

2007 LSBC 22

Report issued: April 23, 2007

Citation issued: July 28, 2006

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

**Donald Craig King**

Respondent

**Decision of the Hearing Panel  
on Facts and Verdict**

Hearing date: January 15 and 16, 2007

Panel: James Vilvang, Q.C., Chair, Richard Stewart, Robert Brun, Q.C.

Counsel for the Law Society: Jean Whittow, Q.C. and Paula Ramsay

No-on appearing on behalf of the Respondent

[1] We were empanelled to consider a citation against the Respondent that was issued on July 28, 2006. Acknowledgement of service of the citation was made by counsel for the Respondent and was filed as an Exhibit in these proceedings. This hearing had been set to be heard by the same Panel and at the same time as the Shane Sidney Dennison matter. At the commencement of this hearing we were advised by Ms. Whittow that neither the Respondent nor his counsel, Jerome Ziskrout, would be participating in the proceedings. The Panel determined that it had jurisdiction to proceed with the hearing in the absence of the Respondent and his counsel.

[2] As noted in this Panel's decision in relation to the Dennison matter, we were also advised that the Respondent, Dennison, and his counsel, Leonard T. Doust, Q.C., would not be participating in the Dennison hearing.

[3] Ms. Whittow advised this Panel that the conduct to be inquired into, as set out in the schedule to the amended Dennison citation, was identical to the conduct to be inquired into in the schedule to the King citation. In both cases, the allegation was:

1. That between September 1, 2002 and November 30, 2003 you altered lawyers' time sheets to indicate that more hours had been worked than had actually been worked, and caused false accounts based on these altered time sheets to be submitted for payment to the Department of Justice.

[4] Ms. Whittow also advised the Panel that the evidence to be led by the Law Society against the Respondent, King, was inextricably linked to the evidence to be led against the Respondent, Dennison. As noted in the Panel's decision of the hearing on Facts and Verdict in the Dennison matter, it was determined that it would be just and convenient in the circumstances to hear both citations at the same time.

[5] In so deciding, the Panel observed that Mr. Doust and Mr. Ziskrout had, with the knowledge of the other party jointly proffered the same hearing dates; namely January 15 and 16, 2007. The Panel

inferred that Mr. Doust and Mr. Ziskrout, on behalf of their clients, had agreed that the citations should be heard at the same time.

[6] In this matter, this Panel must consider whether the Respondent, King:

- (a) professionally misconducted himself;
- (b) conducted himself in a manner unbecoming a member of the Law Society;
- (c) contravened the *Legal Profession Act* or rule made under it; or
- (d) incompetently carried out duties undertaken by him in his capacity as a member of the Society.

## Introduction and Background

[7] Mr. King became a member of the Law Society of British Columbia on May 17, 1996. He ceased to be a member as a consequence of non-payment of fees on January 1, 2005.

[8] Following his call to the Bar in May of 1996, Mr. King commenced employment as an employee/contractor with the firm Hunter Garrett Lobay (" HGL" ) in Nanaimo, British Columbia. In 1995 HGL had entered into an agreement with the Department of Justice Canada (" DOJ" ) whereby the firm was appointed as a standing agent to perform legal services on litigation and criminal proceedings.

[9] The DOJ required that each lawyer who performed services under the HGL agreement be approved by the DOJ. Mr. King was approved by the DOJ to perform work under the contract on February 2, 1998.

[10] HGL was located in Nanaimo, but also operated in Courtenay through the services of three lawyers: H.S., S.S. and S.F. (the " Courtenay lawyers" ) who performed work on DOJ files in the Courtenay region. The arrangement between HGL and the Courtenay lawyers was that they were to be paid by HGL at the rate of one-half of the DOJ billable hourly rates. HGL retained the balance of the fee billed to the DOJ.

[11] The Panel heard evidence that, in the Fall of 2002, HGL ceased to operate as a partnership. It functioned for a period of time as an " association" of lawyers, and then in the Summer of 2003, a new firm was formed, known as Lobay Dennison Beaubier (" LDB" ). When the new partnership was formed, the DOJ terminated the appointment of HGL as standing agent and entered into a new arrangement with LDB on the same terms. The lawyers approved by the DOJ under the new contract remained as before. Mr. King continued as an employee of the new firm of LDB.

[12] Evidence was led regarding the general procedure for recording time and billing of DOJ matters. The lawyer who performed the legal work involved prepared a daily time sheet recording the hours worked, the type of activity and the file number. Data from the time sheets were entered by firm clerical staff into a computerized billing system. As clerical staff would enter the data from the time sheets, they would highlight the original document to show that the entry had been recorded in the billing system.

[13] Periodically, a form of account called a Request for Payment was prepared and delivered by the firm to the DOJ containing a certification signed on behalf of the firm as to the accuracy of the Request for Payment. The DOJ made payments to the firm based upon the Request for Payment subject to minor adjustments.

[14] Evidence was also led that the Courtenay lawyers' prepared time sheets that were delivered to the

Nanaimo office of HGL and later, LDB, who then billed the DOJ for the Courtenay lawyers' services. The Courtenay lawyers also sent a monthly invoice for their total hours worked for that month, in accordance with their time sheets, and received payment from HGL and later LDB, in accordance with the time recorded on the time sheets.

[15] In early 2003, Kenneth Paziuk, a junior lawyer with HGL, in the Nanaimo office, was offered an opportunity to enter into a similar arrangement as the Courtenay lawyers doing DOJ work for the firm. In order to evaluate the volume of work that would become available to him through this offer, Mr. Paziuk obtained and reviewed time sheets and invoices and in so doing, discovered significant irregularities with the time sheets that had been received from the Courtenay lawyers. It was evident that, at some point the time, sheets that the Courtenay lawyers had submitted had been systematically altered. It was this discovery that led to the complaint to the Law Society.

[16] The Law Society arranged to have the altered time sheets that had been received from the Courtenay lawyers reviewed by Donald J. Gamble, a forensic document examiner. Mr. Gamble prepared two reports concerning the authorship of the alterations to the Courtenay lawyers' time sheets. This Panel accepted Mr. Gamble as an expert in the field of forensic document examination. Mr. Gamble identified the handwriting of Mr. King that appeared on 26 of the time sheets that he had reviewed. The effect of the alterations made by Mr. King on these time sheets was always to increase the amount of time recorded or to add entries for files that had not been recorded at all on the time sheets as submitted by the Courtenay lawyers.

[17] The Law Society also retained Mr. William Kinsey to conduct a forensic examination. The Panel accepted Mr. Kinsey as an expert in the field of forensic accounting.

[18] In his written opinion Mr. Kinsey observed on page 2:

2.a LDB acted as an " Agent" for the Federal government, operating from offices in Nanaimo and Courtenay. Courtenay's DOJ time charges were recorded on special time sheets and sent to Nanaimo for inputting into the DOJ computer system - the first step toward payment. [The Courtenay lawyers were subcontractors who billed the Nanaimo office based on these same time sheets.]

Nanaimo copies of Courtenay time sheets have been substantially altered, increasing reported hours and thereby leading to substantial overbillings.

Altered time sheets have existed since September 2002\* - and perhaps earlier when the DOJ work was handled via another practice (Hunter Garrett Lobay) involving some of the same individuals. I have not reviewed any of that firm's records. [\*Officially LDB started November 1 but DOJ time from September 1 was considered as LDB's revenue.]

2.b DOJ time records made available enabled a comparison of:

- time charged to the DOJ regarding the Courtenay lawyers with
- the Courtenay lawyers' billings to LDB (or HGL) for time worked on DOJ files.

Appendix A-1 is my comparison of these two types of records and shows hours having a billing value of \$277,278 were charged to DOJ in excess of what the Courtenay lawyers claimed they

worked (and were paid for) regarding the September 2003 [sic] to November 2003 period.

2.c Appendix A-1 also shows that the billable hours were more than doubled: an overall increase of 117%, ranging from 62% to 960% per lawyer. The latter percentage was for Ms. H.S. who worked only occasionally but whose name shows time charged more frequently.

[19] Mr. Kinsey noted, *inter alia*, that, in September 2003, the alterations made by Mr. King to the time sheets from the Courtenay lawyers contributed to the increased time claimed. The Courtenay lawyers had only invoiced LDB for the 149.5 hours they had actually worked. LDB, based upon the documents altered by both Mr. King and Mr. Dennison, claimed for 328 hours of work by the Courtenay lawyers during the month of September 2003, thereby more than doubling the amount of time said to be incurred in that month. Mr. Kinsey ultimately concluded that between September 1, 2002 and November 30, 2003 the sum of over \$277,000 was wrongfully charged by HGL and later LDB to the DOJ for the work purportedly done by the Courtenay lawyers.

[20] Based upon the evidence of Mr. Kinsey and Mr. Gamble, this Panel concludes that the Respondent, King, knew or ought to have known that the altered time sheets would be submitted to DOJ for payment. The Panel therefore concludes that King participated in this scheme whereby grossly inflated bills were submitted to the DOJ for payment. There was, however, no evidence that Mr. King received a direct financial benefit for these alterations. Rather, it appears that the partnership of HGL and LDB received the benefit. Why Mr. King took part in the scheme was not apparent on the evidence.

## Discussion

### Burden and Standard of Proof

[21] In *Law Society of BC v Martin*, 2005 LSBC 16, paragraph [137] it is observed:

- (a) the onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct;
- (b) the standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

[22] In assessing the evidence this Panel has relied on these principles.

[23] Counsel for the Law Society also directed this Panel to *Cross v Wood* (1993), 92 Man. R. (2d) 94 (C.A.), in which a police disciplinary board had commented on an officer's failure to testify. The Manitoba Court of Appeal found no error in this and observed at paragraph 15:

The Board, in my view, was entitled to comment upon Cross' failure to testify, and in doing so did not place a burden of proof upon him. The words of Arbour, J.A. in *R. v. Johnson* (1993), 79 C.C.C. (3d) 42 (Ont. C.A.), at page 50, succinctly describe the rationale:

It is not so much that the failure to testify justifies an inference of guilt; it is rather that it fails to provide any basis to conclude otherwise. ... If the Crown's case cries out for an explanation, an accused must be prepared to accept the adverse consequences of his decision to remain silent ...

[24] The Panel has not found it necessary to rely upon the failure of Mr. King to provide an

explanation. In the opinion of the Panel, the evidence presented at the hearing establishes that Mr. King altered the time sheets upon which the ultimate requests for payment made by HGL and LDB to the DOJ were based. That is the gravamen of the offence. The evidence was clear and convincing.

[25] The evidence was less clear as to what benefit Mr. King may have received from the alteration of the time sheets. On this point the reasoning of the Manitoba Court of Appeal in *Cross, supra*, has application. Why Mr. King took part in this fraud is a question that cries out for explanation, yet Mr. King has chosen to remain silent.

[26] In the result, the Panel finds that, between September 1, 2002 and November 30, 2003, Mr. King altered the Courtenay lawyers' time sheets to indicate that more hours had been worked than had actually been worked, when he knew, or ought to have known, that false accounts based on these altered time sheets would be submitted for payment to the DOJ.

## **Verdict**

[27] As noted in the Dennison decision, counsel for the Law Society properly pointed out that the term "professional misconduct" includes conduct that can be described as "dishonourable or disgraceful". It is also defined as conduct that is contrary to the best interest of the public or the legal profession or harms the standing of the legal profession. This Panel concludes, on the requisite standard, set out in *Martin, supra*, that Mr. King is guilty of professional misconduct. The evidence is clear and convincing that Mr. King falsified documents for the purpose of defrauding the DOJ and as such, is among the most serious types of breach that can be committed by a lawyer.