2005 LSBC 35
Report issued: November 2, 2005
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 section 47 review concerning

Re: Lawyer 3

Respondent

Decision of the Benchers

Review date: July 14, 2005

Quorum: **Majority Decision:** Ross Tunnicliffe, Chair, Dirk Sigalet, Q.C., Joost Blom, Q.C., Carol Hickman, Glen Ridgway, Q.C., Michael Falkins
Concurring decision: Greg Rideout

Counsel for the Law Society: James Doyle
Counsel for the Respondent: Murray Smith

Citation

[1] The Respondent is a member of the Law Society of British Columbia. He was cited by the Law Society by way of a citation dated April 28, 2004, with the Schedule to the citation providing as follows:

> 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.

[2] The hearing of citation was held on August 4, 2004, by way of an Agreed Statement of Facts and submissions by counsel.

[3] At the hearing, the Panel determined that the conduct of the Respondent did amount to professional misconduct. However, the facts set out in the Statement of Facts showed that the offending Affidavit was not the Affidavit of the Respondent's client, G.S., but rather, the Affidavit of one T. As the evidence did not establish what was alleged in the citation, the Panel dismissed the citation as against the Respondent.

[4] Counsel for the Law Society had applied for an amendment to the Schedule so that the particulars of the complaint would correspond to the evidence at the hearing, being the evidence provided by the Agreed Statement of Facts. This application to amend was denied.

[5] The matters before this Review Panel are essentially twofold. Firstly, the Law Society of British Columbia seeks to review the Panel decision pursuant to s. 47 of the *Legal Profession Act*, and particularly, seeks an Order permitting the amendment to the Schedule so that the particulars of the complaint correspond with the evidence at the hearing. There is also an application by the Respondent to seek a review, again pursuant to s. 47 of the *Legal Profession Act*, of the determination that the conduct complained of amounts to professional misconduct. As a consequence, the Respondent seeks an order that his conduct does not

amount to professional misconduct.

[6] The members of the Review Panel received a written argument from counsel for the Respondent prior to the commencement of the hearing and contrary to the direction of the Hearing Administrator. This was inappropriate. No material should be provided to a panel prior to a hearing except through the Hearing Administrator. Counsel for the Law Society did not object to the Review Panel proceeding with the hearing.

[7] The first issue to be determined by this Review Panel is the scope or standard of review that should be applied to the decision of the Hearing Panel.

[8] The Respondent urged us not to interfere with the decision of the Hearing Panel lightly, and referred us to various authorities, including:

(a) *Suresh v. Canada (Minister of Citizenship & Immigration)* , [2002] 1 S.C.R. 3;

(b) *Moreau-Berube v. New Brunswick* , [2002] 1 S.C.R. 249;

(c) *C.U.P.E. v. Ontario (Minister of Labour)* , [2003] 1 S.C.R. 539;

(d) *Law Society of New Brunswick v. Ryan* , [2003] 1 S.C.R. 247;

(e) *Dr. Q. v. College of Physicians and Surgeons of British Columbia* , [2003] 1 S.C.R.226.

The Respondent argued that pursuant to this line of authority, the standard of review for a Panel constituted under s. 47 of the *Legal Profession Act* was the standard of reasonableness. Should the decision of the Hearing Panel be a reasonable decision, this Panel should not interfere. The Review Panel should not "re-weigh" the evidence.

[9] This approach is supported by a decision of an Appeal Panel of the Law Society of Upper Canada in *Watt v. LSUC*, [2004] L.S.D.D. No. 27, where the Panel determined that when a decision under review is largely of fact or mixed fact and law, the appropriate standard of review is one of "reasonableness", but when the decision under review involves solely the law, then the standard of review is one of "correctness" .

[10] The position taken by prior Review Panels in this Province is different than the approach apparently adopted by the Law Society of Upper Canada. There is a line of authority adopted by Panels constituted under s. 47 of our *Legal Profession Act*, including *Hordal*, [2004] LSBC 36; *Dobbin*, [1999] LSBC 27; *McNabb,* [June 15, 1999]; and *Hopps* [1999] LSBC 29. This Panel will follow that line of authority.

[11] The appropriate standard of review is one of correctness. The authorities referred to by the Respondent's counsel and set out above in paragraph 8 relate to the standard appropriate for judicial review and not to the standard or scope of statutory review contemplated under s. 47 of the *Legal Profession Act*.

[12] The problem of the divergence of the evidence from the specifics of the citation was initially raised by the Hearing Panel. The following exchange then took place, as recorded at page 51 of the transcript of the hearing (Record, Tab 2):

> THE CHAIR: Mr. Smith, what's your position on that?
>
> MR. SMITH: Can I just have one moment?
>
> THE CHAIR: Do you want to take a break?
>
> MR. SMITH: No, I can deal with it now. Mr. Doyle is right. I wasn't misled. I'm not prejudiced. Like the affidavit, nobody was prejudiced. Nobody was misled, and we don't hold whoever drew the schedule

accountable as having professionally misconducted themselves, and we agree that it was an oversight and not deliberate and that there would be no reason to oppose the amendment at this time.

MR. DOYLE: May I suggest this. If we were to stand this matter down for a week, I'd like to see whether there's some provision for amending after the evidence has been led.

MR. SMITH: I'm not opposing amendment.

MR. DOYLE: If my friend wants some time to consider his position -- I'm pushing on an open door, but I want to make sure that the procedure is right.

THE CHAIR: I'm deeply troubled by the concept of allowing an amendment after the evidence is concluded. I've never heard of that happening.

[13] In the decision of the Hearing Panel, the matter was dealt with in the following paragraphs:

"[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."

[14] The *Criminal Code of Canada*, s. 601, does provide for amendment of an Indictment to conform to the evidence where there is a variance between the evidence and the Count on the Indictment. This section provides that an amendment can be done at any stage of the proceeding, including on appeal, and the section describes a number of considerations which the Court must consider in making the amendment.

[15] The fundamental consideration in making such an amendment is a determination of the potential prejudice to the accused, or in these circumstances, the Respondent:

(a) *R. v. Morozuk* [1986] SCJ No. 3;

(b) *R. v. A.L.B.* [1998] BCJ No. 1840.

[16] As can be seen from the transcript and, in particular, the submissions of the Respondent's counsel, there was no prejudice to the Respondent in allowing the amendment.

[17] The Hearing Panel was not correct in holding that you could not amend the particulars of a complaint at a hearing after the evidence had been called.

[18] Accordingly, we order that the Schedule to the citation be amended so as to read:

> In the course of representing your client, G.S., in matrimonial proceedings, you permitted a witness to swear an Affidavit without attaching the exhibits to which the Affidavit referred and without the witness reviewing the exhibits prior to swearing. You subsequently attached the exhibits and filed the Affidavit in court.

[19] The next matter to be dealt with in this Review is the application by the Respondent for a review of the Hearing Panel's determination that his conduct with respect to the Affidavit and its exhibits amounted to professional misconduct.

[20] There was an initial objection to that from the Law Society, their position being that there is no jurisdiction for a member review at this stage of proceedings. It is the position of the Law Society that the member can only apply for a review following the penalty phase of the discipline process. The only recourse at this stage for the member would be through the Court of Appeal.

[21] This Review Panel does not agree with the submission of the Law Society and is of the view that once seized with a review, it is entitled within the line of authorities referred to in paragraph 10 to proceed with a review of the issues raised on behalf of the Respondent in the correspondence dated September 20, 2004. We are entitled to review the Hearing Panel's decision that the Respondent's conduct with respect to the Affidavit and the exhibits amounted to professional misconduct. Accordingly, we do so.

[22] On October 25, 2002, the Respondent swore an Affidavit of a Ms. T. in proceedings between J.S. as Plaintiff and G.S. as Defendant, Supreme Court of British Columbia, Vancouver Registry No. E010820.

[23] Paragraph 11 of that Affidavit provides as follows:

> 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 checks are attached as Ex. B"

[24] The flyers referred to as Exhibit "A" were not appended to the Affidavit when it was sworn by Ms. T. before the Respondent. The flyers which constituted Exhibit "A" were subsequently faxed to the Respondent's office and attached to the Affidavit, and the Affidavit was then filed in the Vancouver Registry.

[25] The application for which the Affidavit provided evidence went before the Court on November 8, 2002. The identical Affidavit, with exhibits, was re-sworn on November 20, 2002.

[26] The thrust of the Respondent's argument on review was that there is no specific direction as to the handling of exhibits to Affidavits. There is no direction that exhibits must be attached to Affidavits. The Supreme Court Rules, in fact, provide at Rule 51(8) as follows:

> An exhibit referred to in an affidavit need not be filed, but must be made available for the use of the court and for the prior inspection of a party to the proceeding and, in the case of a documentary exhibit not exceeding 5 pages, a true reproduction must be attached to the affidavit and to all copies served or delivered.

[27] The Exhibit "A" in this proceeding exceeded five pages, and counsel argued it need not have been attached to the Affidavit pursuant to Rule 51(8).

[28] Counsel for the Law Society could not provide any further specific direction, either in the Rules of Court or otherwise, as to how exhibits were to be handled, and there appears to be no determinative judicial authority in that regard.

[29] Counsel for the Respondent referred us to various text and authorities as to what constitutes professional misconduct. In particular, we were referred to Gavin MacKenzie's book, Lawyers and Ethics, Professional Responsibility and Discipline, 3rd Edition, 2001; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869; and *Reddoch v. Yukon Medical Council*, [2001] Y.J. No. 132. The thrust of those authorities and Mr. MacKenzie's book was that moral turpitude was an essential component of professional misconduct. Mere negligence, a single mistake, even of serious character, will not suffice in being regarded as disgraceful or dishonorable conduct of a nature to be defined as professional misconduct.

[30] While there appears to be little, if any, judicial authority or rules specifying the circumstances relating to the swearing of Affidavits and, in particular, the appending of exhibits thereto, a practice and convention has developed in British Columbia, which this Review Panel believes is appropriate. That practice is to have all exhibits before the maker of the Affidavit at the time of the making of the Affidavit, in order that the deponent can review same and swear that they are correct. The Courts are entitled to be ensured to the highest degree possible that matters being placed before them as evidence are done so with maximum certainty.

[31] The approach adopted by the Respondent with respect to the Affidavit in question departs significantly from the practice that this Panel believes is appropriate with respect to exhibits to Affidavits for use in our Courts. The manner in which this Affidavit was taken and the exhibits purported to be sworn was incompetent and contrary to the accepted practice. However, while the Respondent's approach is far from acceptable, we are of the view that his conduct, in these circumstances, does not amount to professional misconduct. His procedure, while sloppy, misinformed or confused, lacks the degree of dishonorable conduct or moral shortcoming necessary to be viewed as professional misconduct.

[32] Accordingly, the Review Panel finds that the Law Society has failed to meet the onus placed upon it to establish that the conduct of the Respondent amounts to professional misconduct. However, we find that the Respondent acted incompetently in the performance of his duties respecting the Affidavit and exhibits thereto.

Concurring Decision of Greg Rideout

[33] I agree with the Review Panel as to the disposition of the citation.

[34] In particular, I support the position taken by the Panel that the standard or scope of review adopted by panels constituted under Section 47 of the *Legal Profession Act* is one of "correctness" .

[35] Section 47 of the *Legal Profession Act* provides for a broad power of review with a wide discretion granted to the review panel to substitute its own decision for that of the panel below. The relevant provisions of Section 47 state that:

> (3) Within 30 days after the decision of a panel under section 38 (4), (5), (6) or (7), the discipline

committee may refer the matter to the benchers for a review on the record.

(4) If, in the opinion of the benchers, there are special circumstances, the benchers may hear evidence that is not part of the record.

(5) After a hearing under this section, the benchers may

(a) confirm the decision of the panel, or

(b) substitute a decision the panel could have made under this Act or the rules.

(6) The benchers may make rules establishing procedures for an application for a review under this section.

[36] It was argued by counsel for the Respondent that the standard of review in relation to Section 47 hearings would be that of reasonableness as set out by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 and, concurrent with *Ryan*, the decision of the Supreme Court of Canada in *Dr.Q. v. College of Physicians and Surgeons (British Columbia)*, [2003] 1 S.C.R. 226. It is not without significance that in both *Ryan* and *Dr. Q.* the Supreme Court of Canada restored the decisions of the Law Society of New Brunswick and the College of Physicians and Surgeons (British Columbia) respectively.

[37] As the *Law Society Act of New Brunswick* is strikingly similar to our *Legal Profession Act* the procedural history of the *Ryan* case is important. A panel of the Discipline Committee of the Law Society of New Brunswick was appointed under Section 56(5) of the *Law Society Act* to inquire into charges that the Respondent had conducted himself in a manner deserving of sanction. The allegations were serious and included complaints that the member did not pursue claims in which he had been retained on behalf of clients and that in relation to those claims he informed clients of numerous fictitious steps taken in the actions including the invention of Court decisions and even wrote a fictitious decision of the Court of Appeal. In due course the member disclosed this conduct and deception to his clients and the matter was referred to the Law Society of New Brunswick for further action.

[38] The Discipline Committee appointed to hear the complaint included four members of the Law Society and one lay member. On the first day of hearing the member admitted to two of the three charges of conduct deserving of sanction as a result of which counsel for the Law Society withdrew the third allegation.

[39] As a result of the admissions by the member the question turned as to what sanction should apply and in reasons pronounced the 26 th day of November, 1999, the Discipline Committee determined that the only appropriate sanction under the circumstances was that of disbarment.

[40] Thereafter, the member applied to the New Brunswick Court of Appeal seeking an order that he be granted leave to introduce fresh medical evidence before the Discipline Committee which could, if accepted, justify the imposition of a sanction less stigmatic and less severe than disbarment. The Court of Appeal allowed the appeal on the 9 th day of May, 2000, and the matter was remitted back to the Discipline Committee.

[41] The Discipline Committee of the Society conducted a further hearing as a result of the order of the Court of Appeal and in reasons pronounced the 9 th day of November, 2000, the Discipline Committee was not persuaded to alter its earlier ruling that the member be disbarred.

[42] It is noteworthy that in relation to all of the proceedings conducted before the Discipline Committee that viva voce evidence was led by both counsel for the Law Society and counsel for the Respondent and that the Respondent did testify on his own behalf.

[43] As a result of the ruling of the Discipline Committee the member launched a further appeal to the Court of Appeal seeking a review of the decision of the Discipline Committee.

[44] In reasons pronounced the 15 th day of April, 2001, the Court of Appeal for New Brunswick allowed the appeal and directed that the member be suspended indefinitely from the practice of law subject to the terms and conditions that were set out in the Reasons for Judgment: *Ryan v. Law Society of New Brunswick*, [2001] N.B.C.A., 37.

[45] During the course of the ruling the Court was called upon to determine the standard of review to be applied by the Court when an appeal is taken from a decision of the Discipline Committee as of right to the Court of Appeal where there are no statutory restrictions on that right.

[46] The Court ruled at para. 21 as follows:

> "After a review of the authorities, we are of the opinion that the standard of review in this particular case is "reasonableness" but on the spectrum this standard is closer to correctness than patently unreasonable. This is particularly so, as here, when you have the most serious of sanctions being considered."

[47 The Law Society of New Brunswick appealed the decision to the Supreme Court of Canada where the Court was called upon to determine the standard which would exist for judicial review of administrative actions. At para. 20 of *Ryan* the Court determined that there were three standards: "correctness, reasonableness, and patent unreasonableness." The Court went on to further determine that in relation to the application of those three standards that the pragmatic and functional approach shall apply to judicial review of administrative actions.

[48] In my opinion when one views the procedural history of the *Ryan* decision the Supreme Court of Canada has articulated the standard for judicial review of administrative actions (emphasis added).

[49] I further note that in *Ryan* the Court determined that the Discipline Committee of the Law Society of New Brunswick does, by its legislative regulation, enjoy superior expertise relative to courts. It is my view that this expertise would equally apply to the administrative actions of a hearing panel constituted pursuant to s. 47 of the *Legal Profession Act*.

[50] I am further persuaded that the Court in *Ryan* and *Dr. Q.* confirm that there must be significant deference accorded to the regulatory hearing process, especially so if it relates to a self regulating professional body where it is the objective of that body to set and maintain professional standards of practice.

[51] The Law Society of British Columbia is a self regulating professional body and is vested with the authority to set and maintain professional standards of practice. Specifically, the disciplinary process established by the *Legal Profession Act* is designed to advance the duties and objectives set out in Section 3 of the *Legal Profession Act*:

> 3 It is the object and duty of the society
>
> (a) to uphold and protect the public interest in the administration of justice by
>
> (i) preserving and protecting the rights and freedoms of all persons,
>
> (ii) ensuring the independence, integrity and honour of its members, and
>
> (iii) establishing standards for the education, professional responsibility and competence of its

members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

[52] It is clear that a panel constituted under Section 47 of the *Legal Profession Act* is provided with a broad range of remedial choices or administrative responses in the furtherance of the ultimate objective and purpose of the *Legal Profession Act* as set out in Section 3.

[53] It is this process which establishes a distinction between the role of the Courts and the role of the Law Society in the disciplinary process established by the *Legal Profession Act*. This is clearly recognized by the Court in both *Ryan* and *Dr. Q.* In particular, the Court at para. 40 of the *Ryan* decision recognized the need for a high degree of deference which accords to decisions of the Discipline Committee of the Law Society of New Brunswick:

> "Taken as a whole, the legislative purpose of the Act suggests a higher degree of deference to decisions of the Discipline Committee. This deference gives effect to the legislature's intention to protect the public interest by allowing the legal profession to be self-regulating. The Law Society is clearly intended to be the primary body that articulates and enforces professional standards among its members."

[54] This deference and the rationale for same would likewise apply to the discipline process that is set out in the *Legal Profession Act* in British Columbia.

[55] With respect to that process the Benchers have established over an extended period that the standard or scope of review of a panel constituted pursuant to s. 47 of the *Act* is that of "correctness" .

[56] It was argued by counsel for the Respondent that this Panel ought to follow the decision of the Law Society of Upper Canada in *Watt v. Law Society of Upper Canada*, [2004] L.S.D.D. 27 where a panel of three Benchers in denying an application by Watt for re-admission to the Law Society found that the appropriate standard of review was that set out in *Ryan* and that the appropriate standard of review for the Law Society of Upper Canada is "reasonableness" and that "correctness" would only apply in situations involving a decision solely of law.

[57] It is my view that the position taken by the Law Society of Upper Canada may be appropriate to their regulatory process. However, in British Columbia, the Benchers have adopted the "correctness" standard in relation to Section 47 Reviews as such a standard clearly differentiates the function between the Benchers and the Court of Appeal. This distinction was noted by the Benchers in the decision of *John Wilson Dobbin*, [1999] LSBC 27 where the panel noted:

> "10. The first question which arises is as to the scope of a Bencher review under Section 47(3). In Reasons issued June 15, 1999, in **McNabb**, the Benchers referred to their "wide discretion to substitute our own judgment for that of the Hearing Panel" . However, recognizing that the Hearing Panel may have enjoyed an advantage from seeing and hearing witnesses testify, the **McNabb** Benchers declined to interfere with findings of fact as to controversial testimony unless there was no evidentiary support for those findings. No such limitation on our "wide discretion" arises on Mr. Dobbin's case: the Hearing Panel enjoyed no advantage over us in looking to the Agreed Statement of Facts and, as the Hearing Panel remarked, Mr. Dobbin's sworn evidence was not challenged. In the result, we have reviewed on

the basis of asking ourselves whether the Hearing Panel's decision was correct.

11. There is an important principle in adopting correctness as the standard of review, with the sole exception of deference as to a Hearing Panel's advantage in making findings of fact from controverted sworn evidence. We decline to adopt a standard of deference to the Hearing Panel's exercise of judgment or discretion, as may be imposed on Courts of Appeal reviewing triers of fact in certain circumstances, due to the difference in function between the Benchers and the Courts of Appeal: as Branca, J.A., stated in **Re: Prescott** (1971) 19 DLR (3 rd) 446, at 452, in the language of his day:

> The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition, in my judgment, shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the public or of the legal profession" . The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men who enjoy the full confidence and trust of the members of the legal profession of this Province."

12. It would be quite wrong of the Benchers, on review, to abdicate their duty to decide, in this case, whether some admitted action or failure to act is professional misconduct, by erecting a standard of error on the part of the Hearing Panel. If the Benchers did not adopt a correctness standard, it would be a Hearing Panel of one Bencher, or three Panelists (not all of whom need be Benchers) who would be setting the standards for the legal profession. That would be a case of the tail wagging the dog. In this case, there being no advantage in the Hearing Panel from hearing witnesses and determining credibility, we must employ our wide discretion to determine whether the Hearing Panel came to the correct conclusion and, if we determine it did not, we must substitute a decision the Hearing Panel could have made. That is our plain responsibility."

[58] I would decline to follow the approach taken by the Law Society of Upper Canada in *Watt* and adopt the position taken by the Benchers in *John Wilson Dobbin*.