

2006: No. 01 February

Brian John Kirkhope

Nanaimo, BC

Called to the bar: August 31, 1990

Discipline hearing: January 17 and October 27, 2005

Panel: James D. Vilvang, QC, Chair, Dirk J. Sigalet, QC and David A. Zacks, QC

Reports issued: June 1, 2005 (indexed as 2005 LSBC 23) and November 8, 2005 (indexed as 2005 LSBC 47)

Counsel: Todd Follett (facts and verdict) and Brian McKinley (penalty) for the Law Society and Jerome Ziskrout for Mr. Kirkhope

Facts

In 1999 Mr. Kirkhope began acting for Mr. F, who was the defendant in a divorce proceeding brought by Mrs. F.

Mr. F provided Mr. Kirkhope with a tape recording of a private telephone conversation between Mrs. F and her lawyer (J). Mr. F had intercepted and recorded the conversation over a year earlier, without the knowledge or consent of either Mrs. F or lawyer J.

Mr. Kirkhope had a transcript made of the tape recording. He read the transcript in preparation for an examination for discovery of Mrs. F.

Decision

The hearing panel found it apparent that Mr. Kirkhope had violated section 193(1)(a) of the *Criminal Code* by using the private communication that his client had earlier intercepted and recorded. The panel accepted that Mr. Kirkhope at the time was unaware of the provisions of section 193(1)(a) of the *Criminal Code*. The panel also accepted that Mr. Kirkhope believed there was no solicitor-client relationship between Mrs. F and J at the time his client had recorded their conversation because there was no litigation in progress and because he did not think there was a retainer in place.

The panel pointed out that, for conduct to be considered professional misconduct, it must be “morally blameworthy.” Lawyers should not be disciplined for mere negligence. But, when a lawyer fails to acquire the basic knowledge needed to function as a lawyer and that failure leads him or her into error, it can be seen as morally blameworthy.

In this case, the *Criminal Code* provisions in question were not new — they dated back to the 1970s — and the concept of privilege attached to solicitor-client communications was much older than that. It should have been plain to any lawyer receiving such a tape recording that the first question to ask is whether or not the lawyer can use the tape in any way. Had Mr. Kirkhope undertaken an investigation of the issue and come to the wrong conclusion, he might have been merely negligent. But he did not take that step. In the panel’s view, he was wilfully blind to the fact that what he was doing was wrong, and his conduct constituted professional misconduct.

Penalty

After considering the factors relating to penalty, the submissions of counsel and letters of reference, the hearing panel ordered that Mr. Kirkhope:

1. pay a \$10,000 fine; and
2. pay \$5,000 as costs.

The panel accepted a submission by Mr. Kirkhope that the fine and costs be payable in four semi-annual instalments of \$3,750 each.