2006 LSBC 13
Report issued: April 19, 2006
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: March 23, 2006

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] The Panel rendered its decision on Facts and Verdict on August 4, 2004. The decision was whether the circumstances (which were admitted) constituted professional misconduct or whether the Respondent merely made a mistake.

[2] The Panel in its decision stated:

> " [28] Allowing this conduct to go uncensured would harm the standing of the legal profession. . . .
>
> [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. . . ."

[3] Counsel for the Law Society sought an amendment to the Schedule to the citation following the conclusion of the evidence and following submissions. The Panel refused to permit the amendment at that point in the proceedings and dismissed the citation, ordering that each party bear its own costs.

[4] Both the Law Society and the Respondent sought a Review of the Panel's decision. The matter was fully argued before a Review Panel, but before a decision of that Review was rendered, the Panel lost its quorum. Accordingly, a new Review Panel heard the Review on July 14, 2005, and rendered its decision on November 2, 2005.

[5] In that decision, both aspects of the Review were allowed. The decision of the Review Panel respecting the amendment to the citation determined that the Hearing Panel was not correct in holding that the citation particulars not be amended after the evidence had been called, and ordered that the Schedule to the citation be amended.

[6] The Review Panel also found that the Law Society had failed to meet the onus placed upon it

to establish that the conduct of the Respondent amounted to professional misconduct, and so to that extent the Respondent was successful at the Review.

[7] It is apparent from a review of the proceedings before the initial Hearing Panel of August 4, 2004, and from a review of the decision of the Benchers on Review that apart from the amendment issue, virtually all of the argument was directed toward the issue of professional misconduct, an issue on which, as noted, the Respondent was successful.

[8] That did not end the matter, however. The decision of the Benchers on Review also set out as follows:

> " However, we find that the Respondent acted incompetently in the performance of his duty respecting the Affidavit and exhibits thereto."

[9] There is nothing in the decision of the Benchers on Review which analyzes the finding of incompetence, nor was there placed in evidence the sort of evidence often used to show incompetence, such as, for example, a history of practice. Similar facts in similar situations are often evidence of incompetence; no such evidence was put forward in this case.

[10] The decision of the Benchers on Review made no mention of costs nor did it give any direction respecting penalty. By letter of December 1, 2005, Ralston Alexander, Q.C., President of the Law Society, directed that the penalty proceeding would take place before this Panel (the original Panel) at a date to be set in the usual fashion, and as well made comment on the issue of costs and also on the application made on behalf of the Respondent for anonymous publication. The letter was marked as Exhibit 4 to these proceedings.

[11] At the commencement of the penalty phase before this Hearing Panel, counsel on behalf of the Respondent raised a number of issues:

1. He argued that these proceedings should be confined to the sole issue of professional misconduct;

2. He argued that the Review Panel's jurisdiction was confined to the issue of professional misconduct and, in effect, that the Review Panel could not substitute a finding of incompetence;

3. He argued that the Review Panel did not have the power to remit the matter of penalty on a substituted finding of incompetence to this Hearing Panel;

4. He argued that the duty of fairness prohibited a ruling on any issue for which the Respondent had not been given notice and for which there was no opportunity to make argument; and

5. He argued that the Respondent had a reasonable apprehension of bias in appearing before the same Hearing Panel as had previously opined that the Respondent's conduct was professional misconduct.

[12] Arguments 1, 2 and 4 can be disposed of with reference to the applicable legislation. Section 48

of the *Legal Profession Act* (the " *Act*") states that a Respondent (in this case the member, [name]) who is affected by a decision, determination or order . . . of the Benchers may appeal the decision, determination or order to the Court of Appeal. That right to appeal is a complete answer to those three arguments raised on behalf of the Respondent. As can be gleaned from remarks made by this Panel in paragraph [9] above, there may well have been some foundation for an appeal to the Court of Appeal based on those issues raised by counsel for the Respondent, but this Panel has no jurisdiction to entertain such an appeal.

[13] As to argument no. 3, that this Panel cannot impose a penalty, Parts 4 and 5 of the Law Society Rules provide an answer to that submission. In this case, the citation was heard by this Hearing Panel and dismissed. That decision was reviewed and, on Review, a determination was made that in this matter the Respondent acted incompetently. That is a verdict under Rule 4-34, reviewed pursuant to provisions of Part 5 of the Law Society Rules and Section 47(5) of the *Act*. The Benchers on Review substituted a decision the Panel could have made under the *Act*. That constitutes a " verdict under Rule 4-34 adverse to the Respondent" and thus gives this Panel jurisdiction under Rule 4-35. The President then appointed the Panel, as he has the power to do, pursuant to Rule 4-28.

[14] As to the suggestion that this Panel is disqualified by reason of apprehension on the part of the Respondent that the Panel is biased, the Panel has carefully considered the submissions and the relevant law.

[15] First of all, if any member of the Panel (in the event that the Panel is more than one member) personally feels that that member cannot deal with the matters before him or her impartially, then the panelist ought to disqualify himself or herself. In this case, the Panel is capable of approaching the decision with an open mind.

[16] The next question is whether right-minded persons would think that in the circumstances, there was a real likelihood of bias. If that were so, then the panelist should not sit.

[17] There is a presumption that a member of an administrative tribunal will act fairly and impartially in the absence of evidence to the contrary. Grounds for apprehension of bias must be substantial.

[18] As counsel for the Law Society has pointed out, it is quite common for matters before a trial judge for decision (most usually with respect to issues of liability) is overturned by the Court of Appeal, and the matter is then remitted to the trial judge for an assessment of damages. As far as I know, apprehension of bias has not been raised to disqualify trial judges in those situations.

[19] In this case, in the original hearing, the Panel made pejorative commentary about undisputed facts constituting professional misconduct on the part of the Respondent. However, the decision of the Panel was to dismiss the citation. The Benchers on Review have determined that the conduct does not constitute professional misconduct. The Panel has no difficulty in determining a penalty for incompetence without reference to professional misconduct.

[20] Accordingly, the Panel is satisfied that right-minded persons would not think that there was a real likelihood of bias on the part of the Panel.

Decision

[21] The penalty for incompetence usually involves a reprimand and, if needed, directions for remedial action. In this case, the Respondent, through his counsel, has made it clear that he will utilize great care in the future in preparing affidavits and in attaching exhibits to the affidavits. No remedial program is needed as part of the penalty. A reprimand will suffice.

Costs

[22] Counsel for the Law Society has argued that the Law Society is entitled to full indemnity for its costs incurred in the verdict and penalty stages of the Hearing. The Law Society does not seek costs for either the initial Bencher Review nor for the Bencher Review which occurred on July 14, 2005.

[23] There is no doubt that this proposition for full indemnity for costs, as stated in *McNabb* [1999] LSBC 02 and *Mah Ming* [1999] LSBC 28, will be the usual order. However, as is made clear in *Hobbs* 2004 LSBC 30, there can be exceptions. In this case, the Respondent faced a serious allegation of professional misconduct. The Panel's view of the seriousness of the allegation was alluded to in paragraph 28 of the Hearing Panel's decision:

> " 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 practiced."

[24] The Respondent was successful in defending this allegation of professional misconduct, which was the main (indeed only) substantive issue before this Hearing Panel on August 4, 2004, and the main issue before the Benchers on Review on July 14, 2005.

[25] In addition, through no fault of the Respondent, the initial Bencher Review Panel hearing was a nullity. The matter has been hanging over the Respondent's head for two years.

[26] As noted, the only evidence of incompetence is the failure to properly swear an exhibit to an affidavit. There is no history of incompetence. The Respondent's discipline history consists of two Conduct Reviews (one initiated by the same complainant whose complaint resulted in the citation in this matter).

[27] The Respondent, through his counsel, argues with some force that, had the matter been brought forward as a competency complaint in the first instance, with an agreement that there be a reprimand, the matter would likely have proceeded by way of a conditional admission and consent to disciplinary action pursuant to Rule 4-21 or 4-22.

[28] There is merit in the submissions of counsel on behalf of the Respondent. These are peculiar circumstances. The Respondent has successfully cleared his name from allegations of professional misconduct, which are viewed as much more serious than incompetence, because professional misconduct generally indicates an issue of character. I accept that if an allegation of incompetence had been at the centre of the citation, the matter would probably have not gone to a hearing. At most, there would have been a conditional admission. The Review Panel found that he acted incompetently in the performance of his duties respecting the affidavit and exhibits thereto.

[29] In the circumstances, my decision is that each party shall bear its own costs.