2007 LSBC 07
Report issued: January 17, 2007
Citation issued: June 30, 2004

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a section 47 Review concerning

Howard Raymond Berge, Q.C.

Applicant

Decision of the Benchers on Review

Review date: October 12, 2006

Quorum: David Zacks, Q.C., Chair, Gavin Hume, Q.C., Bruce LeRose, Q.C., Barbara Levesque, Thelma O'Grady, Dirk Sigalet, Q.C., Richard Stewart

Counsel for the Law Society: Herman Van Ommen
Counsel for the Applicant: Christopher Hinkson, Q.C.

Introduction

[1] On June 30, 2004, the Law Society issued a citation (the " Citation") against Howard Raymond Berge (the " Applicant").

[2] The Citation contained a number of allegations concerning the Applicant, including the allegation that he conducted himself in a manner unbecoming a member of the Law Society.

[3] The Citation attached the particulars of the Applicant's conduct that the Law Society alleged amounted to conduct unbecoming a member, namely:

> On October 2, 2002, after consuming a substantial amount of alcohol just prior to driving a motor vehicle and then causing an accident by driving without due care and attention you removed an open can of beer from your car to dispose of it or you acted in a manner that made it appear as if you intended to dispose of it and you used mouthwash prior to the arrival of the police in order to mask the smell of alcohol on your breath.

[4] On July 14, 2005, a hearing panel of the Law Society (the " Hearing Panel") found the Applicant guilty of conduct unbecoming (the " Hearing Decision").

[5] On December 21, 2005, as a consequence of the Hearing Decision, the Hearing Panel ordered that the Applicant:

(a) be reprimanded;

(b) be suspended from the practice of law for a period of one month, to commence on a date to be agreed upon by counsel;

(c) pay the costs of these proceedings as agreed upon by counsel and deducting from the total costs the following:

(i) the reasonable costs incurred by the Applicant as a result of the memorandum sent to a member of the Panel by a staff member of the Law Society.

(Tab 18 of the Record, Decision of the Hearing Panel on Facts and Verdict, and Penalty)

(the " Penalty Decision").

[6] The Applicant has applied to the Benchers for a Review on the record of both the Hearing Decision and the Penalty Decision, pursuant to Section 47 of the *Legal Profession Act*.

[7] The Review on the record was held on October 12, 2006, before a quorum of Benchers.

[8] These reasons set out the decision of the Benchers on the Review.

THE HEARING DECISION

Findings of Fact

[9] The Hearing Panel made the following findings of fact:

1. the Applicant did consume a substantial amount of alcohol prior to driving;

2. the Applicant did cause an automobile accident by driving without due care and attention;

3. following the accident, the Applicant did use mouthwash so that he did not have to undergo a breathalyzer demand;

4. following the accident, the Applicant tried to dispose of a partially consumed can of beer that was in his possession so that he could avoid the police relying on its presence in the Applicant's vehicle as a ground for:

i) making a breathalyzer demand;

ii) determining that there were grounds to charge the Applicant under the relevant provisions of the *Liquor Control and Licensing Act*.

5. the Applicant's attempt to dispose of the open can of beer and his consumption of mouthwash were deliberate and conscious efforts to thwart any police investigation or police demand for a breathalyzer.

Verdict

[10] The Hearing Panel referred to, and considered, the Canons of Legal Ethics, the Canadian Bar Association *Code of Professional Conduct* and the reported decision of *Law Society of BC v. Watt,* [2001] L.S.D.D. No. 45 in order to answer the question of whether the Applicant's conduct, based on those findings

of fact, constituted " conduct unbecoming a lawyer."

[11] The Hearing Panel considered the Applicant's submissions that the Law Society should not be involved in a lawyer's conduct if it relates to simple matters, and that the Law Society has no authority to " police every activity of an individual simply because he or she is a member of the Law Society." The Applicant also submitted that off-duty conduct of members of the Law Society may only properly come under the scrutiny of the Law Society if the member's conduct is criminal or overtly dishonest.

[12] The Hearing Panel concluded that the combined effect of the conduct of the Applicant was, in fact, conduct unbecoming.

The Penalty Decision

[13] The Law Society and the Applicant both agreed that, based on the Verdict of the Hearing Panel, the Applicant should receive a reprimand.

[14] The Law Society also asked that the Applicant:

i) be suspended from practising law for a period of one to three months; and

ii) be ordered to pay the costs of the hearing.

[15] The Applicant did not agree.

[16] The Hearing Panel referred to and considered Section 3 of the *Legal Profession Act*, each of the factors set in the decision of the Benchers in *Law Society of BC v. Ogilvie,* [1999] LSBC 17, and other decisions referred to by counsel for both the Law Society and the Applicant.

[17] The Hearing Panel concluded that the conduct of the Applicant was very serious. They repeated their findings of fact that the Applicant's actions were a conscious effort to thwart any police investigation or police demand, and that the combined effect of his actions were tantamount to dishonest conduct.

[18] The Hearing Panel therefore ordered that the Applicant be suspended from the practice of law for a period of one month and that he pay the costs of the proceedings with one exception.

Standard of Review

[19] The standard of review to be applied by the Benchers on this Review is one of correctness. See *Law Society of BC v. Dobbin*, [2000] L.S.D.D. No. 12.

[20] This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:

i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer; and/or

ii) whether the penalty imposed was appropriate.

[21] The standard of review described above is subject to one qualification, namely, that where issues of credibility are concerned, the Benchers should only interfere if the Hearing Panel made a clear and palpable error. See *Law Society of BC v. Hops,* [1999] LSBC 29 and *Law Society of BC v. Dobbin* (*supra*).

STATEMENT OF ISSUES ON THIS REVIEW

[22] The Applicant admitted that the Hearing Panel's findings of fact 1, 2 and 3 in paragraph [9] above, were correct. The Applicant submits that the Hearing Panel erred in its finding of fact number 4. (Issue 1)

[23] The Applicant submits that the Hearing Panel was not correct in concluding that the Applicant's conduct was ‘ conducting unbecoming a lawyer." The Applicant repeated the submission made to the Hearing Panel, where he advanced the proposition that previous Law Society hearing decisions have established that a finding of conduct unbecoming requires a finding of deliberate falsehood or a criminal offence.

[24] The Applicant says that his conduct was neither a deliberate falsehood, nor a criminal offence, and therefore his conduct was not conduct unbecoming a lawyer. (Issue 2)

[25] The Applicant submits that the penalty was too severe. The Applicant referred to the facts set out in the *Law Society of BC v. Ogilvie (supra)*, and says that a proper weighing of those factors should result in a reprimand, and a requirement that he pay a part of the costs of the hearing. (Issue 3)

Discussion

Issue 1

[26] The Hearing Panel found that the Applicant tried to dispose of the beer can because it would avoid the police relying on its presence in the car as grounds for making a breathalyzer demand, and that the Applicant was also removing the evidence that tended to prove that he was in violation of the provisions of the *Liquor Control and Licensing Act*.

[27] The Applicant gave evidence before the Hearing Panel that he did not remove the beer can from the vehicle with the intention to dispose of it. He explained that he took the beer can out of the car in order to avoid the beer inside the can from spilling into the car when it was towed away.

[28] The Applicant says that the Law Society's burden of proof of the Applicant's intention in removing the can of beer is at a higher standard than the balance of probabilities (the " Civil Standard"), and that the Law Society's burden more closely approximates the standard of proof beyond a reasonable doubt (the " Criminal Standard").

[29] The Applicant says that the Hearing Panel was incorrect when it did not recognize that the Applicant's alternative explanation raised sufficient doubt about his motive, and so, therefore, the Law Society did not meet the relevant standard of proof of that motive.

[30] The Benchers note that the Hearing Panel had all the advantages of hearing the witnesses, including the Applicant, give their evidence, and be subject to cross-examination concerning his intention in removing the can of beer. The Hearing Panel carefully considered the logic of the Applicant's explanation, in all of the circumstances existing at the time he removed the can of beer. The Hearing Panel did not believe the Applicant's explanation of his intention. The Hearing Panel was not left with any doubt as to the Applicant's intention. The Law Society therefore met the burden of proof whether the standard was the Civil Standard, the Criminal Standard, or any standard between the two.

[31] The Benchers find that the Hearing Panel was correct when they concluded that the Applicant removed the can of beer with the intention to dispose of it; this finding of fact is upheld for the purposes of this Review.

Issue 2

[32] The Benchers agree with the Hearing Panel's conclusion that the Applicant's conduct is conduct unbecoming a lawyer and adopts each of the Hearing Panel's reasons for reaching this conclusion.

[33] It serves no useful purpose in this decision to repeat those reasons.

[34] The Benchers wish to emphasize that any investigation by a police officer is an essential part of the administration of justice. Any attempt by a lawyer to thwart a police investigation significantly undermines the administration of justice and constitutes a breach by that lawyer of his duty to the state to maintain its integrity and its laws.

[35] The Applicant's conduct is directly related to one of the most important responsibilities that every lawyer assumes when he takes his or her oath on admission to the Bar.

[36] Some may view the act of swallowing mouthwash and attempting to dispose of an open can of beer as relatively minor acts. The significance of the Applicant's conduct does not relate to those acts themselves, but rather to his intention in performing those acts.

[37] The Benchers specifically reject the Applicant's submission that only conduct that is criminal or overtly dishonest should warrant investigation as conduct unbecoming and potential sanction.

[38] The Benchers find that lawyers in their private lives must live up to a high standard of conduct. A lawyer does not get to leave his or her status as a lawyer at the office door when he or she leaves at the end of the day. The imposition of this high standard of social responsibility, with the consequent intrusion into the lawyer's private life, is the price that lawyers pay for the privilege of membership in a self-governing profession. Conduct unbecoming not only includes the obvious examples of criminal conduct and dishonesty, but it also includes " any act of any member that will seriously compromise the body of the profession in the public estimation. " See *Hands v. Law Society of Upper Canada* (1889), 16 O.R. 625.

Issue 3

[39] The Benchers recognize and accept that, pursuant to s. 3 of the *Legal Profession Act*, it is the primary object of the Law Society to uphold and protect the public interest in the administration of justice. That objective is fulfilled when the Law Society acts in a way that ensures the integrity and honour of its members. This objective requires the Hearing Panel and the Benchers to establish a penalty for the Applicant that will ensure that the members of the public have a high regard for lawyers. The legal profession must be seen by the public as capable of setting a penalty that is appropriate to the conduct that resulted in the finding of conduct unbecoming. In each case, we must assess carefully what impact the conduct unbecoming could reasonably be expected to have on the public's confidence in the legal profession's integrity.

[40] The Applicant was a long-sitting Bencher and President of the Law Society. In these roles he was a public figure and a high profile representative of the legal profession. As a result, the Applicant's conduct has a greater capacity to damage the public's regard for all lawyers, and therefore cause harm to the legal profession.

[41] The Benchers assume that members of the public are reasonable, right-thinking persons with full possession of all of the relevant facts as determined by the Hearing Panel.

[42] The Benchers agree that the Hearing Panel applied the proper test and considered all of the relevant evidence in relation to each of the relevant factors set out in *Ogilvie (supra)* (the Ogilvie Factors)

when they reached their decision on penalty.

[43] The Benchers note that, when considering each of these factors, some factors will be considered in mitigation of the penalty while others will support a more severe penalty. The decision-maker must weigh the mitigating factors against the factors suggesting a more severe penalty. Ultimately, this process requires the application of subjective discretion to the relative weighing of those factors.

[44] As stated previously, the standard of review by the Benchers is one of correctness. The Benchers agree with the period of suspension imposed by the Hearing Panel and adopt the relative weighing of the Ogilvie Factors set out in the Hearing Panel's decision on penalty.

[45] In particular, the Benchers wish to emphasize the Hearing Panel decision when the Hearing Panel refers to the decision on penalty in the case of *Law Society of BC v. Hamilton* 2005 LSBC 5 at paragraph 21 (decision overturned on appeal, but without comment on the following):

> While there is no particular assistance offered by the array of cases provided, it is perhaps necessary for the Law Society to note that as times change, so must our view of appropriate penalty in circumstances such as those before this Panel. In short, we must have less tolerance for behaviour that seeks to denigrate the standing of the profession in the eyes of the general public. It will become increasingly important over time that we respond vigorously and with resolve to address any behaviour that might lower the esteem in which the legal profession is regarded.

[46] The Benchers recognize that a period of suspension is one of the most severe penalties that they can impose on a lawyer. Such a penalty has an effect on the lawyer's economics and the lawyer's professional reputation. The most significant impact to any lawyer of a suspension will be the damage to his or her professional reputation. A lawyer's single most important asset is his or her reputation. The Applicant is a former President of the Law Society. He has given countless hours in support of the legal profession in fulfilling its mandate to govern in the public interest. He has enjoyed the respect of his fellow members of the legal profession. The letters of support that were submitted into evidence on his behalf by a wide variety of respected practitioners is proof of that respect. He is a more public figure than most lawyers who practise in this Province. The loss to his reputation by the imposition of a period of suspension is significant.

[47] The Benchers expect that the imposition of this period of suspension will send a clear message to the public that the conduct of the Applicant is not to be condoned.

COSTS OF THIS REVIEW

[48] The Law Society will have its costs of this Review. The Applicant will have his costs for the hearing to determine the scope of the Review. If the parties cannot agree they can provide written submissions to the Benchers.