

2006: No. 1 February

## Howard Raymond Berge, Q.C.

Kelowna, BC

Called to the bar: May 12, 1967

**Discipline hearing:** March 23 and 24 and October 21, 2005

**Panel:** Carol W. Hickman, Chair, Hugh Legg, QC and Dr. Maelor Vallance

**Reports issued:** July 14, 2005 (indexed as 2005 LSBC 28) and December 19, 2005 (indexed as 2005 LSBC 53)

**Counsel:** Herman Van Ommen for the Law Society and Christopher Hinkson, QC for Mr. Berge

## Facts

On October 2, 2002 Mr. Berge consumed eight or nine ounces of alcohol in a very short period of time while at his law office. The date was two days before the second anniversary of his wife's death.

After drinking the alcohol, Mr. Berge left his office and immediately began to drive home. He took with him in the car an open can of beer. On the way, he was involved in a motor vehicle accident. Following that accident, Mr. Berge used mouthwash. The police arrived at the scene and he was later charged under the *Criminal Code* with impaired driving and driving with a blood alcohol reading in excess of .08.

Mr. Berge's trial took place in Provincial Court on October 9, 2003. After several witnesses had testified at his trial, Mr. Berge entered a guilty plea to section 144 of the *Motor Vehicle Act*, driving without due care and attention. The sentence was a \$1,000 fine and a three-month driving prohibition. The BC Supreme Court dismissed Mr. Berge's appeal of sentence.

With respect to Mr. Berge's actions subsequent to the accident, the hearing panel adopted the finding of a justice of the BC Supreme Court who stated:

*In my view, particularly, when viewed collectively, the evidence supports the inference drawn by the trial judge. The appellant's conduct in relation to the beer can in his breast pocket, does not, on the evidence, reasonably support any conclusion other than that he was in the process of attempting to dispose of it. As to the mouthwash, when the appellant consumed it, he had just been involved in a serious motor vehicle accident prior to which he had been drinking. He consumed it while bent over in the front seat of his vehicle. The effect of doing so would be, among other things, to mask the smell of beer on his breath....*

The panel found that Mr. Berge's attempt to dispose of the open can of beer and his consumption of mouthwash were conscious efforts to thwart any police investigation or police demand for a breathalyzer, which conduct was irresponsible and a breach of his duties under the Law Society's Canons of Legal Ethics. This was such conduct as might erode public confidence in the administration of justice and in the legal profession.

## Verdict

The hearing panel found that the combination of Mr. Berge's actions, specifically the consumption of a substantial amount of alcohol just prior to driving a motor vehicle, causing an accident by driving without due

care and attention and then removing the can of beer from his car to dispose of it and using mouthwash to mask the smell of alcohol on his breath prior to the arrival of the police, were tantamount to dishonest conduct and conduct unbecoming a lawyer.

## Penalty

The panel assessed the various factors relating to penalty. It noted that Mr. Berge had no prior discipline record, but rather had been a Benchers and had a record of outstanding service to the Law Society and the legal profession. It also took into account the impact of Mr. Berge's conduct in this matter on the Society and profession arising from significant media attention and his failure to express remorse or acknowledge that his actions were wrong. The panel canvassed the need for specific and general deterrence, the impact of sanctions and adverse publicity on Mr. Berge and the cases referred to by both counsel. The panel ordered that Mr. Berge:

- be reprimanded;
- be suspended from the practice of law for one month, to commence on a date to be agreed on by counsel (but no later than April 15, 2006); and
- pay the costs of the proceedings, as agreed upon by counsel, and deducting from total costs the reasonable costs he incurred relating to a memorandum that a Law Society staff person had sent to a member of the hearing panel.

Mr. Berge has applied to the Benchers for a review of this decision.