2005 LSBC 14
Report issued: April 28, 2005
Oral Reasons: April 8, 2005
Citation issued: February 11, 2004

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

Robert Gordon Milne

Respondent

Decision of the Benchers on Review

Review date: April 8, 2005

Quorum: Majority Decision: Patricia Schmit, Q.C., Chair, Joost Blom, Q.C., Gavin Hume, Q.C., Bruce LeRose, Gregory Rideout, Grant Taylor, Q.C., June Preston, Terence La Liberte, Q.C., Darrell O'Byrne, Q.C., Lilian To, Dr. Maelor Vallance, Gordon Turriff, Q.C., David Zacks, Q.C.

Dissent/Minority Decision: James Vilvang, Q.C., Robert Brun, Q.C.

Counsel for the Law Society: Todd Follett
Counsel for the Respondent: Jerome Ziskrout

Background

[1] On May 20, 2004, a Hearing Panel found that Mr. Milne had been guilty of professional misconduct. He had tampered with a document without the authorization of the signatory, and submitted the altered document for registration at the Land Titles Office. By decision of June 16, 2004, the Hearing Panel imposed a penalty of a $3,500 fine and payment of costs. The Hearing Panel also made an order under Rule 4-38.1 of the Law Society Rules that the decision against Mr. Milne be published without identifying him.

[2] The Discipline Committee voted to submit the order for anonymous publication to the Benchers for Review, and Mr. Milne' s counsel was informed of the Committee' s decision by letter of June 29, 2004. By letter of March 31, 2005, Mr. Milne' s counsel confirmed to the Law Society that Mr. Milne consented to being identified in the publication of the decision without the necessity of a Bencher Review.

[3] It has been determined that a Bencher Review is nevertheless required. The Law Society Rules do not provide for the rescission of the order of a Hearing Panel by mutual consent of the Law Society and the Respondent.

[4] The Benchers sitting in Review had before them the documentation of the decision under Review, including the hearing transcript. They also had written submissions from counsel for the Law Society , dated April 1, 2005, setting out the Law Society' s arguments why the Rule 4-38.1 order for anonymous publication should be set aside and effect be given to the Executive Director' s usual obligation to publish the decision pursuant to Rule 4-38. Neither counsel appeared at the Review.

Legal Analysis and Reasons

[5] According to Rule 4-38.1(3), a Hearing Panel may order anonymous publication if the penalty imposed does not include suspension or disbarment, and (para. (b)) " publication will cause grievous harm to the Respondent . . . that outweighs the interest of the public and the Society in full publication" .

[6] The Hearing Panel took the view that the harm that publication of his name would do to Mr. Milne' s self-worth, emotional health and reputation was " grievous harm" that outweighed the interest of the public and the Law Society in publication. The Panel referred to Mr. Milne' s standing in the community and the great anguish that his misconduct had caused him, as evidenced by his demeanor throughout the hearing. The Panel also attached weight to Mr. Milne' s 29 years of discipline-free practice, his contrition, the fact that his misconduct had caused no harm or risk of prejudice, and the fact that he was not motivated by self gain. The risk to the public was minimal, and his continued volunteerism in the community might be jeopardized by publication. The Panel gave a " large and liberal" interpretation to Rule 4-38.1, concluding that its character was remedial. The Panel did not accept the Law Society' s argument that the public had a right to know " who did what" , if this meant restricting a Hearing Panel' s ability to apply Rule 4-38.1 from a remedial point of view so that " the punishment [fits] the ' crime' " .

[7] In support of setting aside the anonymous publication order, counsel for the Law Society argued that the facts referred to by the Hearing Panel could not reasonably be taken as evidence of " grievous harm" that publication would cause to Mr. Milne. Even less could they be taken as showing that the harm to him would outweigh the public and professional interest in publication. Counsel also argued that the Panel had erred by giving a large and liberal interpretation to Rule 4-38.1 in isolation from the entire set of rules about publication. Citing the disciplinary decision in *Re: A Lawyer* , 2005 LSBC 06 (issued February 14, 2005) counsel suggested that the fundamental premise for the relevant Rules was indeed the public' s right to know " who did what" . He argued that " grievous harm" did not include damage to reputation. It should be confined to harm to the individual in a serious degree, such as psychological injury to one who suffers mental illness.

[8] Counsel for the Law Society also addressed himself to the question of whether the Benchers'jurisdiction under Section 47(3) of the *Legal Profession Act* to review Hearing Panel decisions extended to an order for anonymous publication under Rule 4-38.1. He argued that it did. An anonymous publication order is referred to as an " order" in Rule 4-38.1(3), and this, counsel argued, brought it within the " other orders" that a Hearing Panel is empowered to make under Section 38(7) of the *Legal Profession Act*. That in turn made it subject to the Benchers'power of review in Section 47(3) of the *Act*, which extends to " the decision of a panel under section 38(4), (5), (6) or (7)" . Moreover, counsel pointed out, Rule 4-38.1(7) empowers the Benchers themselves to make an original anonymous publication order if, upon a review of a Hearing Panel' s decision, they find a lawyer guilty of misconduct when the Hearing Panel did not do so.

[9] Our decision is as follows:

1. We find that we have jurisdiction under Section 47(3) of the *Legal Profession Act* to review an anonymous publication order made by a Hearing Panel under Rule 4-38.1.

2. Based upon Law Society' s application and the Respondent' s consent, we hereby set aside the Hearing Panel' s anonymous publication order made under Rule 4-38.1. The Hearing Panel' s full decision and our decision on Review must therefore be published in the usual way under Rule 4-38.

3. There will be no order for costs of this Review.

[10] Because the Respondent consented to having the order in this case set aside, we have not had full

argument on the proper scope of the power to order anonymous publication under Rule 4-38.1. Nevertheless, we wish to record our opinion, based on the materials before us, that to set aside the order here is correct on the merits. Our expression of this opinion should not, however, be taken to indicate that we necessarily accept all of the Law Society' s submissions on the interpretation of Rule 4-38.1. We also wish to note that, irrespective of the merits, our decision to set the order aside deprives the Hearing Panel' s decision on Rule 4-38.1 of any precedential value.

REASONS OF GORDON TURRIFF, Q.C. AND DAVID ZACKS, Q.C.

[11] We agree with the majority that the Panel incorrectly decided that its determination of professional misconduct should not be published. We are satisfied from our review of the evidence that it was not open to the Panel to conclude that publication would result in greivous harm.

[12] We agree with Mr. Vilvang and Mr. Brun that only time will tell what precedential value any Benchers'decision might have.

Minority Reasons of James Vilvang, Q.C. and Robert Brun, Q.C.

[13] We concur in the result. We do not agree with the statement " Nevertheless, we wish to record our opinion, based on the materials before us, that to set aside the order here is correct on the merits" . We would not be prepared to form such an opinion without having heard submissions from both sides. We make no finding as to the merits of the Review.

[14] We also disagree with the statement:

> " We also wish to note that, irrespective of the merits, our decision to set the order aside deprives the Hearing Panel' s decision on Rule 4-38.1 of any precedential value."

[15] Because we do not believe this Review was, or, in the circumstances, could have been, determined on it' s merits, we can see no justification for ruling that the Hearing Panel' s decision is wrong and of no precedential value.

[16] We would not be prepared to rule the Panel' s decision wrong without hearing full submissions from both sides.

[17] Also, it is not up to a Review panel or any adjudicative body to determine what decisions will have precedential value in other cases. Counsel are free to rely on any previous rulings they wish. For example, *obiter* and minority rulings are frequently referred to as are decisions in other tribunals and tribunals in other jurisdictions. We cannot bind the hands of counsel or of future hearing panels. It will be up to them to determine what, if any, precedential weight will be given to the Bencher' s decision in this case.