2006 LSBC 14
Report issued: April 25, 2006
Citation issued: December 17, 1999

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

Richard Luke Coglon

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: November 3rd and 9th, 2005

Panel: Richard S. Margetts, Q.C., Chair, Russell S. Tretiak, Q.C., Peter J. Keighley, Q.C.

Counsel for the Law Society: Mark L. Skwarok, Michael L. Bromm
Counsel for the Respondent: William S. Berardino, Q.C., Pamela M. Cyr

Background

[1] The facts of this case are detailed in the decision of this Hearing Panel dated October 4, 2001, and the decision of the Benchers on Review dated December 31, 2002.

[2] As a result of the latter decision, the Respondent was, on December 31, 2002, found to have professionally misconducted himself on the matter set forth in the citation. The Respondent then instituted an appeal, which he subsequently abandoned. The matter has now been referred to this Panel for decision on penalty and costs.

Discussion

[3] In the case of *Law Society of British Columbia v. Ogilvie* [1999] LSBC 17, the Panel offered the following with respect to the penalty process:

> 10. The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
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> a) the nature and gravity proven;

b) the age and experience of the respondent;

c) the previous character of the respondent, including details of prior disciplines;

d) the impact upon the victims;

e) the advantage gained, or to be gained, by the respondent;

f) the number of times the offending conduct occurred;

g) whether the respondenthas acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

h) the possibility of remediating or rehabilitating the respondent;

i) the impact on the respondent of criminal or other sanctions or penalties;

j) the impact of the proposed penalty on the respondent;

k) the need for specific and general deterrence;

l) the need to ensure the public's confidence in the integrity of the profession; and

m) the range of penalties imposed in similar cases.

Nature and Gravity of the Conduct Proven

[4] The Benchers determined that the Respondent was in a " hopelessly conflicted position" that prevented him from fulfilling his duty of loyalty to his first clients, [clients], both when he assisted Mr. L. in covertly acquiring an interest in [company] and when he then amended the offering memorandum without disclosing Mr. L.'s investment. The amendment of the offering memorandum then placed the Respondent in a second position of conflict in that his family had interests in [company] that might reasonably have been expected to affect his professional judgment.

[5] The Respondent had been specifically instructed by Mr. J.S. of [corporation] that no employees, directors, or officers of [corporation] were allowed to participate in the investment. He knew that there was at least some " qualified prohibition" in the legislation against investments in the project by directors such as Mr. L., and that his first clients, [clients] were extremely concerned about the political sensitivity of such an investment. He was aware that this sensitivity was significant enough that the entire project might be abandoned if the involvement of " insiders" came to light. The Respondent also knew that Mr. L. proposed to invest in the project through the medium of an offshore company in order to keep his involvement secret from [clients]. The Respondent was fully aware that his instructions to keep Mr. L.'s investment secret prevented him from disclosing to his other clients the fact that Mr. L. was involved in the investment. As a result of this conflict, the Respondent acted in a manner contrary to his first client's

instructions. His duty of candour to his first clients was compromised by his duties of confidentiality to his second.

[6] The Benchers correctly characterized the duty of loyalty as " one of the core values of the legal profession, perhaps the core value." The conflicts of interest into which the Respondent entered were of an extremely serious nature.

Age and Experience of the Respondent

[7] The Respondent was acknowledged to be an " expert" in the field of securities work.

Character and Disciplinary History of the Respondent

[8] The Respondent has no previous disciplinary record with the Law Society, and there is no evidence as to his character before the Panel, with the exception of evidence relating to the substance of this citation.

Impact on the Victim

[9] No actual financial loss appears to have arisen from the Respondent's conduct. In fact, the project ultimately was a success. In dealing with issues of conflict, however, the Panel must also consider the possibility of injury to a party even if no actual injury occurs. In this case, the Respondent's first clients and the market in general were prevented from deciding for themselves whether Mr. L.'s investment in the [R} project was appropriate and whether the market was supportive of the project. Similarly, the " family shareholders" were denied an opportunity for input into the amendment of the offering memorandum.

Advantage Gained or to be Gained by the Respondent

[10] The Respondent was not motivated directly by the hope of financial gain although, through the investments of his wife and extended family, he enjoyed at least a theoretical prospect of a gain by virtue of his conduct.

Number of Times the Offending Conduct Occurred

[11] The citation contains two counts. The first count alleged that the Respondent accepted a retainer from Mr. L. in conflict with his existing retainer with [client]. The second count alleged that the Respondent acted for [client] in amending the offering memorandum when the Respondent's family had a financial interest in the transaction that might reasonably be expected to effect his professional judgment.

Acknowledgement by Respondent/Steps Taken in Redress/Other Mitigating Factors

[12] The Respondent has acknowledged that the conflicts he entered into were " obvious" . There are no mitigating factors.

Possibility of Remediation or Rehabilitation

[13] There is no evidence to suggest that rehabilitation or remediation is required.

Impact of Other Sanctions

[14] No evidence was placed before the Panel of any other sanctions visited on the Respondent by virtue of his conduct in this case.

Impact of the Proposed Penalty on the Respondent

[15] The Respondent has been unable to practise since early 2003 by virtue of his failure to pay his annual membership fees, the final date for late payment of which was January 31 of that year. Although he applied for reinstatement, the Review Panel's finding of professional misconduct resulted in his application for reinstatement being referred to the Credentials Committee. The Credentials Committee ordered a hearing to determine the Respondent's fitness for readmission, but agreed to hold the application in abeyance pending the disposition of the Respondent's appeal to the Court of Appeal. As a result, the Respondent has now been out of practice for over three years. Mr. Skwarok admits, on behalf of the Law Society, that a suspension will not have the same impact on the Respondent as it would have were he currently practising.

[16] The Respondent testified that he has suffered personally and professionally as a result of the publicity surrounding this issue. He has learned that members of the profession, the public, the media, the business community, and even his own friends and family, have been under the mistaken impression that he has been disbarred. He says that the TSX Listing Committee has refused to accept him as a director of a public company as a result of the Benchers' finding of professional misconduct. He has been asked to resign from positions with other companies. He has been advised that companies with which he is associated have been treated unfavourably by regulators as a result of the Benchers' finding of professional misconduct and the formerly outstanding appeal.

[17] The Respondent also says that his personal life has been significantly affected by these disciplinary proceedings. Ultimately, his marriage ended and his relationship with his father-in-law, Mr. L., has become strained.

Specific and General Deterrence

[18] In light of the impact of these proceedings upon the Respondent's domestic, social, and business relationships, specific deterrence is not a significant factor.

[19] However, the nature and seriousness of the conflicts in which the Respondent engaged himself suggests that general deterrence is a significant factor in determining an appropriate penalty.

[20] A lawyer who places himself or herself in a position of conflict can never be sure in advance whether actions taken in this context will result in damage. The conflict avoidance provisions set forth in the *Professional Conflict Handbook* are not simply remedial: they are preventative for the simple reason that the only safe way to deal with conflicts is to avoid them altogether. A lawyer must not be allowed to gauge the seriousness of a conflict with reference solely to the harm it may cause. Such would turn the avoidance of conflict into a game of probability in which lawyers play the odds, weighing potential benefits and liabilities in each conflict as it arises.

Public Confidence in the Integrity of the Legal Profession

[21] The Law Society is, first and foremost, charged with ensuring that the public interest in the administration of justice is upheld. The Benchers are mandated to establish standards for the professional responsibility of the Law Society's members. Law Society proceedings must focus on the public interest in ensuring that lawyers maintain high professional standards. The focus is not on punishment or retribution. Although an appropriate penalty may have a punitive effect, the goal of the Law Society is the protection of the public and the maintenance of public confidence in the profession and the Law Society as regulated: *Law Society of British Columbia v. Dent* [2001] LSBC 36.

Range of Penalties in Similar Cases

[22] Precedents involving conflict of interest are few. In any event, this Panel is charged with determining an appropriate penalty in the circumstances of this somewhat unique case.

[23] The Panel has considered the case of *Law Society of British Columbia v. Van Twest* [1994] LSDD No. 129, in which the respondent was found to have misconducted himself in acting for more than one party in a series of related real estate transactions, and in one instance where he had a personal interest in the transaction. The respondent failed to obtain the consent of the parties to act for more than one of them, failed to advise one or more of the parties that he was acting for other parties, and failed to advise one or more parties to obtain independent legal advice. In the course of the transactions, the respondent certified the signatures of mortgagors who had not appeared before him. There appeared to be no evidence of any loss suffered by any party, and Mr. Van Twest was suspended for a period of two weeks and ordered to pay the sum of $2,500.00 as costs. In addition, he was required to comply with some remaining directions from the then Competency Committee.

[24] The Panel has also considered the case of *Law Society of British Columbia v. Dent* [2001] LSBC 36. In order to finance the purchase of a family home in 1992, Mr. Dent obtained two loans from institutional lenders and a $50,000.00 loan from one E, a friend of his wife. Subsequently, Mr. Dent took steps to consolidate family debts and sought a new loan from a private lender, agreeing to provide that lender with a new second mortgage on the family home as security. He intended the proceeds of the new mortgage to pay off the existing second mortgage and certain other debts. At that time, Mr. Dent prepared and registered a third mortgage on title as security for E's loan, thereby performing a legal service for her when he had a financial interest in the matter, contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook*.

[25] In 1996, Mr. Dent and his wife separated and the property was sold after the commencement of foreclosure proceedings. The sale proceeds were sufficient to discharge the first mortgage and most of the second mortgage, but not the third mortgage, such that E was not repaid the full balance of her loan. Mr. Dent admitted that he had breached a fiduciary obligation he had assumed in respect to E by placing his own interest in obtaining a new loan directly in conflict with her interest in having adequate mortgage security. At the time he prepared the third mortgage, he did not advise E that a new second mortgage would take priority over hers, did not send her a copy of the mortgage or State of Title Certificate for ten months and did not recommend that she obtain independent legal advice. After recognizing that he had not obtained adequate security for E, Mr. Dent failed to advise E of her potential claim against him and failed to recommend that she obtain independent legal advice and failed to report the potential claim to his professional liability insurer. In fact, he took steps to prevent the client from recovering under the insurance policy. Ultimately, E obtained judgment in the amount of $50,337.62 against Mr. Dent, together with special costs of $22,070.42. At the time of the Hearing Panel's decision, Mr. Dent was paying $1,000.00 per month on this judgment. The Panel took into account Mr. Dent's strained financial circumstances and the fact that he had apologized to E, helped to expedite the disciplinary proceedings and was making regular payments to settle the debt. The Panel indicated that it was not overlooking the importance of undivided loyalty to a client and the fact that Mr. Dent had received a personal advantage from his misconduct. E had received no worthwhile security for her loan and was obliged to commence legal proceedings to collect the debt owed to her. In the result, Mr. Dent was suspended for a period of one month and ordered to pay the costs of the proceeding in the amount of $5,023.22.

Result

[26] In the result, the Panel has determined that a one-month suspension is appropriate in the circumstances of this case. Although the fact that the Respondent has been out of practice for some three

years may be seen as a mitigating factor, the reality is that the Respondent still faces a hearing on his application for reinstatement and a delay of several more months before his reinstatement is complete. The suspension will commence May 1, 2006.

Costs

[27] The Law Society claims costs of $27,625.76.

[28] In determining the issue of costs, this Panel is not limited to party/party costs but may order full indemnity of the Law Society's costs if it deems full recovery to be appropriate. In fact, the 1998 decision in *Law Society of British Columbia v. McNabb* [1999] LSDD No. 54 suggests that full indemnity may be the rule rather than the exception. At page 42, paragraphs 92 and 93 of the decision, the Panel stated:

> 92. The costs have been incurred: it is only a question of attributing the payment to one party or the other. In this case, either Mr. McNabb must pay them or they will be borne by the lawyers of British Columbia collectively. It is plain that Mr. McNabb is at fault in causing this proceeding while the other lawyers in British Columbia are blameless.
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> 93. ...the Law Society is obliged to prosecute in cases such as this, to protect the public interest, and would be abdicating its responsibility if it compromised to keep costs down. As the Law Society compels an explanation from the member at the investigatory stage, it takes proceedings in the face of a denial of misconduct at its peril. The differences between ordinary civil litigation and professional disciplinary proceedings militate in favour of a fuller cost recovery by either side. Costs should ordinarily follow the event in cases of professional discipline.

[29] The draft bill presented by the Law Society in this matter includes counsel fees for preparation and attendance at the April 23 and 24, 2001 hearing based on some 88.1 hours of counsel time at $125 per hour. Similarly, preparation for and attendance at the November and December hearings apparently consumed some 68 hours of counsel time at a rate varying from $80.00 to $175.00 per hour. No breakdown of these charges was provided.

[30] In the result, the Panel feels an award of costs in the amount of $20,000.00 to be supportable. These costs are payable prior to the Respondent's reinstatement.