2006 LSBC 44
Report issued: November 17, 2006
Citation issued: November 7, 2005

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

Justis Raynier

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: October 18, 19, 2006

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

Counsel for the Law Society: Gerald Cuttler
Counsel for the Respondent: Paul Jaffe

Background

[1] On November 7, 2005, by direction of the Chair of the Discipline Committee of the Law Society of British Columbia, the Director of Professional Regulation issued a citation against the Respondent, pursuant to the *Legal Profession Act* (the " *Act*") and Rule 4-13 of the Law Society Rules (the " Rules"). This Hearing Panel was directed to inquire into the Respondent's conduct. The nature of the conduct to be inquired into was set out in the amended Schedule attached to the citation and in particular Count 2:

> That you became bankrupt in circumstances where your wilful neglect of your creditors, in particular, the Government of Canada, your financial irresponsibility or your personal extravagance contributed to your bankruptcy.

[2] At the commencement of the hearing, counsel for the Respondent, Mr. Jaffe, admitted service of the citation and to the amended Schedule pursuant to Rule 4-30. Mr. Cuttler, counsel for the Law Society, indicated that the Law Society was not proceeding on Count 1 of the amended Schedule to the citation; therefore, Count 1 was withdrawn.

[3] Mr. Jaffe did raise a concern regarding the form of the citation, which was marked as Exhibit 3 in these proceedings. The original citation deposed:

a) whether you have done one or more of the following:

i) professionally misconducted yourself;

ii) conducted yourself in a manner unbecoming a member;

iii) contravened the *Legal Profession Act* or a rule made under it;

iv) incompetently carried out duties undertaken by you in your capacity as a member of the Society.

[4] Mr. Jaffe submitted that it was unfair to the Respondent to have all of these allegations raised when the Law Society indicated that they were only proceeding with the allegations of conduct unbecoming a member. Mr. Cuttler acknowledged, on behalf of the Law Society, that he was only proceeding under (ii) and (iii) of the citation and therefore the citation was amended by striking out (i) and (iv).

Issues

[5] The issues in this hearing are as follows:

(a) Does the admitted conduct of the Respondent as set out in the Agreed Statement of Facts, which was marked Exhibit 1 in these proceedings, constitute conduct unbecoming a member as defined in Rule 3-45(3)(a) of the Law Society Rules?;

(b) If the admitted conduct does not fall within Rule 3-45(3)(a), does it still constitute conduct unbecoming a member of the Law Society pursuant to Section 38(4)(b)(ii) of the *Legal Profession Act*, SBC 1989, c. 9?

Agreed Statement of Facts

[6] Both counsel agree that there are no material facts in dispute in this matter. The Agreed Statement of Facts sets out the alleged conduct of the Respondent that the Law Society claims violates Rule 3-45(3)(a) and thus constitutes conduct unbecoming a lawyer.

1. The Respondent is 64 years old and has been a member of the Law Society since January 11, 1977.

2. On August 28, 2001, the Respondent advised the Law Society that he had been served with a Petition into Bankruptcy in May 2001 by CRA (Revenue Canada) over a tax debt in the amount of $1.3 million.

3. A Proposal made by the Respondent was rejected by CRA. On December 19, 2001, the Supreme Court of British Columbia made a Receiving Order whereby, *inter alia*, the Respondent was adjudged bankrupt. Deloitte Touche was appointed as trustee.

4. On July 17, 2003, the Respondent sent a letter to the Law Society which enclosed a copy of the Trustee's Section 170(1) Report and correspondence between the Respondent and the Trustee.

5. The cause of the Respondent's bankruptcy was his intentional failure to pay income taxes for approximately 27 years from about 1973 to 2001.

6. During the years that the Respondent did not pay income taxes, he filed income tax returns but did not remit the taxes owing.

7. The Respondent spent the money which he did not pay in income taxes. Among other things, he and his wife enjoyed extensive vacations both within Canada and abroad.

8. During the years that the Respondent did not pay income taxes, he did not provide any correspondence to CRA (other than his tax returns), setting out his position regarding his reasons for not paying income tax.

9. CRA did not take steps to compel payment of the Respondent's income taxes until around 1990 - 1991 when it garnished his general bank account. From time to time thereafter, CRA would garnish the Respondent's general bank account every 3 to 5 years. On May 18, 2001, CRA garnished the Respondent's Canada Trust account for approximately $5,500.00. In 2001, CRA also attempted to seize the Respondent's office equipment but its attempt was unsuccessful.

10. The total amount of income taxes which the Respondent intentionally failed to pay is approximately $640,000.00. In addition, CRA has assessed penalties and interest against the Respondent of over $936,000.00, resulting in a total debt claimed by CRA of over $1,500,000.00.

11. The Respondent began paying income taxes covering the period from December 2001 and has continued to pay his taxes to date.

12. The Respondent remains an undischarged bankrupt. He does not have sufficient assets to pay fifty cents on the dollar to his creditors. To date, CRA and the Trustee have indicated that they would oppose an application by the Respondent for a conditional discharge.

13. On November 7, 2005, the Law Society issued a citation against the Respondent. The citation was delivered by registered mail on November 9, 2005.

14. The documents in the Joint Book of Documents are authentic and were sent and received in the ordinary course of the persons indicated to be the authors and recipients thereof.

Discussion

[7] Mr. Cuttler elected not to call any evidence on behalf of the Law Society other than the evidence set out in Exhibit 1. His position is that Count 2 of Exhibit 3 is proven beyond a reasonable doubt by the agreed facts set out in Exhibit 1, despite the fact that he is only required to prove his case on a balance of probability.

[8] Mr. Cuttler submits that the definition of " conduct unbecoming a lawyer" in Section 1 of the *Act* and the Rules provides the Benchers with the authority to specifically define any matter, conduct or thing they consider in their judgment amounts to conduct unbecoming a lawyer. Mr. Cuttler takes the position that the Benchers have done just that by creating Rule 3-45(3)(a) which says:

> 3-45(3) An insolvent lawyer who becomes bankrupt has conducted himself or herself in a manner unbecoming a lawyer in either of the following circumstances:
>
> (a) the lawyer's wilful neglect of creditors, financial irresponsibility or personal extravagance contributed to the bankruptcy;

[9] This sub-rule is part of a larger scheme that imposes financial responsibility on members. Rule 3-45 entitled " Insolvent lawyer" deals specifically with the ramifications of insolvency on practising lawyers.

3-45(1) An insolvent lawyer has failed to meet a minimum standard of financial responsibility.

(2) A lawyer who becomes an insolvent lawyer must immediately

(a) notify the Executive Director in writing that he or she has become an insolvent lawyer, and

(b) deliver to the Executive Director

(i) a copy of all materials filed in the proceedings referred to in the definition,

(ii) all information about any debts to a creditor who is or has been a client of the lawyer,

(iii) all information about any debt that arose from the lawyer's practice of law, and

(iv) any other information, including copies of any books, records, accounts and other documentation and information in his or her possession that are relevant to the proceedings referred to in the definition that the Executive Director may request.

(3) An insolvent lawyer who becomes bankrupt has conducted himself or herself in a manner unbecoming a lawyer in either of the following circumstances:

(a) the lawyer's wilful neglect of creditors, financial irresponsibility or personal extravagance contributed to the bankruptcy;

(b) the lawyer fails or refuses to take reasonable steps to obtain a discharge from the bankruptcy within a reasonable time.

(4) An insolvent lawyer must not operate a trust account except with

(a) the permission of the Executive Director, and

(b) a second signatory who is a practising lawyer, not an insolvent lawyer and approved by the Executive Director.

(5) Any lawyer who becomes an undischarged bankrupt must resign any directorship in corporations, including law corporations, in accordance with section 124 of the *Business Corporations Act*.

[10] Subrule (1) has been rescinded since the issuance of the citation, but before the hearing The effect of that subrule was included in a new Rule 3-43.1, but the provision in effect at the relevant time was 3-45(1).

[11] The valid purpose of this legislation is to ensure that members exhibit financial responsibility. If they become insolvent, then they have failed to meet a minimum standard of financial responsibility and, therefore, are no longer entitled to manage the finances of clients through their trust accounts without

supervision.

[12] Rule 3-45(3)(a) sets out three distinct ways that an insolvent lawyer can commit conduct unbecoming a lawyer:

1. in circumstances where the lawyer's wilful neglect of creditors contributed to the bankruptcy;

2. in circumstances where the lawyer's financial irresponsibility contributed to the bankruptcy;

3. in circumstances where the lawyer's personal extravagance contributed to the bankruptcy.

Rule 3-45(3)(a) is therefore a deeming provision.

[13] The Law Society's position is that, if the Panel is satisfied that any one of these circumstances exist, the consequences of such a finding lead inexorably to an adverse finding pursuant to section 38(4) of the *Act*.

[14] The Respondent argues that the Law Society has never made a finding of conduct unbecoming a lawyer unless there is an element of dishonesty or lack of moral turpitude connected to the alleged misconduct. In support of this proposition, Mr. Jaffe relies on Chapter 1 of the Canadian Bar Association Code of Professional Conduct which deals with integrity and in particular:

> Non-Professional Activities
>
> 4. Generally speaking, however, a governing body **will not** be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the integrity of the legal profession or the lawyer's professional integrity or competence.
>
> 5. Illustrations of conduct that may infringe the Rule (and often other provisions of this Code) include:
>
> (a) committing any personally disgraceful or morally reprehensible offence that reflects upon the lawyer's integrity (of which a conviction by a competent court would be *prima facie* evidence);
>
> (b) committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty, e.g., by knowingly making a false tax return or falsifying a document, whether or not prosecuted for so doing;
>
> (c) making an untrue representation or concealing a material fact from a client, with a dishonest or improper motive;
>
> (d) taking advantage of the youth, inexperience, lack of education or sophistication, ill health, or unbusinesslike habits of a client;
>
> (e) misappropriating or dealing dishonestly with a client's money or other property;
>
> (f) receiving money or other property from or on behalf of a client for a specific purpose and failing, without the client's consent, to pay or apply it for that purpose;

(g) knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally;

(h) failing to be absolutely frank and candid in all dealings with the Court or tribunal, fellow lawyers, and other parties to proceedings, subject always to not betraying the client's cause, abandoning the client's legal rights or disclosing the client's confidences; and

(i) failing to honour the lawyer's word when pledged even though, under technical rules, the absence of writing might afford a legal defence.

[emphasis added]

[15] Mr. Jaffe argued forcefully that the Respondent has done nothing dishonest nor is there anything disreputable or disgraceful about his conduct. He argued that the Respondent was engaged in a lengthy course of civil disobedience against the Federal Government by not remitting his income taxes for a period of 28 years. Mr. Jaffe's position is that the Respondent did not break any laws as he complied with the *Income Tax Act* by filing his returns and, further, that he has been cooperative throughout with the Law Society investigation, which commenced in July of 2001.

[16] The Respondent also contends that the alleged misconduct does not fall within the parameters of Rule 3-45(3)(a) because the Law Society has only proven that the Respondent wilfully neglected only one creditor, CRA, whereas the subrule clearly refers to the plural " creditors" .

[17] Finally, the Respondent argues that a finding of conduct unbecoming a lawyer in these circumstances would be a violation of his Section 2 and Section 7 Charter Rights and, therefore, the Panel should *read down* the provisions of Rule 3-45(3)(a) so that this set of circumstances falls outside the scope of behaviour intended to be regulated by the said Rule.

Verdict

[18] The Panel has no hesitation in finding that the Respondent intentionally failed to remit income taxes owing to the Government of Canada from the time that he became a member of the Law Society of British Columbia up to and including 2001, and this failure was the direct cause of his bankruptcy. (See paragraph 5 of Exhibit 1 Agreed Statement of Facts.)

[19] The Panel is satisfied on any standard of proof that these intentional acts of defiance on the part of the Respondent fall within the deeming provisions of Rule 3-45(3)(a). The Respondent has conducted himself in a manner unbecoming a lawyer because his bankruptcy occurred as a direct result of this refusal to pay CRA. (See paragraph 2 of Exhibit 1 Agreed Statement of Facts.)

[20] Having made this finding the Panel need not make a determination as to whether the Respondent's financial irresponsibility or personal extravagance contributed to the bankruptcy.

[21] The Panel notes from Tab 3A of the Joint Book of Documents, which is marked Exhibit 2 in these proceedings, that the Respondent had at least seven other unsecured creditors at the time he was petitioned into bankruptcy and that, by his own admission, they have been hurt by his bankruptcy.

[22] The consequences of the Respondent's conduct has not only impacted on his ability to practise law, but has caused damage to other innocent members of the public.

[23] The Panel has also determined that it need not adjudicate on whether the Respondent's conduct was dishonest or lacked moral turpitude. The Benchers have already determined this conduct to be unbecoming a lawyer and all the Panel need do is determine whether the Law Society has proven that the Respondent's conduct fits within this specific definition. This we have already done in Paragraph [19].

[24] The Panel finds that although Rule 3-45(3)(a) does speak of " creditors" plural, the Rule is designed to foster financial responsibility and therefore the wilful neglect of one creditor which leads to bankruptcy is sufficient. The Panel notes the words of Cartwright J. (later C.J.C.) in *McKay v. R.,* [1965] S.C.R. 798, 53 D.L.R. (2d) at 532, quoted in *Hoem v. Law Society of British Columbia,* 1985 Carswell BC 128 at page 11:

> All words, if general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular, that is, they must be understood as used within reference to the subject matter in the mind of the legislature and limited to it.

[25] In any case, the *Interpretation Act*, RSBC 1996, c. 238, section 28(3) is as follows:

> (3) In an enactment words in the singular include the plural, and words in the plural include the singular.

[26] Finally, the Panel finds that neither Section 2 nor Section 7 of the *Canadian Charter of Rights and Freedoms* (" *Charter"*) have been violated by the Law Society investigation or these proceedings.

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.
>
> ...
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[27] The Respondent's argument with respect to Section 7 of the *Charter* is that Rule 3-45(3)(a) and/or the statutory definition of conduct unbecoming a lawyer are so vague so as not to clearly delineate what kind of conduct is to be punished. Such provisions are a violation of the principles of fundamental justice and therefore contrary to Section 7 of the *Charter*. In support of this proposition, Mr. Jaffe quotes the following paragraph from *Pierce v. Law Society of British Columbia*, [1993] B.C.J. No. 1031 at page 13, Tab 10 of the Joint Book of Authorities:

> In my view the public interest or the best interest of the public is capable of being given a constant, settled or workable meaning. When the definition of conduct unbecoming is read in context, the best interest of the public clearly refers to the interest of the public in matters of conduct and competence.

> There are in existence guidelines on the question of what constitutes the public interest. The guidelines discussed provide a basis for legal debate within which the benchers are able to balance competing interests. It follows that the phrase " best interest of the public" is not impermissibly vague. The benchers are not entitled, as suggested by the petitioner, to pursue their " personal predilections" . Legal debate can occur within the framework of the guidelines defining the public interest. There is no danger of a " standardless sweep" when the benchers consider whether the conduct of a member is contrary to the best interests of the public. The same framework also provides guidance for legal debate when considering the definition of " conduct unbecoming" in its broader aspects.

[28] With the utmost respect to Mr. Jaffe, the Panel finds that the very existence of Rule 3-45(3)(a) is so that there can be no doubt as to what constitutes conduct unbecoming a lawyer in this situation. This Panel takes comfort in the words of the Court of Appeal quoted by Mr. Jaffe and in particular, the following words:

> The Benchers are not entitled, as suggested by the Petitioner, to pursue their personal predilections.
>
> Surely the existence of this Rule is to do away with any arbitrariness on the part of a Bencher or panel of Benchers deliberating on a citation like the one before this Panel.

[29] The Respondent argues that a finding of conduct unbecoming a lawyer in his circumstances would be a violation of his fundamental freedom of conscience as protected by Section 2 of the *Charter*. In support of this position he has submitted a number of written articles set out in Exhibit 5 the " Agreed Statement of Facts Part II" . Both counsel agreed at the outset that this exhibit was not tendered for the truth of the contents but merely to establish that they had been said and written. In addition, the Respondent gave evidence of his participation in numerous social protests over the years, and he was of the view that his course of civil disobedience was analogous to that of Mahatma Ghandi and Henry David Thoreau.

[30] The Panel finds that this position is wholly without merit. The Respondent admitted that the $640,000.00 of unpaid income taxes was spent entirely on himself and his family. The Respondent admitted that he never tried to legally challenge the income tax assessments or the validity of the legislation that allowed for the assessments. The Respondent admitted that he was aware that Income Tax remittances were also intended for the Provincial Government but provided no evidence of his dislike or civil disobedience towards this level of government. The Respondent admitted that he did not put any money aside to deal with CRA, although he knew, at least as far back as 1990, that he was going to face certain consequences for his wilful acts some day. The Respondent admitted that he was aware throughout that bankruptcy could be the result of his refusal to pay income taxes. He admitted that his bankruptcy has hurt other innocent creditors. On the strength of these admissions, the Panel has no difficulty concluding that the Respondent's motives for not paying his income taxes were more self-serving than they were an expression of his conscientious objection to the Federal Government.

[31] This Panel finds that the Respondent has contravened Rule 3-45(3)(a) by becoming bankrupt in circumstances where his wilful neglect of a creditor, in particular, the Government of Canada, contributed to his bankruptcy.