at the Law Society Tribunal. There are many documents. The Law Society has already disclosed over 100,000

pages to Mr. Keshen’s lawyers. The hearing in Kenora is expected to take a total of about 10 weeks. It will happen over several two-week periods, with breaks in between, starting in June 2016 and probably continuing through the fall.

- [3] We are aware that there are particular interests and numerous histories in this case. We will make every effort to ensure that the Tribunal’s normal high standard of procedural fairness is maintained.
- [4] The complainants were sent as children to residential schools “created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society.”¹ This case, while not directly about experiences in residential schools, is closely tied to those experiences. Sensitivity to those experiences, as well as to the fact that Mr. Keshen faces serious allegations that may affect his ability to practise his chosen profession, is critical.

WHAT WE ARE DECIDING TODAY

- [5] Under general principles, the Law Society must disclose to Mr. Keshen everything that happened during its investigation. It must provide transcripts of interviews with witnesses, information from investigators about what happened if tape recorders were turned off, and copies of the documents it gathered. It has done all of that. Law Society counsel also gave detailed answers to questions put in writing by Mr. Keshen’s lawyers. Many letters have been sent back and forth asking for and giving further information.
- [6] This decision is about whether the Law Society must look for and share more documents and information with Mr. Keshen and his lawyers before the hearing. If more documents and information need to be shared, then it also will be about how the Law Society should share that information. It is not about whether the allegations have been proven or any defences.
- [7] Many issues raised in the Lawyer’s Notice of Motion were resolved before or during the motion hearing. We deal here with only the disputes that remain outstanding.
- [8] Mr. Keshen says that a key part of his defence at the hearing will be that the complainants’ evidence is less reliable because of how the investigation was done and other factors. He says various things have affected the evidence. They include how the Law Society obtained and investigated complaints as well as discussions in the community about Mr. Keshen. Mr. Keshen has been representing people in the complainants’ communities for many years. He says that people and

¹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) Preface at p. v, available at <http://nctr.ca/reports.php>.

organizations who are on the other side of separate legal disputes or who have had other issues involving Mr. Keshen may have influenced what the complainants say and believe. He expects to call an expert witness who will support this theory.

- [9] Mr. Keshen asks us to order the Law Society to disclose evidence that he says may be relevant to this defence. He requests an order that the Law Society make reasonable efforts to look for correspondence about Mr. Keshen or the complainants between the Law Society and various third persons and an organization (Grand Council Treaty #3) he has identified.
- [10] Mr. Keshen also asks us to order that the Law Society provide complete details about a visit that Jan Walker, a staff member in its Intake Department, made to Kenora and Dryden in September of 2014. According to the Law Society, after interviews had been scheduled with the first 13 complainants, the Law Society was advised that people wanted to meet with Law Society staff. Ms. Walker went to answer questions about the Law Society or the complaints process. The Law Society says that there was no invitation for individuals to make complaints against lawyers and she did not discuss specific lawyers with anyone at that time. Mr. Keshen says that this statement conflicts with information provided by complainants.
- [11] Mr. Keshen asks for all communications with third parties about the trip, Ms. Walker's general discussions about the obligations of lawyers or the problems experienced by residential school complainants, communications about the possibility of complaining to the Society, communications between her and those with whom she met about Mr. Keshen and other communications with the complainants, their family members, members of their bands and others.
- [12] Also, Mr. Keshen asks that we order that various Law Society representatives attend for oral examinations where they would be asked questions by his lawyers. A court reporter would be present and a transcript produced.
- [13] Finally, the Law Society asks that we strike various documents from Mr. Keshen's Motion Record.

THE LAW SOCIETY'S MOTION TO STRIKE PARTS OF MR. KESHEN'S MOTION RECORD

- [14] Mr. Keshen's Motion Record contains the affidavit of a legal assistant and law clerk in the office of one of Mr. Keshen's lawyers. The affidavit attaches various documents that are not authenticated, nor does the assistant say that the content is true. Therefore, the Law Society says, it cannot cross-examine the authors or sources of the documents about their contents. It also says that, by putting the exhibits in the Motion Record, the Lawyer has given information to the panel that would not be allowed at the hearing. It submits that this is an improper attempt to

have the panel pre-judge the issues and the witnesses who will appear at the hearing, and is an abuse of process.

- [15] The first contested document is a redacted version of the Lawyer's submissions to the Proceedings Authorization Committee, the benchers who authorized the Notice of Application that started this Law Society Tribunal proceeding. We understand that it was included in the Motion Record to support the proposition that the Lawyer raised issues about the manner in which the complaints came in some time ago. We give no weight to its assertions of fact or any arguments it contains. Other contested documents are statements or transcripts of statements made by other individuals, including in interviews with Mr. Keshen's lawyers. Mr. Keshen asks us to rely upon them only for the fact that the statements were made.
- [16] Given these limited purposes, we see no need to strike the documents. They support very limited propositions that, in our view, are relevant to the motion. We are conscious that we must not pre-judge the issues based on documents entered for another purpose and give the substance of the statements in them no weight.
- [17] Accordingly, the Law Society's motion is dismissed.

MR. KESHEN'S DISCLOSURE REQUEST

- [18] There is little dispute between the parties about the principles. The Law Society is obliged to disclose non-privileged materials or information in its possession that are potentially relevant to the issues in the application, whether the issue is raised by the Law Society or by the defence. This standard requires broad disclosure. Required disclosure is not limited to materials obtained in the investigation of Mr. Keshen: *Law Society of Upper Canada v. Savone*, 2015 ONLSTA 26.
- [19] The Law Society suggests that the Lawyer must establish an evidentiary foundation that particular documents in the asserted categories actually exist and are in the Law Society's possession. We do not agree. The Law Society must disclose all potentially relevant documents in its possession, once the Lawyer establishes an evidentiary foundation showing the potential relevance of the category.
- [20] In our view, communications to or from the Law Society about Mr. Keshen or about the complainants are potentially relevant to the defence that the witnesses are less reliable and/or credible because of how the complaints were gathered. This includes discussions with Ms. Walker and with other parts of the Law Society, before or outside the formal investigation. Similarly, we agree that communications to or from the Law Society by the third parties identified by Mr. Keshen, which refer to him or the complainants, may potentially be relevant to the reliability of the oral evidence. To be clear, these are only communications with the identified third parties that specifically reference Mr. Keshen or anyone who complained against

him.

- [21] We also agree that if there were discussions about the Law Society seeking out or soliciting complaints against lawyers involved in the residential school process or Mr. Keshen they are potentially relevant to the Lawyer's defence. We do not consider general information or discussions about the Law Society making itself accessible to potential complainants, making its services available in locations outside Toronto or to First Nations communities to fall within this category. The Law Society need only disclose any communications that refer to asking or inviting individuals to make complaints about services provided by Mr. Keshen or lawyers serving residential school claimants or advise that there are no such communications.
- [22] The Law Society has produced only materials from the Investigations, Discipline and Intake Departments. In our view, the Law Society should make reasonable efforts to inquire as to the existence of communications to or from the complainants or the third parties identified in the Notice of Motion that fall within the categories discussed above in all departments that might be expected to have them.
- [23] Similar principles apply to the request for disclosure about Ms. Walker's trip. The Law Society should disclose any discussions it had about Mr. Keshen or confirm that none exist. If others at the Law Society or Ms. Walker had correspondence or discussions with anyone who became a complainant about their residential school claims, that should also be disclosed. Similarly, if Ms. Walker had discussions with individuals who did not become complainants about either the complainants or Mr. Keshen, that is potentially relevant and should be disclosed.
- [24] Some aspects of Mr. Keshen's disclosure request, relating to Ms. Walker's trip, go beyond information about Mr. Keshen or the complainants into the reasons for the trip or discussions that do not involve anyone directly involved in this case. In our view any such discussions are too remote from the issues here to require disclosure.

REQUEST FOR ORAL EXAMINATIONS

- [25] There are additional questions Mr. Keshen would like to ask various Law Society representatives in advance of the hearing, in particular about the alleged solicitation of complaints. He argues that we have the power to make an order that they be answered at an oral examination under s. 5.4(1)(b) of the *Statutory Powers Procedure Act*, RSO 1990, c. S.22.
- [26] Assuming that we have such a power we would not exercise it in this case. This would add an additional step, not used in the Tribunal's process, that would make the proceedings more costly and complex with little benefit. It would reduce, rather than enhance, proportionality in the Tribunal's process. The Law Society has

provided extensive disclosure and detailed written answers to the questions asked by counsel for Mr. Keshen. We are confident that the good faith and co-operation shown by the lawyers so far will lead to appropriate disclosure of the information we have identified as potentially relevant. If a dispute arises about whether the Law Society has taken the right steps, we can rule on that.

COSTS

[27] Success on the motions was divided. Any request for costs will be dealt with at the end of the hearing, although we note that we are not inclined to award any costs.

ORDER

[28] Our order on these motions will provide as follows:

1. The Law Society's motion to strike portions of Mr. Keshen's Motion Record is dismissed.
2. Mr. Keshen's motion for disclosure is granted in part.
3. For the following categories of information, the Law Society must disclose any communications and make reasonable efforts to locate documents outside the Intake, Investigation and Discipline Departments:
 - a) any communications with the complainants not already disclosed that relate to Mr. Keshen or their residential school claims;
 - b) any communications with the third parties identified in schedule "A" to Mr. Keshen's Notice of Motion that relate to Mr. Keshen, any of the complainants or the solicitation of complaints against lawyers involved in residential school claims;
 - c) any communications that relate to the solicitation of complaints against Mr. Keshen or lawyers who served residential school claimants.
4. Mr. Keshen's request that we order oral examinations is dismissed.
5. Any request for costs of the motion will be determined after the hearing on the merits.

