2007 LSBC 53
Report issued: November 27, 2007
Citation issued: March 7, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and an application for a stay of proceedings concerning

Sheldon Goldberg

Applicant

Decision

Application date: October 18, 2007

Bencher: Anna Fung, Q.C.

Counsel for the Law Society: Jean Whittow, Q.C.
Acting on his own behalf: Sheldon Goldberg

Background

[1] On October 18, 2007, the Applicant made an application for a stay of proceedings pending the hearing of a Review with respect to the Penalty of a suspension for 90 days commencing January 1, 2008, which was imposed upon him September 7, 2007 by the majority of the Hearing Panel. The panel had, in an earlier hearing on Facts and Verdict, found him guilty of professional misconduct in the course of representing four men on four separate criminal appeals that were heard together. The Panel's finding of professional misconduct was based on the Applicant having made a number of unfounded, but serious, allegations about the conduct of J.B., the lawyer who had represented the four criminal accused at trial. The Panel also found that the Applicant had incompetently carried out the duties he undertook in the appeals. The minority of the Panel on the Penalty hearing would have suspended the Applicant for a period of 180 days, but otherwise agreed with all other aspects of the decision of the majority.

[2] On September 11, 2007, the Applicant wrote a letter to the Law Society indicating that he wished to appeal both the Facts and Verdict and the Penalty decisions and to " defer the entire penalty perhaps to the last 3 months of 2008 so that the Appeals can be meaningful." The Applicant did not file a formal Notice of Review as contemplated by Rule 5-13(1) of the Law Society Rules.

[3] On September 26, 2007, by way of Notice of Review served on the Applicant, the Law Society initiated a review of the majority decision of the Hearing Panel on Penalty and sought an order that the length of suspension be greater than 90 days and an order for costs of the review.

[4] On October 16, 2007, the Applicant wrote to the Law Society disputing the decisions of the Panel on Facts and Verdict and Penalty on various grounds.

[5] On October 18, 2007, the Applicant wrote to the Law Society seeking a stay of the three-month suspension and penalty and proposed that the suspension commence December 2008 instead of January 2008, setting out various reasons for his application for a stay.

[6] Counsel for the Law Society on the Review provided written submissions dated October 24, 2007 opposing the application.

[7] On October 31, 2007, the Applicant provided further submissions relating to his application.

[8] Upon receipt of this application, I reviewed the materials filed by the Applicant and counsel for the Law Society as referenced above. In addition, I have reviewed the decisions of the Panel in the hearing on Facts and Verdict and the hearing on Penalty along with the transcript of the hearing on Penalty and a casebook of authorities filed by counsel for the Law Society as part of her October 24 written submissions. The casebook included *RJR McDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.); *McGuire v. Law Society of British Columbia*, 2006 BCCA 394; the Decision of a Bencher in applications for stays of proceedings in *Law Society of BC v. Welder,* 2005 LSBC 52 and in *Law Society of BC v. Martin*, 2006 LSBC 22, wherein stays were granted at the request of the respondents.

[9] In order for the Applicant to be successful on his application for a stay, he must satisfy me that he is entitled to a stay in accordance with the three-part test set out in *RJR McDonald (supra)* at page 400:

1. The review must raise a serious question to be tried.

2. The Applicant would suffer irreparable harm if the application were refused.

3. The balance of convenience, taking into account the public interest, must favour the imposition of a stay until final disposition of the legal issues.

[10] The threshold required to meet the first part of this three-pronged test is low. All that is required is a preliminary assessment of the merits of the Review. A Bencher hearing an application for a stay need only be satisfied that the Review is " neither vexatious nor frivolous." It is clear that I should not engage in an extensive review of the merits. That is best left to the Benchers on the Review hearing, where there is opportunity for the parties to canvass all of the issues in a thorough fashion. While I am skeptical as to the substantive merits of the various grounds for appeal by the Applicant, as set out in his written submissions, I cannot conclude that they do not raise " a serious question to be tried." Furthermore, the minority decision on Penalty, which would have imposed a 180-day suspension, provides sufficient ground for me to find that the Law Society's Review seeking a lengthier suspension raises a serious question to be tried. I thus conclude that the first part of the test in *RJR McDonald (supra)* has been met.

[11] Turning to the second part of the test for a stay, I must assess whether the Applicant would suffer irreparable harm if his stay application were denied. As stated in *RJR McDonald (supra)*, irreparable refers to the nature of the harm rather than its magnitude. Having regard to the nature of the penalty ordered, namely, a suspension of 90 days commencing January 1, 2008, I am of the view that it would be unfair to the Applicant to deny him a stay until such time as the Review can be heard. The reason is that, unlike other forms of penalty (for instance, a fine), a suspension, once served, cannot be undone were the Applicant to be successful in having the suspension rescinded or reduced in a subsequent Review. The Notice of Review was issued September 26, 2007. It appears unlikely now that the hearing of the review will take place before the end of 2007. If the Applicant were to serve his suspension effective January 1, 2008, and the Review Panel in a subsequent Review hearing were to find in his favour, in part or in whole, any time of suspension served by the Applicant may well have been served in vain. In that sense, there is a real risk of irreparable harm to the Applicant. On that basis, I find that the second part of the test for a stay has been satisfied.

[12] I turn now to the third part of the test. Where does the balance of convenience lie having regard to

the public interest? Will the granting of a stay in this case put the public at risk again? There is no doubt that the purpose of any penalty imposed by the Benchers is to protect the public. As noted by counsel for the Law Society in her written submissions of October 24, 2007:

> A suspension will always pose some inconvenience to a practising member. The Bencher considering this matter must balance the importance of carrying out the sanction determined by the Hearing Panel against Mr. Goldberg's wishes.
>
> In the present case, however, the Hearing Panel allowed Mr. Goldberg a generous period of nearly three months before the commencement of the suspension. That period of time allows Mr. Goldberg to make other arrangements for clients, such as adjourning matters, moving matters ahead, or arranging for alternate counsel. The inconvenience can thus be minimized.

[13] In his written submissions of October 18, 2007, the Applicant cites the adjournment of a lengthy murder trial, originally set to proceed in 2007, and now adjourned to commence May, 2008, in which he is acting as counsel, as the basis for his request for a stay until December, 2008. He also refers to the fact that he has several other trials involving persons in and out of custody now set from January to April, 2008, allegedly scheduled prior to him being notified of the suspension commencement date, for which it would be difficult to substitute other counsel.

[14] On review of the transcript of the proceedings at the Penalty Hearing on May 18, 2007, I note that the Panel (at pages 83 to 85) specifically questioned the Applicant about the murder trial scheduling, which, at that time, was supposed to run from October 21 to December 21, 2007. In paragraph 38 of its Decision on Penalty of September 7, 2007 (2007 LSBC 40), the majority of the Panel noted as follows:

> The Respondent advised us that if we concluded that a suspension of any duration should be ordered, it would cause the least disruption to clients to whose representation on serious criminal charges he is already committed, if the suspension were to come into effect as of January 1, 2008. That is a reasonable request, and we so order.

[15] It is unclear to me when the adjournment of the commencement of the murder trial in question occurred, but presumably some time between the Penalty Hearing on May 18, 2007 and the Applicant's written submissions on October 18, 2007. In any event, the Applicant was aware, at least as early as May 18, 2007 (the date of the Penalty Hearing), of the possibility of a pending suspension, and certainly had confirmation of the January 1, 2008 suspension commencement date by September 7, 2007 when the decision on Penalty was rendered. In light of that, I am of the view that it was incumbent upon the Applicant not simply to ignore that decision by continuing to assume conduct of the murder trial based on a new commencement date of May, 2008, and by proceeding to set yet other trials over the period of the suspension without any attempt to find alternate counsel or to adjourn those trials beyond the period of his suspension.

[16] The Panel, in ordering on September 7, 2007 the suspension date to commence January 1, 2008 rather than forthwith, was undoubtedly influenced by the fact that the Applicant was scheduled to assume conduct of the murder trial then set to commence within six weeks, a period of time within which it may have been difficult for the Applicant's client to instruct and find replacement counsel. However, given the adjourned commencement date of the murder trial to May 2008, there was and still is ample opportunity for the Applicant to make other arrangements for conduct of that murder trial, as well as other trials that he has apparently since scheduled for the period of his suspension, and I strongly urge him to do so.

[17] Given the findings of professional misconduct and incompetence made by the Panel, it is not, in

my view, in the public interest for the Applicant's suspension to be deferred for a lengthy period of time such that he would be allowed to continue to carry on his practice indefinitely without giving effect to the Panel's decision. The suspension is meant to protect the public from the Applicant's conduct while giving the Applicant an opportunity for needed reflection and amelioration. Accordingly, I decline to grant the Applicant's application for a stay to December, 2008. However, so as to ensure that the review is not rendered moot and, subject to the decision of the Review Panel, I will grant a stay of the suspension to commence the earlier of April 1, 2008 or the conclusion of the Review, whichever occurs first, and I so order. In doing so, I wish to note that I do not make any pre-judgments as to the outcome of the review. Should the Review Panel conclude prior to April 1, 2008 that the Applicant should succeed completely on the review, this stay order would be moot as there would be no need for the Applicant to serve any of the suspension. In any event, it is my expectation that both the Applicant and the Law Society will fully cooperate with each other to ensure that this review proceed expeditiously.

[18] The Applicant, in his written submissions of October 31, 2007, has also agreed to undertake, pending the review, to submit any written material intended for the Courts to another counsel where the issue relates to competence of other counsel in the future. I find such undertaking to be acceptable in the circumstances.