2006 LSBC 15
Report issued: April 25, 2006
Citation issued: September 9, 2004

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

David John Martin

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: December 7, 2005

Panel: Ross Tunnicliffe, Chair, Patricia L. Schmit, Q.C., Bruce A. LeRose

Counsel for the Law Society: William S. Berardino, Q.C. and Pamela Cyr
Counsel for the Respondent: Josiah Wood, Q.C.

Introduction

[1] The facts and verdict are set out in our decision issued September 7, 2005.

[2] Although two members of the Panel are no longer Benchers of the Law Society, the Panel was continued by the President under Rule 5-2(5).

[3] What we must determine now is the appropriate penalty that the Respondent, David John Martin (the " Respondent") should receive pursuant to Rule 4-35 of the Law Society Rules. The range of penalties available is set out in Section 38(5) of the *Legal Profession Act*, S.B.C., 1989, C. 9 (the " *Act*").

Issues

[4] Section 38(5) of the *Act* states as follows:

> (5) If an adverse determination is made against a Respondent, other than an articled student, under subsection (4), the Panel must do one or more of the following:
>
> (a) reprimand the Respondent;
>
> (b) fine the Respondent an amount not exceeding $20,000.00;
>
> (c) impose conditions on the Respondent's practice;
>
> (d) suspend the Respondent from the practice of law or from practice in one or more fields of law

(i) for a specified period of time,

(ii) until the Respondent complies with a requirement under paragraph (f),

(iii) from a specific date until the Respondent complies with a requirement under paragraph (f), or

(iv) for a specific minimum period of time and until the Respondent complies with a requirement under paragraph (f);

(e) disbar the Respondent;

(f) require the Respondent to do one or more of the following:

(i) complete a remedial program to the satisfaction of the practice standards committee;

(ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the Respondent is competent to practise law or to practise in one or more fields of law;

(iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the Respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

(iv) practise law only as a partner, employee or associate of one or more other lawyers;

(g) prohibit a Respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.

[5] Counsel for the Law Society submitted that the appropriate penalty in this case should be:

(a) suspension from the practice of law for six months;

(b) $80,000.00 contribution toward costs.

[6] Counsel for the Law Society noted the Respondent's standing in the profession, his otherwise unblemished professional record and his eminence in his field of practice. Despite this, he argued, suspension was the proper result because the Respondent's conduct was in circumstances where the government had made an unprecedented commitment to funding the defence of the accused in the Air India case, there were unusual circumstances of hiring the children of the accused, and there were warning signs that should have alerted him to pay particular attention to the possible fraud involving the children's accounts.

[7] Counsel for the Law Society emphasized that the Panel's primary obligation is to protect the public interest in the maintenance of appropriate and proper professional standards.

[8] Counsel for the Law Society referred us to *The Law Society of BC v. Ogilvie* [1999] LSBC 17, and argued that the most important factors to consider in the Respondent's case are:

(a) characterization of the conduct;

(b) the requirement to ensure public confidence in the integrity of the profession;

(c) the requirement to provide for deterrence to the profession generally.

[9] Counsel for the Respondent referred us to numerous cases, including *Ogilvie*, and the " Legal Services Society" cases and submitted that the appropriate penalty should be:

(a) a reprimand;

(b) $20,000.00 fine and a $30,000.00 contribution to CLE; and

(c) $30,000.00 contribution toward costs.

[10] No conditions regarding payment were suggested or sought by either counsel.

[11] In his submission, Respondent's counsel emphasized that this was not a case of dishonesty. The Respondent is a barrister of high professional integrity and has, until now, an exemplary professional record in a career of over 26 years.

[12] He noted that this is not a case of dereliction of duty to the client, Reyat.

[13] Respondent's counsel laid the blame for the Respondent's uncharacteristic behaviour on an extraordinary workload from the time of taking on the Reyat brief. This resulted in the Respondent failing to recognize the significance of the warning signs, which, had he understood their significance, would have led him to exercise the care expected of him in the circumstances.

[14] Counsel for the Respondent emphasized that the Respondent's motive for taking on and refusing to jettison the Reyat brief as the workload increased was out of a sense of professional duty. The duty to take on tough cases, carrying the brief to its conclusion regardless of the personal sacrifice required.

[15] Respondent's counsel submitted that the most important factors for us to take into account are:

(a) protecting the public by assessing the degree of risk this Respondent poses to the public, which, he argued, is minimal; and

(b) because penalty should emphasize assessment of risk as well as protection of the public, so that the " punishment should fit the crime" , the principle of proportionality should govern us to find that a suspension of the Respondent is unwarranted in these circumstances.

[16] Respondent's counsel called five witnesses, all eminent lawyers. They all spoke glowingly of the Respondent's dedication to the practice of law, his professionalism, integrity and his skill in handling the Reyat brief. In particular, reference was made to the Respondent's recognition of his duty to take on this brief, which all agreed was a hard case. Evidence was heard from lawyers who were involved with the Air India case of how they were " submerged in the case to the exclusion of everything else" and how it consumed their lives during the duration of the trial. We heard how other briefs " dried up" as counsel were forced to focus on this one case. We heard how, at the end of the case, counsel involved were exhausted.

[17] Respondent's counsel submitted 19 letters of reference from 19 different lawyers, all of whom expressed their belief in the Respondent's passion for the law, his high ethical standards, and his integrity.

[18] Respondent's counsel referred us to *Law Society of British Columbia v. Ogilvie* [1999] LSBC 17 along with numerous other cases in arguing that the proper penalty should be a fine in these circumstances.

Background

[19] This Panel found that the Respondent had professionally misconducted himself in respect of the Citation issued on September 9, 2004, in regard to the following conduct:

> " That you approved and submitted fraudulent or inflated accounts (the " Accounts") of your client's children to the Reviewer for the months of February and March, 2002 as part of a disbursement to your own Accounts and thereby submitting and representing the Accounts to the Reviewer as valid and proper for the purposes of obtaining public funding for the payment of the Accounts when you either knew that the Accounts were not valid and proper or you were reckless and careless or wilfully blind as to whether the accounts were valid and proper or you were grossly negligent or negligent in aggravated circumstances in approving the Accounts as being valid and proper in the circumstances where you had made an agreement or given assurances to your client in relation to providing employment to members of the client's family which would create a substantial monthly income flow to your client's family and in circumstances which required an inquiry and investigation by you into the validity and propriety of the Accounts."

[20] The facts upon which the finding of professional misconduct were made are set out in our decision on Facts and Verdict. We will not repeat the facts in this decision as they are fully canvassed in our earlier Reasons.

[21] We do note, however, that in making our findings, we examined all of the Respondent's conduct and found that it amounted to professional misconduct. We, the Panel, cannot step into the Respondent's mind to determine what he actually thought when the events were occurring. We can only draw conclusions from events and his actions. We concluded that the Respondent failed to meet the standard required of lawyers in British Columbia when he failed to properly monitor Didar Reyat's and Prit Reyat's accounts. The relationships between the Respondent, the funder, his client and the client's children (his employees) were

fraught with danger. When subsequent events raised red flags, he ignored them even though he ought to have concluded that these accounts were suspect. We found there were an abundance of warning signs that should have alerted him to pay particular attention to the children's accounts. We found that he failed to heed those warning signs in circumstances where such failure amounted to professional misconduct.

[22] The question is, how is the Respondent to be penalized?

Discussion

[23] We instruct ourselves that the Benchers of the Law Society of British Columbia are required first and foremost to govern the legal profession in the best interests of the public.

[24] Section 3 of the *Act* sets out the objects and duty of the Law Society, as follows:

> (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.

[25] We adopt the words of Gavin MacKenzie in his publication *Lawyers and Ethics: Professional Responsibility and Discipline* (Carswell, 1993) where he sets out, under the general heading " Purposes of Discipline Proceedings" , the following:

> " The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession."

[26] As noted previously, both counsel referred us to the decision of the Hearing Panel on penalty concerning the decision of *Law Society of British Columbia v. Ogilvie (" Ogilvie"*) [1999] LSBC 17.

[27] We have considered all the submissions of the Law Society and of counsel for the Respondent. We have carefully reviewed the various decisions of previous panels of Benchers to which we have been referred.

[28] We agree with both counsel that *Ogilvie* has become the touchstone for analysis of penalty in the regulation of lawyers in British Columbia.

[29] In the *Ogilvie* decision, that Panel listed a number of non-exhaustive factors which were considered worthy of general consideration in disciplinary dispositions. The *Ogilvie* list of factors is useful to focus the discussion:

> (a) The nature and gravity of the conduct proven;
>
> (b) The previous character of the Respondent including details of any prior disciplinary proceedings;
>
> (c) The age and experience of the Respondent;

(d) The impact of the Respondent's conduct;

(e) Advantage gained, or to be gained by the Respondent;

(f) Number of times the offending conduct occurred;

(g) Whether the Respondent has acknowledged the misconduct and the presence of other mitigating circumstances;

(h) The impact on the Respondent of criminal or other sanctions or penalties;

(i) Impact of the proposed penalty on the Respondent;

(j) The need for specific and general deterrence;

(k) The need to ensure public confidence in the integrity of the profession; and

(m) Range of penalties imposed in similar cases.

[30] In considering the appropriate penalty, we have considered all the factors set out above and, in addition, the numerous other penalty cases cited to us by counsel.

[31] We have considered the evidence of the Respondent's witnesses and his letters of support, all of which were from lawyers who appeared to have full knowledge of the facts found by the Panel and some of whom worked with or against the Respondent on the Reyat brief. Despite knowledge of the circumstances which underlay the findings of professional misconduct by this Panel, these lawyers are universally and fully supportive of the Respondent. In addition, we have also taken into consideration the Respondent's prominent reputation in our profession when making our decision.

[32] We consider the most relevant factors taken from *Ogilvie* and applied to this case to be those set out below.

The nature and gravity of the conduct

[33] In considering the nature and gravity of this conduct, we note that the circumstances complained of in the citation are composed of a continuum of events starting in September, 2001, with the hiring of Didar Reyat, and leading up to the meeting on April 18, 2002, and the subsequent telephone conversation between McKinnon, Sears and Martin. The Respondent, after being briefed about the major problem with the children's accounts, said that he didn't understand what the big fuss was about, as the amount of the Reyat accounts were two to three percent of the overall monthly accounts. The Agreed Statement of Facts relates the following:

" There was silence and then Sears said " Because it's public funds, David" .

[34] Penalty in the instant case is assessed on the basis of conduct that is a single event, albeit that its etiology evolved over the course of approximately eight months.

[35] We consider the Respondent's conduct to be most grave, in that it impacted mightily on the public's perception of lawyers' standard of conduct in a case that was of wide public interest, was publicly funded, historic and unprecedented in nature and, in that the Respondent decided to manage the brief in an unusual way, by hiring family members of the accused in a risk-filled employment arrangement. As pointed out by Ducharme in the January 8, 2002 meeting where the Respondent floated the idea that the accused's

wife should also be employed by DISR, " You don't pay your client (sic) for the privilege of representing them."

[36] Respondent's counsel argued that there was no loss, in financial terms, because the public funder never paid out money on the fraudulent accounts. We find that it is no answer to say that the public funder did not suffer a loss. We accept that there was no financial " loss" to the government with respect to the children's accounts. What was, in fact, really lost was public confidence in the legal system. The legal system cannot function in a free and democratic society unless the system can provide for proper legal defence of those persons accused of crime. In the Air India case, the public was called upon to pay through a government funding mechanism, for the defence of the accused persons, to a never-before experienced degree and in a never-before experienced methodology. The Respondent breached his duties in this relationship, resulting in the potential to undermine the integrity of the justice system.

[37] Respondent's counsel advanced the argument that the Respondent took the Reyat brief, and continued to act, out of a sense of professional duty to the accused and in this way, strove to protect and preserve the rights and freedoms of Reyat. We find, however, that one's professional duty to one's client is not open-ended and endless. We note the conduct of the other eight lawyers who were involved in the Reyat defence team. We remind ourselves that of the ten lawyers on the team, eight felt compelled to resign from the case, when the children's fraud became apparent.

[38] Respondent's counsel argued that the Respondent's commitment to the Reyat brief was huge and all-consuming. But those eight lawyers made the same commitment to the Reyat defence that the Respondent did, and when they resigned, they were likely left with a gaping hole in their practices, too. Those lawyers also must have recognized a duty to the accused to carry out their commitment to him, but also recognized that that duty is circumscribed by other obligations.

[39] Some of those duties are set out in the *Professional Conduct Handbook*, particularly in Chapter 1. Sometimes the duties are not harmonious and can conflict. For example, the duty to one's client may conflict with duties to the state. We find that in this case, the Respondent had a duty to the government funder commensurate with his duty to the accused. It is not, therefore, true to say that as long as your clients have confidence in you, you are obliged to continue to act for them. A lawyer's responsibility and duty to act for a client who wants the retainer to continue, is tempered by all the lawyer's ethical duties, to all his existing clients, to those funding those clients, and to clients who might want to retain him. The challenge is to balance those duties, which the Respondent failed to do.

[40] Respondent's counsel also argued that the Respondent can be excused for his lapse in attention, due to his workload, because he had professional duties, both in taking on the Reyat brief, and in refusing to jettison his existing client obligations.

[41] In answer to that argument, we find that lawyers, in managing their practices, are not free to take on limitless numbers of cases, nor can they continue to act where they cannot give their best and full attention to each and every brief under their control. We appreciate that sometimes, briefs become bigger and/or more problematic than expected, and sometimes there are overlapping emergencies that stretch resources. But that cannot provide an excuse in this case, since the Reyat brief was, from the beginning, recognized as a huge commitment and likely to grow bigger by the day. We note the Respondent's own witnesses described the workload on other aspects of the Air India case and how their other cases had to be offloaded to other counsel.

[42] We note that if the Respondent did not have the time to do a good job for his existing clients, in the event that he took on the Reyat brief, then perhaps he should not have taken it on, or alternatively, he should have made arrangements to transfer some of his other briefs, or arrange delays in conducting those

briefs, or hired more staff to do the work required.

[43] These were options for the Respondent, which he chose not to follow, just as he did not hire support staff to delegate the work left undone. He must bear the responsibility for those choices, and their consequences, the lack of supervision of the accused's children, his employees.

The Previous Character Age and Experience of the Respondent

[44] We accept unconditionally that the Respondent's previous professional character over some 26 years of professional practice is exemplary and that he is an experienced and eminent criminal lawyer.

[45] The Respondent's resume cannot detract from the gravity of the Respondent's conduct. To put it simply, the Respondent is a gifted lawyer. He has a vast amount of experience and intellectual capacity. But the nature of the conduct remains unabated. It is no excuse to say " I am ethical in all other situations."

The Impact of the Respondent's Conduct on the Victim

[46] In this case, we consider the public, in the guise of the public funder, to be the victim.

[47] We note that the definition of " victim" was discussed in *Berge* 2005 LSBC 53 where the penalty decision was rendered after argument on this case was concluded. The Panel in *Berge* noted that the *Ogilvie* decision does not provide us with a definition of the word " victim" . We find, however, that the *Ogilvie* factors are not exhaustive and are organic in nature. We adopt the reasoning in *Berge*, that is that the word " victim" may be given its general meaning rather than used as labelling for an individual or group. In this case, we find that it is proper to consider the word's general broader meaning, and thus, " victim" can be applied to mean the " the public" who are the real source of all monies by which the government, including the justice system, operates and the source of all funding in the Reyat brief.

The Impact of the Proposed Penalty on the Respondent

[48] The Respondent undoubtedly has a busy practice, and if he is suspended from practice, this will have an impact on him as well as on his other clients. However, we determine that, when weighing the harshness of the penalty to be imposed on the Respondent and indirectly on his other clients against the public interest, and taking into account the other factors we have discussed, we must conclude that the public interest takes precedence.

Advantage Gained or to be Gained by the Respondent

[49] We have taken into account that there are many kinds of " gain" financial, augmentation to one's resume, reputation and status. In this case we find that, by keeping the Reyat brief and keeping his client happy, he kept the brief and gained the more intangible benefits to be had by lawyers taking on notorious cases. This encouraged him to ignore the brewing problems with the accused's children's employment and blinded him to his other ethical duties to the government funder.

[50] We do accept that, unlike many of the Legal Services Society cases, this is not a case where the Respondent can be accused of being motivated by any financial gain.

[51] We have been told, and accept, that the Respondent requested that the government deduct the entire amount of the accounts from its remittances to DISR and that the children, Didar and Prit Reyat, were never paid for any portion of their fraudulent accounts.

[52] We note that, after Mr. McKinnon brought the subject up at the meeting between DISR team

lawyers on April 18, 2002, and after the meeting between the lawyers the next day, the Respondent did accept that the children's accounts were fraudulent and that it was his responsibility for his failure to detect that fraud was a problem, and he did take steps to deal with the children's fraudulent accounts although we note that he was left with no other alternative given that five of the team lawyers resigned from the brief on April 29, 2002 and three others followed suit a few days later.

Whether the Respondent has Acknowledged the Misconduct and the Presence or Absence of Other Mitigating Circumstances

[53] In his evidence before us, the Respondent acknowledged that he took full responsibility for his behaviour and that he was negligent in failing to detect the fraud, and he has expressed to us his obviously heartfelt acceptance of responsibility and regret for the conduct of which the Law Society complains.

[54] We have been told and accept, that from the moment of the formal complaint, the Respondent has co-operated fully with the Law Society.

The Impact upon the Respondent of Criminal and Other Sanctions

[55] The Respondent has suffered wide media excoriation, some of it misleading and selective. We can well imagine how hurtful this must have been to him and his family. The notoriety would likely have had a negative impact on his personal and professional life. We consider the fact that some of the media coverage has been unfair to be a mitigating circumstance, when considered in light of the Respondent's early acceptance of responsibility for the misconduct and his co-operation with the Law Society.

The Need for Specific and General Deterrence

[56] We fully accept that the Respondent's misconduct is an event that will not likely be repeated. We fully accept the Law Society's submission that the Respondent is an excellent lawyer in all respects and that there is no suggestion that he will not in the future continue to be so.

[57] We also fully accept both counsel's submission that specific deterrence is not relevant in our considerations, except to this extent. That is, that we consider the real issue in this case to be centred on the Respondent's failure to be vigilant in circumstances where high vigilance was called for, especially when he was, and is, a senior member of the Bar.

The Need to Ensure the Public's Confidence in the Integrity of the Profession

[58] When all is said and done, the factor that is the most important consideration in the case before us, after taking into account all the evidence and submissions and all the previously recited factors from *Ogilvie* is the need to ensure the public's confidence in the integrity of the profession. This is because it is in the public's interest that lawyers have, and be seen to have, the highest integrity, in even the most trying circumstances and that lawyers recognize that their ethical responsibilities are not simply to their client but are multifaceted. The public and society in general need lawyers of high ethical standards to serve them. Our society and the justice system that is its highest hallmark cannot function without them.

[59] We accept and adopt the reasoning in *Law Society of British Columbia v. Dent* [2001] LSBC 36, where the Panel commented on the role of the Law Society in imposing penalty in regulating the profession, as compared to sentencing in criminal proceedings:

> " Law Society discipline proceedings must focus on the public interest in ensuring that lawyers

maintain high professional standards, not on punishment or retribution. Although an appropriate penalty may have punitive effect, the primary goals of the penalty process are the protection of the public and the maintenance of public confidence in both the profession itself and the Law Society as regulator. I am reassured of this by the words of Sir Thomas Bingham, M.R., in the case of *Bolton v. Law Society* [1994] 2 All E.R. 486, at p. 492.

Because orders made by tribunals are not primarily punitive, it follows that consideration which would ordinarily weigh in mitigation and punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in any appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be so, the consequences for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price."

Similar cases

[60] We agree with Respondent's counsel that the particular circumstances of this case are so unique that there are no similar cases on the facts. However, we have reviewed all cases provided by both counsel and we find that the so-called " Legal Services billings cases" can provide some guidance in determining the appropriate penalty.

[61] *Law Society of British Columbia v. Mah Ming* [2000] LSDD No. 22 involved a lawyer who professionally misconducted himself by submitting to the Legal Services Society accounts that he had failed to ensure were true and accurate. The accounts were submitted through error and lack of care, partly as a result of misunderstanding the tariff and partly due to failure to attend to office accounting through overwork and personal stress. The Panel ordered that Mah Ming be suspended for two months, where he had already voluntarily resigned from practice for over one year and had recently ceased membership. He was also ordered to pay costs of the proceedings.

[62] We consider the instant case to be more serious than *Mah Ming* because the Reyat brief was so unusual, unprecedented and historic, and because the Respondent chose to take on the accused's children as employees in circumstances that required him to exercise a high degree of diligence to supervise them.

[63] *Law Society of British Columbia v. Dunn* [1995] LSDD No. 254 involved an incompetent lawyer who recklessly, and inaccurately completed Legal Services Society eligibility forms and then submitted improper accounts based on those forms. The respondent was a sole practitioner at the time, with a heavy work load and no staff, and suffering from alcohol abuse. That Panel found him to be a lawyer of integrity, a

hard worker and compassionate. That Panel ordered that Dunn be suspended for six months, ordered him to reimburse the Legal Services Society and to pay Law Society costs of $14,400.00. Noteworthy is the finding that the respondent had also under billed the Society to his detriment.

[64] We conclude that the subject misconduct is a unique event in the Respondent's professional career, and is highly unlikely to be repeated, either by this Respondent or in similar facts, by any other. However, the general principles which this case brings into bold relief are firstly, that the public must feel that the integrity of the profession is being protected and secondly, it is in the public's interest to be served by a profession whose members recognize all of their ethical responsibilities, including the responsibility to public funders.

Costs

[65] The issue of costs is one of some difficulty. We are mindful of the principle enunciated in *Law Society of British Columbia v. McNabb* [1999] LSDD No. 54 that the Law Society as a general rule is entitled to full indemnity. *McNabb* however, differs from this case in that the Respondent McNabb made no early acknowledgement of responsibility, gave no investigative assistance to the Law Society and the matter went to a full hearing, without significant agreements as to facts.

[66] Here, the Respondent acknowledged his negligence at an early stage. Both counsel worked mightily to present us with an extensive Agreed Statement of Facts including a fulsome description of the Reyat brief, the financial arrangements that funded it, and the facts and evidence upon which the Law Society founded its citation, which were complicated and difficult. We find that we cannot impose the entire burden for the costs of the disciplinary proceeding upon the Respondent.

Conclusion

[67] After considering all of the facts and circumstances in this matter, including our decision on Facts and Verdict, the submissions and cases referred to by both counsel, consideration of the Respondent's unblemished professional record for over 26 years, and the impact upon him of the penalty we are imposing, we have reached the following conclusion and order that the Respondent:

1. be reprimanded;

2. be suspended from the practice of law for a period of six months, to commence on a date to be agreed upon by counsel. However, the suspension should commence no later than June 1, 2006;

3. pay the costs of these proceedings, in the sum of $35,000.00.