Law Society Tribunal
Tribunal du Barreau

LAW SOCIETY TRIBUNAL
HEARING DIVISION

Citation: *Law Society of Upper Canada v. Schulz,* 2016 ONLSTH 153
Date: September 14, 2016
Tribunal File No.: LINT64/16

BETWEEN:

The Law Society of Upper Canada

Applicant

- and -

Martin Christopher Schulz

Respondent

Before:	Susan T. McGrath (chair) Sabita Maraj Frederika M. Rotter
Heard:	June 7, 2016, in Toronto, Ontario
Appearances:	Suzanne Jarvie, for the Applicant Ian R. Smith, for the Respondent

Summary:
SCHULZ – Interlocutory Order – Restrictions on Practice – The Lawyer was found guilty of possession of child pornography – He was sentenced to imprisonment for 45 days, together with ancillary orders and conditions – The Society brought an interlocutory motion to suspend the Lawyer's licence to practise – The Lawyer viewed child pornography, but he had no history of any offence involving physical contact and no other criminal history – He was in a very low risk category to re-offend – There were no reasonable grounds for believing that a significant risk of harm to members of the public existed – However, there were reasonable grounds for believing that a significant risk of harm to the public interest in the administration of justice would exist, if the lawyer continued his practice (which included family law) in an unrestricted fashion – The motion for an interlocutory suspension was dismissed – However, the following interlocutory restrictions were imposed on the Lawyer's practice: 1) he was not to be alone with persons under the age of 18 in connection with his practice, with the exception of his own children; and 2) he was not to represent persons under the age of 18 years.

REASONS FOR DECISION ON AN INTERLOCUTORY MOTION

INTRODUCTION

[1] Frederika Rotter (for the panel):– The Law Society brought an interlocutory motion to suspend the licence to practise law of the respondent Martin Christopher Schulz (the "Lawyer"), until such time as a conduct application is heard and a final order is made. We did not grant the motion and allowed the Lawyer to continue to practise law under certain restrictions.

[2] The Lawyer was found guilty of possession of child pornography after he acknowledged evidence to that effect in a Statement of Admissions. He was sentenced to a term of imprisonment for 45 days, together with ancillary orders and conditions.

[3] We found at the hearing that there were no reasonable grounds for believing that the Lawyer's continued ability to practise would create a significant risk of harm to members of the public, but that a significant risk of harm to the public interest in the administration of justice would exist, if the lawyer continued his practice of law in an unrestricted fashion. Therefore, we dismissed the Society's motion to suspend the Lawyer's licence to practise law. Instead, we made an order restricting the Lawyer's ability to practise. These are our reasons.

BACKGROUND FACTS

[4] The Lawyer is 50 years old and was called to the bar in February 1992. His legal practice consists of approximately 55% family law, 30% immigration law, and 15% wills and estates. He started his own legal practice in the summer of 1993, and

rents space from a firm in Mississauga, Ontario.

[5] The Lawyer has no discipline history with the Law Society.

[6] On November 26, 2013, the Lawyer was charged with two counts of possession of child pornography and one count of make available child pornography. He was released after a bail hearing on the same day.

[7] The Lawyer self-reported to the Law Society on November 29, 2013. He is currently the subject of an investigation by the Law Society but no formal discipline proceeding has yet been commenced.

[8] The Lawyer's initial bail conditions were restrictive, including no contact with persons under age 18 and only supervised contact with his two children, then aged 10 and 12 years old. He also was prohibited from using any computer system or device able to connect to the internet and from connecting to the internet, except at his place of employment and for employment purposes only.

[9] On December 22, 2014, one of the bail conditions was varied to allow the Lawyer internet access for reviewing criminal disclosure.

The Involvement of the CAS

[10] The Halton Children's Aid Society ("CAS") investigated child protection concerns respecting the Lawyer's children. Pending the resolution of those concerns, his contact and communication with his children were required to be in the presence of, and under the direct supervision of, his spouse.

[11] The Lawyer and the CAS signed an agreement that the CAS would investigate the child protection issues and the Lawyer would undergo a full sexological assessment and provide the CAS with a copy of the assessment.

[12] Alan Kaine, RSW, completed a psychosexual assessment of the Lawyer in February 2014, in the context of the CAS investigation. His report discusses the Lawyer's relationships, interests, and sexual history. For the purpose of the report, Mr. Kaine also conducted an interview with the Lawyer's spouse. No evidence of sexual pathology was found.

[13] The CAS concluded its investigation on June 1, 2015 and found no ongoing child protection issues. The CAS file was subsequently closed.

[14] After the conclusion of that investigation, on August 18, 2015 one of the bail conditions was varied to allow the Lawyer unsupervised contact with his children, although the general condition prohibiting contact with persons under age18 was not varied.

The Trial

[15] The Lawyer's trial commenced on January 16, 2016, in the Superior Court of Justice in Milton. After a partly successful motion for the exclusion of evidence under ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*, the Lawyer filed an admissions document in the Superior Court of Justice on March 23, 2016. He was convicted of one count of possession of child pornography, based on that document. Details of the admitted facts included:

- Between May 30 and August 8, 2012, the Lawyer possessed images and videos of a sexual nature involving individuals who appeared to be under the age of 18, on computers and other personal devices.
- The devices and computers contained 101 photographs and 155 movies of child pornography (with some duplication).

[16] The Crown withdrew a second count of possession and the count of make available child pornography. Sentencing was scheduled for May 31, 2016.

Interview by LSUC Investigator

[17] The Lawyer was interviewed by the Law Society investigator on March 29, 2016.

[18] The interview by the investigator reviewed and confirmed the pertinent facts, including: the Lawyer's personal background, relationships, interests and sexual history; his account of the offence; and the investigation by Mr. Kaine for the CAS. The investigator also reviewed the Lawyer's professional background and history. She learned that two of the lawyers in the Lawyer's building were aware of the charges and conviction. They would be in a position to assist and take over his files in the event that he had to leave his practice.

[19] The investigator learned that the Lawyer had been careful about what files he had taken on, so he would be able to carry on as usual with his practice if he received an intermittent sentence.

[20] The Lawyer admitted to the investigator that he had viewed images of child pornography (mostly of young girls about 14 years of age) about once a week, for a few years, usually after his wife and children had gone to sleep. He was aware that possession of this material was illegal, and knew that what he did was wrong. He admitted that it was a very serious mistake, with disastrous consequences for himself and his family. His children were affected. His spouse continues to support him.

[21] The Lawyer has never inappropriately touched a child.

Report of Dr. Sandra Jackson

[22] The Lawyer met with psychologist Dr. Sandra Jackson on April 29, 2016. Her report reiterates much of the information found in the report of Mr. Kaine and the factual information that the Lawyer provided to the investigator.

[23] Dr. Jackson reviewed the material from Mr. Kaine, and administered a further series of psychological tests. She concluded that the Lawyer had experienced significant distress in connection with the charges, both on his own behalf and because of the hurt he caused his family. She found that he displayed no indications of significant mental health concerns or anti-social personality characteristics.

[24] Dr. Jackson completed a thorough risk assessment, the purpose of which was to determine the likelihood that the Lawyer would commit a similar crime in the future. She concluded that the Lawyer was in the very low risk category for general recidivism, and explained that offenders in this range show a low likelihood of engaging in any criminal activity within one year of release from custody. In fact, the Lawyer's score placed him in the low end of the lowest category in this measure. Dr. Jackson observed that the Lawyer has no history of anti-social attitudes or values, and appears to recognize the need to protect vulnerable individuals and to respect social standards and laws.

[25] In the category of sexual recidivism, Dr. Jackson noted that that there were no indications that the Lawyer suffered from any sexual preoccupations, impulsive sexual behaviours, or other paraphilias. There was no evidence that the Lawyer had ever attempted to contact youth for sexual purposes, either on-line or through real life interactions, and there has never been any allegation of sexual contact. In fact, Dr. Jackson commented that the Lawyer's sexual history and interests have been relatively conventional, if not restrained.

[26] The Lawyer expressed a desire to attend counselling with the hope that he could better understand why he had committed this offence.

[27] Dr. Jackson concluded by indicating that, as a group, non-contact sexual offenders are at a low risk to re-offend. Her opinion was that the Lawyer was a low risk in the areas of both general and sexual recidivism. Dr. Jackson emphasized that the Lawyer does not identify with children or youth and has never attempted to contact or build a relationship with a child or youth. He has adequate and appropriate social skills. He has been living a pro-social and stable lifestyle, and pro-social supports in the community are often viewed as a protective factor.

[28] The Lawyer views the offence as shameful, and has taken responsibility for his behaviour. He was very cognizant of the bail conditions (in force at the time of the interview). He was compliant and co-operative and he was responsibly self-

regulating his behaviour. He is open to making changes and seeking treatment.

[29] Dr. Jackson found that the Lawyer would be most effectively managed by remaining in the community, where he has a healthy adult marital relationship and other supports. This would also allow him to maintain employment stability. He requires little supervision and access to individual treatment and counselling would best address his situation.

Sentence

[30] Miller, J., of the Superior Court of Justice, released reasons on penalty after the penalty hearing of May 31, 2016. She reviewed the facts and circumstances of the offence, as well as the circumstances of the offender.

[31] The Lawyer had submitted a number of character letters from other lawyers, clients and family members. The letters from his legal colleagues speak of the Lawyer as honest, intelligent, insightful and considerate of others, as well as acting in "the highest standards of our profession." A client describes him as professional, respectful, dependable, kind and upstanding. His mother says he is honest, responsible, and compassionate. His wife describes his high standards of integrity, his abilities as a father, and the fact that she has no concern for the safety of their children.

[32] Miller J. reviewed the reports of Mr. Kaine and Dr. Jackson, and noted that the Lawyer had acknowledged the seriousness of his behaviour, had expressed feelings of guilt and remorse, and had indicated a willingness to participate in treatment.

[33] The Lawyer also spoke directly to the Court, stating that he still struggled with how he could have gone down "such a stupid path." He spoke eloquently and emotionally of the professional and personal impact of the proceeding, on himself and on his family, in particular on his children. He assured the Court that the professional and personal consequences were such that specific deterrence had been fully addressed. He had taken steps to follow through with the counselling recommended by Dr. Jackson

[34] Miller J. stressed that possession of child pornography is not a victimless crime, and it is abhorrent, as held by the Ontario Court of Appeal,[1] in that it victimizes the most vulnerable members of our society.

[35] The Crown took into account that the Lawyer had served one day of pre-sentence custody, and had been on restrictive bail conditions while awaiting trial and sentencing – conditions that required that, for a significant time, his contact with his

[1] *R. v. Nisbet,* 2011 ONCA 26.

own children was supervised. His trial had proceeded efficiently with no contest as to the facts, after a ruling on the admissibility of the evidence. The Crown also took into account the assessment reports.

[36] The Crown therefore took the position that a minimum sentence of 45 days was appropriate, and did not oppose the Lawyer's request that the term of imprisonment be served intermittently. The Crown also sought a three-year term of probation, with specific conditions in addition to the statutory conditions. The Lawyer agreed to the term of the sentence.

[37] In her reasons, Miller J. noted, as mitigating factors, that the Lawyer had no criminal history and that prior to the offence he had conducted himself in an exemplary manner, both personally and professionally. His trial was conducted efficiently, he acknowledged his wrongdoing and he expressed significant remorse.

[38] The only aggravating factor that she noted was inherent in the commission of the offence – namely the impact on the children depicted in the images.

[39] The Court acknowledged that the Lawyer's conduct fell within the category of dishonourable conduct that could reflect adversely on the integrity of the profession. However, Miller, J was aware that the Law Society was taking steps to address this issue and, in imposing the sentence, declined to consider it as an aggravating factor in the circumstances of this case.

[40] The Court acceded to the terms of the sentence requested and imposed a three-year period of probation, which included, among others, the following conditions:

- To report forthwith to a probation officer, and thereafter to be under the supervision of a probation officer and to report as required
- To abstain from owning, possessing or carrying any weapon
- To attend and complete sex offender assessment/treatment/counselling as directed by the probation officer
- To seek and maintain gainful employment
- Not to engage in any activity involving contact with children under 18, except for the purposes of travelling, dealing with his own children, shopping, attending medical, legal, or dental appointments, or while engaged in lawful employment
- Not to use any device capable of accessing the internet or e-mail and capable of storing digital data except at the lawyer's place of employment and as required for employment purposes, or for the purposes of communicating with legal counsel legal and professional regulatory matters. The Lawyer may not use a personal computer that does not have installed

on it K9 protection software, and he was to provide proof of the installation of the software to his probation officer.

- Not to use electronic media to communicate with internet websites known as bulletin boards
- To allow a police officer or probation officer access to the Lawyer's computer to ensure compliance with the conditions of the order.

[41] A number of ancillary orders were made, including an order prohibiting the Lawyer from using the internet or other digital network for a period of 10 years, except in accordance with the following conditions:

- At his place of employment or as required for employment purposes
- For the purposes of communicating with legal counsel and reviewing documents regarding ongoing legal and professional regulatory matters
- A personal computer may only be used if K9 protection software has been installed and proof of installation is provided to the probation officer
- Not to use electronic media to communicate with internet websites known as bulletin boards
- A police officer or probation officer is to be allowed access to the Lawyer's computer to ensure compliance with the conditions of the order.

THE ISSUES

[42] The issues to be determined in this motion are:

- Whether there are reasonable grounds for believing that there is a significant risk of harm to members of the public or to the administration of justice if an interlocutory order is not made;
- Whether making such an order is likely to reduce the risk of harm.

THE LAW

[43] Section 49.27 of the *Law Society Act*, RSO 1990, c. L.8, allows a hearing panel to order an interlocutory suspension or restrictions on a practitioner's licence to practise law or provide legal services as follows:

> (1) The Hearing Division may make an interlocutory order authorized by the rules of practice and procedure, subject to subsection (2).
>
> (2) The Hearing Division shall not make an interlocutory order suspending a licensee's licence or restricting the manner in which a licensee may practise law or provide legal services, unless there are reasonable

> grounds for believing that there is a significant risk of harm to members of the public, or to the public interest in the administration of justice, if the order is not made and that making the order is likely to reduce the risk.

[44] The hearing panel's task is to consider, in advance of any conduct hearing, whether the Law Society has shown that there are "reasonable grounds for believing" that there exists a significant risk of harm to members of the public or to the public interest in the administration of justice, such that an interlocutory order should be made.

[45] An interlocutory order may suspend the licensee's licence, or may restrict the manner in which a licensee may practise, if such a restriction would adequately reduce the risk to the public. The test is disjunctive, so that either of the risks to the public identified in s. 49.27(2), or both, may trigger an interlocutory order.

[46] Two different questions must be addressed when considering whether to make an interlocutory suspension or restriction order. The first question is whether the conditions for the order have been met, based on the "reasonable grounds" test.

[47] "Reasonable grounds" has been defined as something more than mere suspicion, but less than the civil standard of proof on a balance of probabilities. What is required to meet the test is "an objective basis for the belief which is based on compelling and credible information."[2] If reasonable grounds have been shown, an interlocutory order may be issued.

[48] The second question is whether the panel should make the proposed order. The panel here must consider whether a suspension order is necessary or whether a restriction order would adequately protect the public from the identified risk.[3]

[49] Two separate risks are identified in s. 49.27(2). The first risk that must be addressed considers whether members of the public may be harmed by the licensee's conduct, if he is allowed to continue to practise without restriction. Will any admitted misconduct be repeated?

[50] The second risk is the risk to the "public interest in the administration of justice." The "public interest" includes public confidence and trust that the administration of justice and the integrity of public processes and proceedings will be protected, and will not be undermined by the licensee's unrestricted practice.[4]

[51] If the "reasonable grounds" threshold is not met under either risk, an interlocutory

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[2] *Law Society of Upper Canada v. Sullivan,* 2008 ONLSHP 83 at para. 38, as cited in *Law Society of Upper Canada v. McGee,* 2011 ONLSHP 70 at para. 38.
[3] *Law Society of Upper Canada v. Ejidike,* 2016 ONLSTH 69 at para. 10.
[4] *McGee,* above at paras. 42-45.

suspension or restriction order cannot be made. If the threshold is met, however, s. 49.27 does not require that a suspension order be made, if a restriction order would adequately protect the public.[5]

ANALYSIS

Are there reasonable grounds for believing that there is a significant risk of harm to the public?

[52] The Society submitted that the Lawyer has an active family practice that may bring him into contact with persons under the age of 18. An order suspending the Lawyer pending the outcome of any discipline proceeding will reduce any risk of harm to the public.

[53] The Society conceded that the risk assessments indicate that the Lawyer is in a very low risk category for re-offending.

[54] The Society submitted that, in the alternative, an order prohibiting the Lawyer, in conducting his practice, from being alone with a person under the age of 18 and from representing children under that age, should adequately address the risk of harm to the public.

[55] The Lawyer submits that no member of the public is at any risk of harm. The report of Dr. Jackson indicates that the risk of recidivism in his case is very low, virtually negligible, and that no real risk of sexual misconduct exists. The sentence imposed by Miller, J. confirms that the Lawyer does not need to be isolated from society, and Dr. Jackson's report indicates that pro-social supports in the community are often viewed as protective.

[56] The Lawyer has no history of any offence involving physical contact, and no other criminal history. We find no reasonable grounds for believing that a significant risk of harm to members of the public exists.

[57] However, even in the absence of a significant risk of physical harm to members of the public, it appears to us that there exists a reasonable risk of harm to the public interest in the administration of justice if the Lawyer were seen, or known to be, alone in a room with a young person under the age of 18, or legally representing such a young person.

[58] We consider that any such concern and risk to the public interest in the administration of justice is sufficiently addressed by an order prohibiting the Lawyer, in conducting his practice, from being alone with a person under the age of

[5] *Ejidike,* above at para. 12.

18 and from representing children under that age. We discuss this concern further in the paragraphs below.

Are there reasonable grounds for believing that there is a significant risk of harm to the public interest in the administration of justice?

[59] The Law Society submitted that the Lawyer had deliberately engaged in consuming child pornography for some time before the charges were laid and knew that his conduct was illegal. The gravity of the Lawyer's offence amounts to an implicit breach of public trust and goes to the root of the Lawyer's fitness to practise law. The commission of the offence demonstrates a profound lack of respect for the law. This constitutes a significant risk of harm to the public interest in the administration of justice.

[60] The Society submitted that child pornography perpetuates the multi-faceted, ongoing abuse of children by persons who consume this material. Our society has demonstrated its ever-increasing disapproval of this conduct and Parliament has established mandatory minimum sentences for the offence of possession of child pornography.

[61] Licensees are expected to maintain high standards of social responsibility in exchange for the privilege of membership in a self-governing profession. Obvious minimum standards of conduct require lawyers to uphold and respect criminal laws, not violate them.

[62] The Lawyer submitted that there was no need for an interlocutory order. Since the prosecution was commenced, he has done everything "right." He has acknowledged the seriousness of his offence and scrupulously complied with his restrictive bail and probation conditions, for two and one-half years. He has co-operated with the Court, the CAS, and with the Law Society. He submitted to a number of examinations and assessments. As a result of his compliance and co-operation with the justice system and the CAS, two of the more onerous bail conditions were lifted.

[63] The Lawyer has taken his obligations to the Society seriously, by self-reporting, by sharing all relevant information with the Society, and by voluntarily attending at an interview with the investigator. He answered all questions carefully, honestly, and respectfully. He demonstrated insight into his conduct and sincerely expressed his remorse.

[64] The Lawyer has lived with restrictive bail conditions, which are being continued in a probationary order with ancillary conditions. Some of them will persist for another 10 years.

[65] The Lawyer argues that he has been practising law for the two and one-half years since the charges were laid and, in this case, there is no evidence of a significant

risk of harm to the public interest in the administration of justice. Character letters from clients, colleagues and family members show no significant loss of confidence and trust on the part of those individuals. The public interest in the administration of justice is at no greater risk now than during the time between the laying of the charges and his conviction of the offence.

[66] In fact, public confidence should be enhanced since the Lawyer will be practising under the restrictions imposed by the probation and ancillary orders for the next 10 years.

[67] The Lawyer conceded that any conduct that shakes the confidence of the public in the administration of justice might satisfy the test. He maintained, however, that here we have insufficient evidence that any reasonable member of the public would have their confidence in the administration of justice shaken, if they were informed of the relevant facts.

[68] Moreover, the Lawyer submitted that it is not clear that an interlocutory order would be likely to reduce any risk of such harm.

[69] The Lawyer also submits that, at this point, it would be inappropriate to suspend him from practice until such time as any discipline proceeding is concluded, since such a suspension might well last longer than any penalty the Tribunal might impose for his misconduct. The Law Society has yet to bring a Notice of Application in respect of the misconduct, and a great deal of time could pass until a penalty is imposed.

[70] We acknowledge that an interlocutory order might make incursions on the ultimate penalty. However, that is the case for all interlocutory orders, and cannot be a consideration in deciding whether such an order is necessary.

[71] We agree that in the particular circumstances of this case, the Lawyer has been reasonable, open, co-operative and compliant with all bail and probationary orders and conditions. As observed by Miller J., prior to the commission of the offence his conduct was exemplary and since the charges were laid he has also conducted himself faultlessly.

[72] Our review of the jurisprudence indicates that interlocutory orders have generally been granted in cases where there was some objective basis for believing in the existence of a significant risk of potential harm to members of the public or to the public interest in the administration of justice, even though that risk was not proven on the balance of probabilities.[6] As noted in *Ejidike,* s. 49.27(2) does not set a high

[6] *Law Society of Upper Canada v. McGee,* 2011 ONLSHP 70*; Law Society of Upper Canada v. Townley-Smith,* 2010 ONLSHP 77; *Law Society of Upper Canada v. Borkovich,* 2015 ONLSTH 36; *Law Society of Upper Canada v. Farmani,* 2014 ONLSTH 13.

bar.[7]

[73] We agree that the misconduct of the Lawyer is very serious. He has been convicted of a crime that victimizes the most vulnerable members of our society. Miller J, commented that this fell within the category of dishonourable conduct that could reflect adversely on the integrity of the profession. We agree with this view.

[74] We also consider, as noted above, that there exists a significant risk of harm to the public interest in the administration of justice, if the order is not made and the Lawyer were seen to be alone with or representing young people under the age of 18.

[75] We therefore find that there are reasonable grounds for believing that a significant risk of harm to the public interest in the administration of justice would exist if the lawyer continued his practice of law – which includes a family law practice – in an unrestricted fashion.

[76] We are not persuaded and we find no objective basis for believing that, unless the Lawyer's licence to practise were completely suspended, the public interest in the administration of justice would suffer a significant risk of harm. We are also not persuaded that only an interlocutory suspension would adequately reduce the risk of harm.

[77] We conclude that a restriction on the Lawyer's practice will adequately and best address this risk.

ORDER

[78] The panel orders as follows:

1. The motion for an interlocutory suspension is dismissed.

2. The following interlocutory restrictions are imposed on the Lawyer's practice:

    a. The Lawyer shall not be alone with persons under the age of 18 years in connection with his practice, with the exception of his own children.

    b. The Lawyer shall not represent persons under the age of 18 years.

[7] *Ejidike,* above at para. 56.