2004 LSBC 27

Report issued: August 23, 2004

Oral reasons: August 4, 2004

Citation issued: April 28, 2004

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 3

Respondent

Decision of the Hearing Panel

Hearing date: August 4, 2004

Panel: Robert W. McDiarmid, Q.C., Single Bencher Panel

Counsel for the Law Society: James A. Doyle
Counsel for the Respondent: Murray L. Smith

BACKGROUND

[1] On April 28, 2004, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation directed this Panel to inquire into the Respondent's conduct, the nature of which is stated on the Schedule attached to this citation.

[2] The Panel is to inquire into conduct as follows:

> " 1. In the course of representing **your client, G.S.**, in matrimonial proceedings, you permitted your client to swear an affidavit without attaching the exhibits to which the affidavit referred and without the **client** reviewing the exhibits prior to swearing. You subsequently attached the exhibits and filed the affidavit in court."
> (emphasis added)

[3] At the commencement of the hearing, the Respondent acknowledged proper service of the citation in compliance with the provisions of Rule 4-15.

[4] An Agreed Statement of Facts was consensually admitted and marked as Exhibit 2 in these proceedings. The Agreed Statement of Facts sets out the following.

> 1. [The Respondent] is a member of the Law Society of British Columbia and was called to the Bar in 1992.
>
> 2. At all material times the Respondent was a sole practitioner, practicing in the areas of matrimonial, employment and personal injury litigation.
>
> 3. Between 2001 and 2003, the Respondent acted for Ms. S in matrimonial proceedings where custody

and access were in issue. Her husband, Mr. J.S. was represented by three different counsel over this period.

4. The Respondent was originally retained by Ms. S on a legal aid certificate. The legal aid certificate was withdrawn following changes in funding criteria. Thereafter the Respondent proceeded on a disbursement-only retainer such that he was effectively acting " pro bono."

5. On November 8, 2002, the Respondent appeared before the Honourable Mr. Justice Groberman. J.S. and his counsel were also in attendance. The Respondent handed up an Affidavit sworn by T. Mr. J.S.'s counsel objected on the basis of late service.

6. The following exchange took place between the Respondent and the Court:

> The Court: Is there an explanation for why this Affidavit is so late in the day?
>
> Mr. C.: You should note that it was sworn October 25th. My friend had ample time to get it over to my office. He should not have left it.
>
> The Court: No, I'll hear you in a moment.
>
> [The Respondent]: It wasn't. It wasn't delivered to my friend immediately because the... the attachments were not forwarded to our office until just two or three days ago. Mrs. T. had to go through her tapes and find the. find the. We are talking three or four years worth of tapes to find the. find the materials which she wanted to give to me, and in addition to that she also had to consult her bookkeeper to get a copy of the cheque, which is attached as exhibit B. So as a result we couldn't give the Affidavit without the.
>
> The Court: I am having some difficulty following this.
>
> [The Respondent]: Well the.
>
> The Court: She swore this Affidavit without the exhibits?
>
> [The Respondent]: She swore it without the. Well she swore it without the exhibits and said she would. she would bring them in.

7. The Respondent withdrew the Affidavit.

The Affidavit

8. On October 25, 2002, T attended at the Respondent's office. Her Affidavit referred to exhibits " A" and " B" but exhibit " A" was not appended to the Affidavit when it was sworn by T. and notarized by the Respondent. To the best of the Respondent's recollection, exhibit " B" was appended to the Affidavit when it was sworn.

9. Exhibit " A" was subsequently faxed to the Respondent's office on November 6, 2002.

10. The Affidavit was then filed in the Vancouver Registry on November 6, 2002.

11. The identical Affidavit, with exhibits, was then re-sworn on November 20, 2002 by T. The Respondent notarized the Affidavit and exhibits using the date of November 20, 2002 for the Affidavit and two exhibits.

[5] The impugned conduct of the Respondent is that on October 25, 2002, he notarized an affidavit " Sworn, affirmed and declared" (sic) by a witness, T. That affidavit, a copy of which was entered as Exhibit 3 at the

hearing, contains the following paragraph 11:

> " That during these sessions he would talk about some printing that he would order from us from time to time. These would be flyers for his sportswear lines. He ordered flyers from us several times. (See Ex. " A" samples of these flyers) He would pay for ½ of these flyers and give us another from Flying Tiger. Samples of these cheques are attached as Ex. " B" ."

[6] It is common ground that at the time the affidavit was sworn, Exhibit A was not attached to the affidavit, nor was it before the Respondent.

[7] Exhibit A of the affidavit consists of 11 pages. The first page is a handwritten invoice; the second page is a blank order form. Pages 3, 5, and 6 are what appear to be parts of a catalogue. Page 4 is a typed invoice. Pages 8 to 11 are price lists. Page 12 is a document entitled Sales Terms and Conditions. Paragraph 11 of Exhibit 3 does not state that Exhibit A is attached; as noted, it describes Exhibit A as " samples of these fliers" .

[8] Counsel for the Law Society has invited me to conclude, despite some apparent contradictions on the evidence (see Agreed Statement of Facts, paragraph 6) to find that Exhibit B was attached at the time the affidavit was sworn. I make that finding.

[9] The narrow issue I am asked to decide then is whether the Respondent's failure to have Exhibit A before him when the affidavit was sworn constitutes professional misconduct.

[10] Counsel for the Respondent submits that there is no legal requirement that an exhibit be attached to an affidavit at the time of swearing. He also submits that there is no legal requirement that the deponent must review the exhibits in front of the Respondent prior to swearing. Neither of these submissions is correct.

[11] Rule 51 of the Supreme Court Rules is the Rule pertaining to affidavits for use in the Supreme Court of British Columbia. I note parenthetically that the peculiar jurat in the affidavit (Exhibit 3) states " Sworn, affirmed or declared" , and in my view does not comply with Rule 51, nor does it comply with the rules of the *Evidence Act*, both of which require either swearing or affirming with respect to affidavits.

[12] Rule 51(7) states: " An exhibit referred to in an affidavit must be identified by the person before whom it is made (that would be the Respondent). By signing a certificate placed on the exhibit in the following form:

> This is Exhibit _____referred to in the affidavit of _____ made before me on ____ [date]."

[13] Subrule 51(8) permits an exhibit or more than five pages in length to be made available but not attached. That subrule does not in my view assist the Respondent in these circumstances.

[14] Subrule 51(9) states: " The person before whom an affidavit is made shall initial all alterations in the affidavit, and unless so initialed, the affidavit shall not be used in a proceeding without leave of the court."

[15] Section 20 of the *Evidence Act*, R.S.B.C. 1996, Ch. 124, sets out that a presiding officer includes a person having by law authority to administer an oath, and in s. 60 sets out that practising lawyers as defined in s. 1(1) of the *Legal Profession Act* are, because of their office or employment, commissioners for taking affidavits in British Columbia.

[16] Section 65 of the *Evidence Act* sets out that a document purporting to have affixed, impressed or subscribed on it or to it the signature of a commissioner must be admitted in evidence without proof of the signature. In other words, lawyers are entrusted with ensuring that only properly sworn or affirmed evidence is placed before the courts.

[17] I conclude that while an exhibit exceeding five pages in length need not be attached to an affidavit, Rule 51, read in its entirety and in the context of the court utilizing the affidavit as evidence, requires that all exhibits to affidavits be identified before the person before whom the affidavit is made (in this case that is the Respondent) at the time the affidavit is made. So while exhibits need not be attached, the Respondent is required to identify them at the time the deponent T. swears the affidavit. The Respondent knowingly failed to do so.

[18] The effect of the Respondent's action was to cause a misleading affidavit to be placed before the court. I don't know what went through the trial judge's mind or whether he reviewed the affidavit in detail at all, but Exhibit A of the affidavit is not what I would consider " fliers" . I don't know whether the error in fact misled the Court. I suspect that in this case it probably didn't because the affidavit was withdrawn. However, skilled counsel could have used the discrepancies in the affidavit to impugn T.'s credibility to the potential detriment of the Respondent's client. The fact that the information contained in the affidavit was not placed before the court probably adversely affected the case being presented by the Respondent on behalf of his client.

[19] The next issue I am asked to determine is whether the Respondent in these circumstances professionally misconducted himself or whether he merely made a mistake. Several decisions of hearing panels were placed before me for consideration.

[20] In *Stunden*, the member admitted professional misconduct after Mr. Stunden's client signed a blank form and then phoned in the information for Mr. Stunden to complete a form that was part of a sworn financial statement.

[21] Similarly in *Morris*, that member admitted to altering and filing his client's affidavit without advising the client and without having her acknowledge the alteration or swear an amended affidavit. It constituted professional misconduct.

[22] In *Grant*, the lawyer swapped a pencil-written statement, which was part of a sworn document, for a retyped, identical - in the sense of identical information - document. That case may well have had a different result had Ms. Grant not admitted professional misconduct. However, the facts of *Grant* are in my view less egregious than the matter before me.

[23] Lawyers are put in a special position by virtue of the *Evidence Act* and by virtue of their profession. They are permitted by the *Evidence Act* to complete jurats to enable documents to be admitted into evidence that have the force of evidence made under oath.

[24] Lawyers have a duty to scrupulously adhere to the formalities of swearing affidavits because to do otherwise will have grave repercussions. Deponents can escape perjury sanctions. Unreliable affidavits may cause judges and masters to worry about admissibility issues instead of dealing with the facts which should be properly before them.

[25] I am urged to find that the Respondent's conduct is not disgraceful or dishonourable and thus can not constitute professional misconduct. However, that is not the test. Professional misconduct can include conduct unbecoming a member. That was made clear in the Supreme Court of Canada decision of *Pearlman v. the Manitoba Law Society Judicial Committee* where on page 12 of the decision before me, Mr. Justice Iacobucci states:

> Professional misconduct is a wide and general term. It is conduct which would be reasonably regarded as disgraceful, dishonourable, or unbecoming of a member of the profession by his well-respected brethren in the group.

His Lordship goes on to say:

> No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body.

[26] Conduct unbecoming is defined in Section 1.1 of the *Legal Profession Act*. Conduct unbecoming a lawyer includes a matter, conduct, or thing that is considered in the judgment of the benchers or a panel to be contrary to the best interest of the public or of the legal profession or to harm the standing of the legal profession.

[27] To permit a lawyer to swear an affidavit in the circumstances described before me is contrary to the best interests of the public. This affidavit is potentially misleading. The judge before whom the circumstances were explained seemed understandably perplexed at the inappropriate circumstances of the swearing of this affidavit.

[28] Allowing this conduct to go uncensured would harm the standing of the legal profession. Documentary evidence sworn before lawyers would lose its value if the public and the courts became aware that scrupulous adherence to the rules of swearing such documents was not being practised.

[29] I have no problem in concluding that the matters in evidence before me would constitute a finding of professional misconduct on the part of the Respondent, provided the citation properly alleged these matters. This conclusion does not, however, end the matter.

[30] At the opening of the Respondent's counsel's submissions, the discrepancy between the facts and the Schedule to the citation was raised in an exchange between counsel for the Respondent and the Panel. No amendment to the citation was sought until all the evidence was admitted and both counsel had made submissions. The amendment was sought during reply by counsel for the Law Society.

[31] I suspect that through oversight, the Schedule erroneously alleged that the Respondent's client, G.S., swore the affidavit without attaching exhibits and without the client seeing the exhibits. Of course, it was a witness, T., who swore the affidavit. Counsel for the Respondent candidly agreed that he wasn't misled by this.

[32] The case has proceeded with full disclosure. Counsel for the Respondent did not consent, but also did not oppose an amendment as sought by counsel for the Law Society to have the Schedule conform to the evidence. Despite this, I know of no authority for permitting an amendment at such a late stage in the proceedings. I consider the allegation that it was the client who swore the affidavit to be an essential averment.

[33] I have attempted to find authority, both in the Supreme Court Rules and in the Criminal Code with respect to this issue. Generally speaking, amendments need to be made prior to the evidence being closed.

[34] There are many cases which deal with details in different circumstances. I've been referred to Section 602 of the Criminal Code and to a digest on page 1049 of Martin's Annual Criminal Code 2004 of a Supreme Court of Canada case called *R. v. P. (M.B.)* [1994] 1, S.C.R. 555. The digest states:

> Once the Crown actually closes its case, the trial judge's discretion will narrow with reopening being permitted to correct some oversight or inadvertent omission of the Crown in the presentation of its case provided that justice requires it and will be no prejudice to the defense. Where the Crown has closed its case, and as in this case, the defence has started to answer the case against him, the trial judge's discretion is very restricted, and it will only be in the narrowest of circumstances

that the Crown will be permitted to reopen its case.

[35] Here the Law Society must prove what is alleged in the citation; namely, that in the course of representing his client G.S., G.S. swore an improper affidavit. The Law Society has not done so.

[36] To permit an amendment on what I consider to be an essential averment at this point in the proceedings may well set a precedent with unforeseen and potentially unfair consequences.

[37] Accordingly, the citation has not been proven and is therefore dismissed. By Rule 5-9 I have discretion respecting costs. In the circumstances, I order each party bear its own costs.