2006 LSBC 22
Report issued: May 26, 2006
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and an application for a stay of proceedings concerning

David John Martin

Applicant

Decision

Application date: May 23, 2006

Bencher: Gavin Hume, Q.C.

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

[1] On May 16, 2006, the Applicant made an application for a stay of proceedings, pursuant to Rule 14(3) of the Law Society Rules. This application followed a determination by a Hearing Panel of the Law Society that found the Applicant guilty of professional misconduct and an order by the same Hearing Panel that the Applicant:

(a) be reprimanded;

(b) be suspended from the practice of law for a period of six (6) months to commence on a date to be agreed upon by counsel. However, this suspension should commence no later than June 1, 2006; and

(c) pay the costs of these proceedings in the sum of $35,000.

[2] Concurrently a Notice of Application for Review of the suspension was made under Section 47 of the *Legal Profession Act*, SBC 1998, c.9.

[3] The application for a stay is with respect to the six month suspension which is to commence no later than June 1, 2006.

[4] Upon receipt, I reviewed the application and the materials filed in support. Those materials included a submission by Mr. Wood dated May 16, 2006, an Affidavit of Mr. Martin sworn May 16, 2006, and a Book of Authorities which included *RJR McDonald Inc.* v. *Canada (Attorney General)* (1994) 111 D.L.R. (4th) 385 (S.C.C.) and the Decision of a Bencher in an application for a stay of proceedings in *Law Society of BC v. Welder* 2005 LSBC 52 wherein a stay was granted at the request of Mr. Welder. While *RJR McDonald (supra)* involved a Charter issue, it is my view that it is appropriate to follow the tests as articulated in that decision, as did the Bencher in the Welder decision.

[5] *RJR McDonald (supra)* reviewed a three-stage test for Courts to apply when considering an application for either a stay or an interlocutory injunction. In general terms it describes the test as follows at page 400:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[6] After a review of the materials, I advised counsel that I had concluded that the second and third tests had been met but that I wished submissions on the first test, which submissions were made during the course of a conference call with counsel on May 23, 2006. After hearing the submissions, I concluded that a stay should be granted with reasons to follow. These are my reasons.

[7] The first test in *RJR McDonald (supra)* is whether or not there is a serious question to be tried. This test is discussed in pp. 401 to 405 of the decision. It is clear that the threshold to meet this test is a low one. All that is required is a preliminary assessment of the merits of the application. A Bencher hearing the application must only be satisfied that the application is " neither vexatious nor frivolous." It is clear that I should not engage in an extensive review of the merits. That is left to the Benchers on Review, where an opportunity is available for both parties to canvass all of the issues in an appropriate fashion.

[8] After hearing submissions from Mr. Wood, I concluded that the application under Section 47 was not frivolous or vexatious. Mr. Wood outlined in some detail the facts before the original Hearing Panel, on the verdict, and the grounds for review of the suspension penalty as he has presently formulated them.

[9] He identified several grounds for review. In view of the first test in *RJR McDonald (supra)*, I will only comment briefly on one ground. In simple terms, that ground was based on the proposition that neither counsel had argued that Mr. Martin had acted either fraudulently or dishonestly, as the facts did not support such a finding. However, the thrust of the Hearing Panel's decision was, in effect, to find that Mr. Martin had acted either fraudulently or dishonestly. Because suspension of the duration imposed was appropriate in cases where the lawyer had acted dishonestly or fraudulently, the penalty imposed by the Panel was inappropriate in a case where neither fraud nor dishonesty were argued or established.

[10] In addition, Mr. Wood reviewed other submissions that he intended to make. After listening to Mr. Wood's submissions, I concluded that the application was not frivolous or vexatious, thereby meeting the first test.

[11] As I indicated above, I reached the conclusion, from my review of the materials, that the second and third tests in *RJR McDonald (supra)* had been met.

[12] The second test is whether or not irreparable harm would be suffered by the Applicant. As the decision indicates, this refers to the nature of harm rather than its magnitude, and is harm that cannot be measured, generally speaking, in monetary terms.

[13] The third test involves the balance of inconvenience and the public interest. To paraphrase the decision in *RJR McDonald (supra)*, " the question becomes one of determining which of the parties will suffer the greater harm from the granting or refusal of the stay application," pending a decision on the merits of the review under Section 47. In considering this issue, *RJR McDonald (supra)* made it clear that I should also consider harm that will not be directly suffered by one of the parties to the stay application.

[14] *RJR McDonald (supra)* indicates that the concept of inconvenience should be widely construed in Charter cases. In my opinion, given the role of the Law Society, under Section 3 of the *Legal Profession Act (supra)*, the same approach should be taken in stay applications, pursuant to Rule 14(3).

[15] The second and third tests under *RJR McDonald (supra)* were met for the following reasons:

(a) In his Affidavit, the Applicant outlined his involvement in a number of criminal cases. In particular, he is intimately involved in and has at this point in time exclusive responsibility for, or aspects of, three very significant cases. If the Applicant is suspended on June 1, 2006, he will be required to instruct other counsel, likely resulting in a delay or adjournment of at least two of the cases. This will have the inevitable effect on the schedules of the Courts, other counsel and, to the extent witnesses are required, their schedules also.

(b) This may also potentially negatively affect the Applicant's clients. They will either have to delay the determination of their issues or instruct other counsel, who may not be able to obtain the same level of knowledge with respect to the file that the Applicant has in the time available.

(c) I also note that the public is not at risk with respect to the delay in the Applicant's suspension. It is very clear that he is well-respected counsel and has a lengthy history of an unblemished practice of law.

(d) In addition, and significantly, the Applicant undertook that he will not accept other retainers of a complex nature that would be difficult to transfer to other counsel without first taking steps to engage associate counsel who will be in a position to assume conduct of such matters during any suspension that may still be imposed following a review of the penalty.

(e) Last of all, I noted that on page 184 of the Transcript of the proceedings before the Hearing Panel on the penalty phase, Mr. Berardino, on behalf of the Law Society, indicated that if the Panel was inclined to order a suspension, he consented to Mr. Wood making an application to that Panel as to when the suspension should begin. That appears to have been overlooked by the Hearing Panel.

[16] For the foregoing reasons, I grant the stay.