2007 LSBC 20
Report issued: April 11, 2007
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 section 47 review concerning

David John Martin

Applicant

Decision of the Benchers on Review

Review date: October 19, 2006

Quorum: James D. Vilvang, Q.C., Chair, Dirk J. Sigalet, Q.C., Leon Getz, Q.C., Robert D. Punnett, Thelma O'Grady, Richard N. Stewart, Ronald S. Tindale

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

[1] This is a Review pursuant to Section 47 of the *Legal Profession Act* concerning David John Martin (the " Applicant"), a member of the Law Society of British Columbia.

Background

[2] A citation was issued to the Applicant on September 9, 2004, by the Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee under authority of the *Legal Profession Act* and Rule 4-13 of the Law Society Rules.

[3] That citation was amended on March 3, 2005, authorizing the Panel to inquire into 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 an investigation by you into the validity and propriety of the Accounts.

[4] On April 18, 19, 20, 21, and 22, 2005, a Hearing was held to inquire into the Applicant's conduct.

[5] On September 7, 2005, written reasons were issued by the Hearing Panel on Facts and Verdict.

[6] The Hearing Panel found that the Applicant had professionally misconducted himself as outlined in the amended citation.

[7] On April 25, 2006, the Hearing Panel issued written reasons on Penalty.

[8] The Hearing Panel ordered that the Applicant receive the following penalty:

(a) be reprimanded;

(b) be suspended from the practise 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; and

(c) pay the costs of these proceedings, in the sum of $35,000.00.

[9] The Applicant argues that the Hearing Panel erred in its decision on Penalty.

[10] A Section 47 Review was held on October 19, 2006, and these are our reasons.

The Standard of Review

[11] Pursuant to section 47(5) of the *Legal Profession Act*, after the Hearing, the Benchers may:

(a) confirm the decision of the Panel; or

(b) substitute a decision the Panel could have made under the *Act* or Rules.

[12] The test to be applied by the Benchers on a Review under Section 47 is that of " correctness" .

[13] This standard is described in the decisions of the Benchers in the cases of *Law Society of BC v. Dobbin*, [1999] LSBC 27, *Law Society of BC v. McNabb*, Decision on Review June 15, 1999, *Law Society of BC v. Hops*, [1999] LSBC 27 and *Law Society of BC v. Hordal*, 2004 LSBC 36.

[14] The Benchers must determine if the decision of the Hearing Panel was correct, and if not, the Benchers must substitute their own decision.

Position of the Parties

[15] The Applicant's position on this Review is that the penalty imposed upon him could only be justified if the misconduct to be sanctioned involved dishonesty, was intentional or evidenced moral turpitude.

[16] The Applicant further states that the Hearing Panel erred in principle as follows:

(a) by failing to give effect to the essential legal distinction between negligent and fraudulent conduct;

(b) by over-emphasizing the need to ensure public confidence in the integrity of the legal profession, in circumstances where that confidence would necessarily have been undermined by the wide-spread media excoriation of the Applicant, which the Hearing Panel itself acknowledged was misleading, selective and unfair;

(c) by either rejecting, or failing to acknowledge and give effect to, mitigating circumstances in order that a balanced and fair assessment of the professional misconduct could be established; and

(d) by ordering a penalty that, in all the circumstances, is inordinately harsh and severe.

[17] The Applicant seeks to set aside the suspension, and replace it with a fine of $20,000.00, a $30,000.00 contribution to the Continuing Legal Education Society of British Columbia, and reduce the contribution towards costs from $35,000.00 to $30,000.00.

[18] The Law Society position is as follows:

(a) the Hearing Panel was correct in all respects in finding that the appropriate penalty for the Applicant's gross culpable neglect in approving the February and March 2002 fraudulent accounts of his client, Mr. Reyat's, children (the " Accounts") was a six month suspension from the practice of law;

(b) the six month suspension was premised on a careful consideration and application of the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, including taking guidance from the most similar cases, those involving an unintentional submission of improper accounts to the Legal Service Society. Although the Hearing Panel relied on the most similar precedents in respect of the appropriate penalty for the Applicant, there can be no question that this case is unique. The Applicant's conduct occurred in circumstances where the Government made an unprecedented commitment to funding the defence of the accused in the Air India case. The Hearing Panel found at the facts and verdict stage that there were warning signs that should have alerted the Applicant that he had to pay particular attention to the validity of the Accounts of his client's children. In these circumstances, where the Hearing Panel followed the most applicable authorities and applied the authorities to the extraordinary circumstances of this case, their finding of a six month suspension must stand;

(c) the Hearing Panel took into account all mitigating circumstances and did not err in respect of factual issues relevant to whether a suspension was proper in all of the circumstances. The Panel considered mitigating circumstances such as the Applicant's reputation and the prejudice that would be caused to the Applicant by way of interruption to his practice and to the Applicant's existing clients if he were suspended. When weighing the harshness of the penalty to be imposed on the Applicant and indirectly on his other clients against the public interest, and taking into account all the other factors, the Hearing Panel did not err in concluding that a six month suspension was warranted.

Discussion

[19] Section 3 of the *Legal Profession Act* provides 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.

[20] In the case of *Ogilvie* (supra) the Panel listed a number of non-exhaustive factors with respect to the penalty process as follows:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the Respondent;

(c) the previous character of the Respondent, including details of prior discipline;

(d) the impact upon the victim;

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

(f) the number of times the offending conduct occurred;

(g) whether the Respondent has 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 public confidence in the integrity of the profession; and

(m) range of penalties imposed in similar cases.

[21] It was common ground that the Applicant's misconduct involved neither dishonesty nor deceit, was not intentional and was not characterized by moral turpitude.

[22] During his closing submission in the Facts and Verdict phase, counsel for the Law Society admitted to the Hearing Panel the following:

> The first [question] is whether or not Mr. Martin is guilty of deceit or wilful blindness in approving these accounts. And my submission to you is that he is not. That this is not a case of dishonesty or deceit, that this is a case of gross negligence, of very gross negligence in the acts or omissions that were made and that those gross omissions constitute professional misconduct. In other words, that this is not a case of simple negligence. It's a case, I will say, of culpability which is greater than simple negligence. And it is in circumstances which really draw attention to the issue of professional responsibility.
>
> (Transcript, April 21, 2005, p. 2, l. 9-21)

[23] Further, in the Law Society's submission to the Hearing Panel, counsel made this admission:

And there's no doubt at all - and this is why I believe it is important for me to take this position, and I have thought about this a great deal. I want to say to you I have given it not just casual thought. But there is a very, very clear requirement that there has to be proof of an intention to deceive, there has to be proof of the deceit, and it has to be clear and convincing. And to me with all that we've done and all that we've said here, when I've weighed that issue very anxiously in my mind, I come out with the submission that this clearly is a case of recklessly proceeding conscious of a risk but it is not a case where someone has, as we want to say, an evil mind, an intention to deceive, and certainly not a case where this has been established in a clear and convincing way.

(Transcript, April 21, 2005, p.4, l.6-21)

[24] Counsel for the Applicant drew our attention to paragraph 14 of the Law Society's written closing submission to the Hearing Panel whereby the Law Society made the following admission:

It is admitted that Martin's conduct does not constitute deceit for the following reasons:

(a) There were valid reasons for employing Didar and Prit that were inferentially accepted by the entire Reyat defence team as being reasonable;

(b) The Accounts, on a cursory review were similar to valid accounts submitted by Didar and Prit in October 2001;

(c) There were reasons for Martin to believe that the volume of work for the February to March 2002 time-frame was similar to or greater than in the October 2001 time-frame;

(d) Martin reviewed the Accounts in a time-frame that was very congested and in circumstances that were very stressful;

(e) All of the warnings that were given to Martin with respect to Didar and Prit, save the one by Seifert in March 2002, were consistent with a lack of supervision but were not necessarily statements that expressed falsification of accounts. With respect to the March 2002 warnings from Seifert, it was in essence a statement calling for an inquiry and was made in circumstances where Seifert did not know the extent to which Didar and Prit were working outside the office;

(f) The April 2, 2002 comment by Martin where he expressed concerns with respect to the " growing size of Didar's accounts" is not a statement that would necessarily be made by someone who has made a deliberate and conscious effort to cover up. It is a statement consistent with someone who knows that proper administration should call for a scrutinizing of the Didar and Prit accounts. Martin knew that and proceeded to approve the accounts in a congested time frame, which demonstrates clearly that Martin's approval process constituted a marked departure from any reasonable approval process.

(g) When the issue of the propriety of the Didar and Prit's accounts was raised in a clear and unequivocal way by McKinnon at the meeting of April 16, 2002 Martin turned over the

inquiry into the propriety of the accounts to others. Martin suggested at the meeting that the accounts of Didar and Prit be reviewed. Further, the tenor of Martin's conversation with McKinnon on April 17, 2002 when Martin agreed that McKinnon should review the accounts of Didar and Prit was described by McKinnon as co-operative and cordial. All of this does not bespeak of Martin being a part of a conscious and deliberate effort to cover up the falsification of accounts.

[25] This Panel finds that the admissions made by the Law Society in paragraphs 22, 23 and 24 are supported by the evidence introduced at the Hearing.

[26] Counsel for the Applicant further drew our attention to the discussion that counsel for the Law Society had with the Chair of the Hearing Panel relating to deceit and the doctrine of wilful blindness as follows:

THE CHAIR: Please proceed - sorry. No, we don't need to hear you on the fraud issue.

MR. BERARDINO: Thank you. I appreciate that. That takes me right through to - that's excellent. I've set it all out there. That really shortens my task, and I am very grateful for that direction. I really am. And I must say I agree with that direction.

(Transcript, April 21, 2005, p.5, ll. 16-23)

[27] The Hearing Panel in *Law Society of BC v. Martin*, 2005 LSBC 16, at page 31, paragraph 175(m) stated the following:

Despite the specific warnings from Seifert and other warning signs cited above, the respondent spent only minutes reviewing the children's accounts for March hours which this Panel finds were fraudulent, before submitting them to the reviewer. This amounts to wilful blindness.

[28] In their decision on Penalty, 2006 LSBC 15 at par. [45] the Panel states:

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."

[29] Despite the submissions of counsel for the Law Society and the direction of the Chair with regard to the issue of fraud, the Hearing Panel, at both the Facts and Verdict stage and the Penalty stage, continued to refer to the Applicant's misconduct as intentional conduct or conduct involving moral turpitude. The Hearing Panel was in error in finding wilful blindness, which is tantamount to a finding of fraud on the part of the Applicant.

[30] In their decision on penalty the Hearing Panel made the following findings:

(a) at page 37, paragraph [34], the Hearing Panel finds: 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.

(b) at page 9, paragraph [44], the Hearing Panel finds: 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.

(c) at page 10, paragraph [50], the Hearing Panel finds: 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.

(d) at page 10, paragraph [51], the Hearing Panel finds: We have been told, and accept, that the Respondent requested that the government deduct the entire amount of the accounts from its remittance to DISR and that the children, Didar and Prit Reyat, were never paid for any portion of their fraudulent accounts.

[31] Counsel for the Applicant, in his submissions on this Review, indicated that the relevant facts that ought to govern the assessment of penalty in this case include the following:

(a) that Mr. Martin failed to supervise adequately the work and billing practices of the Reyat children, in circumstances where he was under a high duty to manage carefully the expenditure of the public funding of Mr. Reyat's defence;

(b) that Mr. Martin failed to appreciate the significance of the warning signs indicating the risk that the accounts of the Reyat children might be fraudulent;

(c) that Mr. Martin's failure in both respects was negligence which, in the circumstances, amounted to gross culpable neglect;

(d) that Mr. Martin's failure in both respects was due to the unprecedented nature of the workload and pressures associated with the Reyat brief, and the pressure and the workload associated with the balance of his cases, including the sudden and unexpected activation of a brief of international dimensions, as a consequence of all of which he was unable " to be vigilant in circumstances where high vigilance was called for" ;

(e) that while Mr. Martin failed to appreciate the significance of the warning signs indicating the risk that the accounts of the Reyat children might be fraudulent, he recognized that he needed help, both in connection with the administrative and substantive tasks of the Reyat defence team and in connection with the burdens of his own practice, and that he did take steps to address those needs which, had they been successful, would have likely averted the fraud of the children;

(f) that while it may have been improvident, in the circumstances, for Mr. Martin to have taken on the Reyat brief, he did so out of a sense of duty and in accordance with the high standards and historical traditions of our profession;

(g) that while public funds were put at risk by Mr. Martin's gross culpable neglect, it was due to his own actions that the fraud of the Reyat children was subsequently discovered with the result that no public funds were, in fact, lost by reason of his delict;

(h) that Mr. Martin is held in the highest esteem by his peers who acknowledge his past reputation as a lawyer of the highest integrity and who affirmed their belief that he will continue to enjoy that reputation in the future;

(i) that Mr. Martin's gross culpable neglect was a single lapse in an otherwise unblemished career of 26 years which, on all the evidence, will never occur again;

(j) and that, notwithstanding that single lapse, Mr. Martin's skill and his tireless efforts on behalf of Mr. Reyat led in the end to the saving of many millions of dollars of public funds.

[32] This Panel finds that these facts are supported by evidence, and we agree that these facts govern the assessment of the appropriate penalty.

[33] The Hearing Panel further considered the cases of the *Law Society of BC v. Mah Ming*, [2000] L.S.D.D. No. 22 and *Law Society of BC v. Dunn*, [1995] L.S.D.D. No. 254.

[34] It should be noted that, in the case of *Dunn* (supra), the inaccurately completed Legal Services accounts were submitted over a period of two years. Also, in that case, of serious concern were the emotional and alcoholic issues of Mr. Dunn.

[35] The case of *Mah Ming* (supra) involved the submission of more than 50 inaccurate Legal Services accounts and a lawyer who was having considerable issues managing his practice.

[36] In the cases of both *Dunn* and *Mah Ming*, the lawyers in question actually prepared the accounts, whereas the Applicant only reviewed the accounts.

[37] Both counsel for the Law Society and the Applicant provided us with a number of cases that relate to penalty.

[38] In the case of *Law Society of BC v. Morrison*, [1997] L.S.D.D. No. 193, Mr. Morrison failed to account to his partner for over $8,000.00 in payments received from a client. He misled his partner on two separate occasions as to the status of these payments and breached the Law Society Rules by failing to record them properly. In that case Mr. Morrison was reprimanded, ordered to pay of fine of $7,500.00 and $2,500.00 in costs.

[39] In the case of *Law Society of BC v. Cruikshank*, [1998] L.S.D.D. No. 11, Mr. Cruikshank, in driving a vehicle while intoxicated, came into collision with another car. At the scene of the accident he allowed his client to tell the police that he was the driver. Mr. Cruikshank ultimately took steps to report the true circumstances of the accident. In that case the Hearing Panel ordered a fine of $6,000.00.

[40] In the case of *Law Society of BC v. Hall*, [2002] LSBC 34, Mr. Hall incorporated a company under the *Small Business Venture Capital Act.* While acting as the director and officer of the company, Mr. Hall paid himself a total of $6,250.00 as a stipend and for expenses, receiving $4,000.00 of this amount after his call to the Bar. These payments were made without the authority or consent of the other officers and directors of the company and without the authority of a specialized resolution. In that case a fine of $6,500.00 was imposed.

[41] While the Applicant's case is unique, the salient features considered in the authorities provided on behalf of the Law Society and the Applicant, as well as the cases mentioned by the Hearing Panel and noted above, when considering a suspension include the following:

(a) elements of dishonesty;

(b) repetitive acts of deceit or negligence;

(c) significant personal or professional conduct issues.

[42] None of those factors apply to the Applicant in this case.

Decision

[43] Having regard to all of the considerations we have referred to, our conclusion is that the Hearing Panel erred in imposing the penalty described in paragraph [8] above. Accordingly, we order that the Applicant:

(a) be reprimanded;

(b) be fined $20,000.00, to be paid by May 1, 2007; and

(c) pay the costs of these proceedings in the sum of $35,000.00.