2007 LSBC 55
Report issued: December 17, 2007
Citation issued: May 19, 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

Sheldon Goldberg

Applicant

Decision of the Benchers on Review

Review date: October 25, 2007

Benchers: Gordon Turriff, QC, Chair, James D. Vilvang, QC, Kathryn Berge, QC, Bruce A. LeRose, QC, Robert D. Punnett, Ken Dobell, Barbara Levesque

Counsel for the Law Society: Jaia Rai
Appearing on his own behalf: Sheldon Goldberg

Background

[1] On March 14, 2005 the Hearing Panel issued its decision on Facts and Verdict (" Decision on Facts and Verdict"). The decision of the Hearing Panel on Penalty was rendered on May 26, 2005 (" Decision on Penalty").

[2] The majority of the Hearing Panel on Facts and Verdict (Patricia L. Schmit, Q.C. and G. Glen Ridgway, Q.C.) found that, on April 25, 2003 the Applicant left his client, Mr. T. unrepresented in mid-trial, contrary to his obligations to his client and the Court. They found that the Applicant's conduct amounted to professional misconduct. The Hearing Panel subsequently imposed a penalty consisting of a 30-day suspension commencing December 5, 2005, and the costs of the hearing to be agreed upon. The Applicant has served the suspension. The costs of the hearing have not been agreed upon as a result of the Notice of Review filed by the Applicant on June 3, 2005, which, pursuant to Rule 5-14(1), stayed the order of the Panel with respect to costs.

[3] Robert McDiarmid, Q.C. issued a dissenting decision, concluding that, while the Applicant's conduct was ill-advised and contrary to the provisions of the *Professional Conduct Handbook*, it did not support a finding of professional misconduct.

[4] The Notice of Review failed to comply with Rule 5-15, and in a pre-review conference held on June 7, 2007, the Law Society sought and obtained an order that the Applicant file a Notice of Review in compliance with Rule 5-15 not later than July 6, 2007. The Applicant filed a revised Notice of Review on July 15, 2007.

[5] Notwithstanding that the suspension has been served, the Applicant seeks a review of both the verdict and the penalty imposed. He also seeks to introduce two affidavits as fresh evidence to be

considered on the Review.

[6] We reserved decision on the admissibility of the new evidence, and the Applicant was allowed to refer to that evidence in his submissions.

Standard of Review

[7] This application is governed by Sections 38, 47 and 48 of the *Legal Profession Act*.

[8] It is settled law that the standard of review by the Benchers is that of correctness. The Benchers must determine whether the decision of the Hearing Panel was correct and, if the Benchers find that it was not, they must substitute their own decision for that of the Hearing Panel. [1]

[9] However, since the Hearing Panel had the benefit of *viva voce* evidence and the opportunity to assess the credibility of witnesses by observing their demeanour in the proceedings, the Benchers " ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute." [2]

[10] The Applicant on this Review did not disagree that this was the standard of review.

Review of Verdict

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

> [10] On April 25, 2003, the Respondent, representing client Mr. T, attended at the Provincial Court, Courtroom 303, Main Street, for Mr. T's trial.
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> [11] The Provincial Court at Main Street is a busy place. While efforts are made to schedule matters in particular Courtrooms, it is not uncommon for matters, including trials, to be shuffled from Courtroom to Courtroom as time and Judges become available.
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> [12] Mr. T's trial, *R. v. T* was scheduled to consume four hours of Court time. This trial was the only matter the Respondent had scheduled for hearing on April 25, 2003.
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> [13] Mr. T had been denied bail and remained in custody on the instant charges of attempted break and enter of a residence. Therefore his trial was a priority to proceed.
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> [14] That morning, scheduling problems occurred in other Courtrooms at Main Street, resulting in the matters that had been scheduled for Courtrooms 306 and 309 being called into Courtroom 303 to be dealt with.
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> [15] This is not an uncommon situation.
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> [16] Her Honour Judge Godfrey was presiding in Courtroom 303.
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> [17] Mr. T's trial was to be heard in Courtroom 303, before Judge Godfrey.
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> [18] Before Mr. T's trial commenced, Judge Godfrey dealt with several matters including a matter *R. v. D*, which was also set for trial that day.
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> [19] Ms. D, the accused in *R. v. D* was facing two charges of breach of probation.
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> [20] Ms. D was not represented by a lawyer at the time that the matter was called before Judge Godfrey. Crown Counsel, Ms. R indicated to the Court that *R. v. D* was ready to proceed, Ms. D

indicated that she was ready to proceed. The matter was peremptory on Ms. D due to numerous adjournments and the age of the information. Judge Godfrey directed both Crown and Ms. D to stand down to await a decision as to whether the trial *R. v. D* would be moved to another Courtroom or whether it would be dealt with by her in Courtroom 303.

[21] Respondent's evidence was that he was unaware of what was happening regarding other cases called in Courtroom 303 as he sat waiting, including anything regarding *R. v. D*. He was unaware that matters were before Judge Godfrey due to illnesses of other Judges, he was unaware of whether *R. v. D* would be going into another Courtroom in the afternoon, and he was unaware that that trial had been set " peremptorily" .

[22] Mr. T's trial commenced before Judge Godfrey.

[23] Over the course of the morning, the Crown completed four of its five witnesses in *R. v. T*. An interpreter was present to translate evidence for Mr. T. At noon, the Court stood down for lunch and Mr. T was returned to cells at 222 Main Street.

[24] After the lunch break, the Court session resumed in Courtroom 303 before Judge Godfrey.

[25] Before Mr. T was present in the Courtroom, Crown Counsel, Ms. R, called *R. v. D*. She advised the Court that she had been informed by the Respondent over the lunch break that he had been retained by Ms. D and the file was being called in Courtroom 308.

[26] The Respondent sought a brief adjournment of Mr. T's matter, which Judge Godfrey granted. He left Judge Godfrey's Courtroom. Judge Godfrey stood Court down to await his return.

[27] Ms. R and the Respondent went to Courtroom 308 to deal with the Respondent's adjournment application in *R. v. D*.

[28] Time passed in Courtroom 303. The few minutes stretched into half an hour. At approximately 3:00 p.m. *R. v T* [sic] was returned to Courtroom 303 without having been spoken to because the Judge in Courtroom 308 was already occupied with matters.

[29] *R. v. D* was recalled in Courtroom 303. The Respondent made his adjournment application before Judge Godfrey.

[30] Mr. T was not in Courtroom 303 throughout this exchange between the Court, Crown and the Respondent.

[31] The Crown opposed the Respondent's adjournment application on *R. v. D* on the basis that the charges were old, dating from 2001, that several earlier trial dates had been aborted due to Ms. D's then counsel getting off the record, and that the trial date of April 2, 2003 had been fixed after Crown had determined that Ms. D was not going to have counsel and that this date would be peremptory on Ms. D.

[32] The Respondent argued for the adjournment on the basis that Ms. D should now come to the conclusion that she could not represent herself at trial, that Ms. D was unfamiliar with the Court process, that the Respondent as counsel for Ms. D wanted the opportunity to speak to Crown after which time he might admit evidence of a police officer that would obviate the need to call that officer as a witness, and there was no urgency since there was no suggestion of continued contact between Ms. D and the complainant. The Respondent suggested that a trial date could be set as early as 60 days hence. The Respondent did not indicate at any time that the Crown's case was fatally flawed because

it could not prove notice of the terms of the Probation Order had been given to Ms. D.

[33] Judge Godfrey denied the Respondent's adjournment application on *R. v. D* and directed that the file be taken to another Courtroom for trial.

[34] Judge Godfrey directed that *R. v. T* proceed.

[35] Judge Godfrey directed that Mr. T be brought down from cells.

[36] The Respondent was unhappy with the ruling.

[37] The Respondent asked Judge Godfrey if he could go to the Courtroom where *R. v. D* would be tried, to assist Ms. D. Judge Godfrey refused this request and directed that the Respondent continue the trial *R. v. T*.

[38] The Respondent left Courtroom 303.

[39] Judge Godfrey had Mr. T. brought from cells and directed a mistrial of *R. v. T*.

[40] The Respondent went to Court 305 where Ms. R had taken the *R. v. D* file to be heard before Judge Bruce.

[41] The Respondent advised Judge Bruce that he was representing Ms. D and that he wanted the Crown to call its case and then he would be seeking an adjournment.

[42] It then became clear that the Crown had been relying on Ms. D's representation that she was admitting that she was bound by the Probation Order and that the Respondent was withdrawing any such admission.

[43] The Crown proceeded with its first witness in *R. v. D* at about 3:00 p.m. and the Court was occupied with the leading of the Crown's evidence and the Respondent's cross examination straight through until 4:25 p.m. By the time the Crown's available witnesses' evidence was concluded, it was 4:25 p.m., and there was insufficient time to conclude the case. Ms. D's trial was adjourned to continue on a date to be set.

[44] Mr. T remained in custody from April 25, 2003 until May 28, 2003 when a Supreme Court Judge released him after a bail review. The Respondent was ill on the next trial date of July 28, 2003, so the trial was adjourned. On the trial date of February 13, 2004, Mr. T did not appear and a bench warrant was issued for his arrest.

[45] On April 25, 2003, the Respondent did not speak to Mr. T before agreeing to represent Ms. D.

[46] Accordingly, the Respondent did not obtain instructions from Mr. T to seek an adjournment of his trial, in order that the Respondent could represent Ms. D at her trial.

[47] The Crown eventually stayed *R. v. D* because the Crown was unable to prove an element of the offence, that is, that Ms. D had been made aware of the terms of the Probation Order.

[12] The Applicant asserts in his Revised Notice of Appeal that the majority erred in its verdict and that the following errors were made:

(a) The majority erred in finding that Mr. T, due to his custodial status, was disadvantaged by what occurred;

(b) The majority failed to consider or conclude that he acted in the best interests of the Bar in

preventing an innocent person from making admissions in a case, against her interest, that could not be proven, thereby avoiding criminal convictions and a jail sentence for her; and

(c) The majority failed to consider or conclude that the trial court judge failed to give him, as defence counsel, an opportunity to make submissions explaining the facts above and did demonstrate a bias against him then that continues to the present, causing undue hardship for him and his clients.

[13] With respect to the Applicant's argument that the majority erred in finding that Mr. T, due to his custodial status, was disadvantaged by what occurred, we agree with the Hearing Panel for the reasons set out in paragraphs 62, 68, and 74 of the Decision on Facts and Verdict as follows:

> [62] It was unfair to Mr. T for the Respondent to leave him without counsel, in mid-trial, in the circumstances of this trial. By walking out of Court in mid-trial, the Respondent abandoned his client at a stage in the proceedings where Mr. T would have had to face the Crown's case alone, had the Judge proceeded. The Respondent chose to put the interests of his new client before the interests of his existing client. By abandoning Mr. T, the Respondent severed the solicitor client relationship. To do so in these circumstances was to sever the relationship for an improper purpose. It was only because Judge Godfrey declared a mistrial that Mr. T's potentially unfair position of being forced to proceed while unrepresented, was avoided.
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> [68] The Respondent's abandonment of Mr. T when the presiding Judge would not grant his adjournment placed Mr. T. in a potentially unfair position, which was only avoided by Judge Godfrey's declaration of a mistrial. This conduct resulted in the natural and foreseeable consequences of his withdrawal, that being a delay in Court proceedings, leaving Mr. T to languish in jail.
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> [74] The natural consequence of the Respondent's conduct was to waste Court time, the time of witnesses, and other counsel, and, worst of all, to delay Mr. T's trial.

[14] The Applicant argued that, since Mr. T was already in custody, he was not disadvantaged by what occurred. This argument ignores the fact that Mr. T was entitled to have his trial completed. Completion of his sentence on another matter would still leave him in jail pending either release or completion of the trial in which the Applicant abandoned him. In any event, the abandoning of Mr. T mid-trial was sufficient for a finding of professional misconduct.

[15] In addition, as noted in paragraph 74 of the Decision on Facts and Verdict, the consequences of the Applicant's conduct wasted Court time, the time of witnesses and other counsel and delayed Mr. T's trial.

[16] With respect to the Applicant's argument that the Hearing Panel did not give adequate consideration to the fact that he prevented an innocent person, Ms. D, from being convicted, thereby avoiding criminal conviction and a jail sentence, the majority of the Hearing Panel accepted that he did provide good service to Ms. D.

[17] However, that did not entitle the Applicant to jeopardize Mr. T's position, nor did it justify his conduct towards Judge Godfrey. As stated by the majority in the Decision on Facts and Verdict at paragraphs 63 and 77:

> [63] The Respondent's primary duty was to the client with whom he was engaged in trial. While it is laudatory to render assistance to unrepresented citizens, it is inappropriate to do that in circumstances where that jeopardizes the position of an existing client on a pre-existing retainer.

[77] The Respondent's justification for this conduct, that being the need to assist Ms. D who was most in danger of injustice, is no justification, in these circumstances, for his conduct respecting Judge Godfrey.

[18] We agree. A lawyer is not entitled to abandon a pre-existing client mid-trial simply because someone else is in need of the lawyer's services at the time.

[19] Finally, the Applicant submits that Judge Godfrey failed to allow him the opportunity to explain the above facts and did demonstrate a bias against him that continues to the present day, causing undue hardship for him and his clients. He asserts that Judge Godfrey's alleged mistreatment of him was not given adequate consideration.

[20] A review of the transcript of the Applicant's application to Judge Godfrey for an adjournment of the matter of Ms. D reveals that he was given the opportunity to make his argument and, further, that he concluded his submissions with the words " those are my submissions."

[21] The Applicant now argues that he was denied the opportunity to make further submissions respecting the situation Ms. D was in. The transcript reveals that he made full submissions. He completed those submissions and Judge Godfrey made her ruling. The fact that he did not anticipate that Ms. D's case would then be moved to another courtroom did not entitle him to then make further submissions on that issue.

[22] The Applicant acknowledged to the Benchers on this Review the right of a trial judge to control the trial list. Accordingly, he acknowledged that Judge Godfrey was entitled to exercise her discretion to control the court list. However, he perceived that she exercised her discretion wrongfully in the circumstances that applied to him and his two clients that day. As a result, he was entitled to make his own decision as to the correct priority to give to his professional obligations to his clients.

[23] The Applicant's perception of Judge Godfrey's treatment of him does not excuse his conduct and the majority of the Hearing Panel was correct in not relying on it. He was not entitled to walk out of the courtroom in the middle of a trial, abandoning his client.

[24] The Applicant, in agreeing to represent Ms. D, should have made his representation conditional on either having the matter adjourned or dealt with after the T matter. His failure to do so created the situation in which he found himself.

[25] The Applicant also argued that he was acting in the tradition of an independent bar and that the Canadian *Charter of Rights and Freedoms* guarantees entitlement to legal representation. Aside from whether or not the Applicant's interpretation of the *Charter of Rights and Freedoms* is correct,[3] the Applicant's argument misses what is at issue in this Review and before the Hearing Panel. At issue is his professional obligation to a client and his decision to abandon that obligation in favour of another.

Professional Misconduct

[26] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules or the *Professional Conduct Handbook*. It has been considered by the Benchers in a number of cases. The leading decision is the Decision on Review in *Law Society of BC v. Hops,* [1999] LSBC 29.

[27] *Hops* and decisions of hearing panels since, confirm that professional misconduct is no longer restricted to conduct that can be characterized as dishonourable or disgraceful. The hearing panel in *Law Society of BC v. Martin,* 2005 LSBC 16 at 29 para. 171 and at 23, paras. 139-140, reviewed *Hops*, (*supra*), and characterized the test as " whether the facts as made out disclose a marked departure from that

conduct the Law Society expects of its members; if so, it is professional misconduct."

[28] The Applicant's position at the Hearing and on this Review was that, at the time he accepted Ms. D's retainer, he fully expected that her trial would proceed after Mr. T's trial had concluded. His position was that he was acting for two clients with trials in the same courtroom, and he thought they both could complete.

[29] The majority on the Hearing concluded:

> The Panel finds on the Respondent's own evidence that he had insufficient knowledge of the circumstances of the *R. v. D* matter to be able to conclude that it would necessarily proceed in Courtroom 303, before Judge Godfrey. He had a duty to Mr. T to use diligence to determine whether he could in fact be available to represent Ms. D while still fulfilling his obligations to Mr. T. He failed in his duty. [4]

[30] Mr. McDiarmid's dissent turned on his finding of fact that the Applicant accepted Ms. D's retainer fully expecting her trial would proceed after Mr. T's trial and in the same courtroom.

[31] We are satisfied on the evidence of the Applicant and the witnesses called at the hearing that the Applicant did not have sufficient information to conclude that the *R. v. D* matter would proceed in the same courtroom as the *R. v. T* matter. He failed to place any conditions on the retainer for Ms. D, such as that he could only act for her if her trial was adjourned or if it proceeded after Mr. T's trial concluded. His actions placed him in the position he found himself in. The fact that Judge Godfrey refused his application to adjourn the matter of Ms. D did not justify his abandonment of Mr. T.

[32] In addition, the manner in which he walked out of the courtroom was discourteous to Judge Godfrey and buttresses our conclusion that the Hearing Panel correctly concluded that the Applicant had misconducted himself professionally. His commitment to Ms. D. and his perception of Judge Godfrey's attitude to him did not justify his conduct. To excuse his conduct would amount to a licence to lawyers to abandon pre-existing clients mid-trial simply because someone else was in need of their services.

[33] In reaching this conclusion we, as did the Hearing Panel, have relied on our own experience with guidance from the Canons of the *Professional Conduct Handbook,* Chapters 1 and 10.

[34] We note that the Hearing Panel stated in paragraph 80 that:

> This Panels [sic] finds that the Respondent has professionally misconducted himself in abandoning his client in mid trial, and in treating the Provincial Court Judge with disrespect.

The citation does not specifically allege the Applicant's discourteous treatment of the trial judge in leaving the courtroom mid trial. The citation does state that the Panel was to inquire into the Applicant's conduct in leaving his client mid-trial " contrary to his obligations to [his] client and the Court." (emphasis added) The conclusion of the Panel may give the appearance that the Applicant was guilty of professional misconduct on two separate allegations; however, when the decision is read in its entirety, it is clear that the majority was considering the Applicant's conduct in leaving the courtroom as part of, or as an aggravating factor relating to, his conduct in abandoning his client Mr. T. In other words, his manner of leaving was a factor to be considered.

Review of Penalty

[35] The Hearing Panel imposed a 30-day suspension and costs of the hearing, to be agreed upon.

[36] The Applicant's grounds for a review of the penalty, as set out in his revised Notice of Review, are:

(a) the penalty imposed is " inconsistent with the actions of Counsel who acted in the best interests of both clients and the goals of the justice system" ; and

(b) paragraphs 4 and 5 of his Notice (his assertion that the trial judge failed to give him an opportunity to make submissions and demonstrated a bias against him and his application to admit the fresh evidence) should be applicable and ameliorate any penalty.

[37] The test for review of a penalty decision was discussed in *Hordal* (*supra*). In that decision, the Benchers on the Review determined, at para. 14, that the question of whether particular misconduct should lead to particular penalties can often be easily answered by the Benchers. However, when considering whether the quantum of fine or duration of suspension is the correct quantum or duration, the correctness test is informed by the reasonableness test in that the Benchers on the Review will substitute their judgment only if it falls outside the appropriate range. The *Hordal* Panel stated:

> [16] The Benchers are often required to consider whether the quantum of a fine levied on a member, or the duration of a suspension imposed as a result of particular conduct, is the correct fine or is the correct duration for the suspension. Those issues arise in this Review.
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> [17] While we have determined that these issues are not as easily capable of the application of the correctness test, they are nonetheless questions to which there is a correct answer. If the Benchers in review are satisfied that the penalty differs from that imposed by the Hearing Panel, the Benchers must substitute their judgment for that of the Hearing Panel.
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> [18] In considering questions regarding the correctness of the magnitude of a fine, or of the duration of a suspension, the Benchers must examine the impugned conduct and determine if the proposed penalty falls within a " range" of penalties that have been applied in similar situations in the past. This examination is often referred to as a " reasonableness" test, and in our view that characterization is sometimes wrongly contrasted with the correctness test. It is the view of the Benchers that to be correct, the proposed fine or suspension duration must be " reasonable" or within the range of appropriate penalties for similar delicts. In other words, the " correctness" test is informed by the " reasonableness" test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension duration in those circumstances.
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> [19] Counsel suggested that it would be improper for the Benchers to interfere with the fine quantum and/or suspension duration, as it was suggested that conduct by the Benchers would amount to " tinkering" with the determination of the Hearing Panel. Within certain parameters, we agree that it is inappropriate for the Benchers to " tinker" with determinations made by a Hearing Panel. It would, for example, be inappropriate for the Benchers to determine, in circumstances where a Hearing Panel had levied a fine of $5,000.00, that a fine of $4,000.00 or $6,000.00 would have been more appropriate. That substitution of judgment would clearly amount to tinkering by the Benchers, and would be inappropriate. On the other hand, if the Hearing Panel had determined a fine of $5,000.00 while the Benchers thought that a fine of $15,000.00 was the correct fine, then clearly it would not, on a relative basis, amount to tinkering with the determination of the Hearing Panel for the Benchers to substitute a fine of $15,000.00 for the fine of $5.000.00 imposed by the Hearing Panel. Similar considerations with respect to orders of magnitude as to penalty duration will arise, and we will address those later in these reasons.

[20] In summary then, we note that we must review the correctness of the Hearing Panel's determination, and when considering issues of magnitude of fine and duration of suspension, if we are satisfied that the magnitude of fine and/or duration of suspension established by the Hearing Panel is incorrect, meaning that it falls outside an appropriate range, then we must substitute our judgment for that of the Hearing Panel.

[38] We are satisfied that the penalty imposed by the Hearing Panel was appropriate and was within the appropriate range for the reasons given by them.

Application to Adduce Fresh Evidence

[39] The fresh evidence the Applicant seeks to introduce consists of:

(a) An affidavit of Mr. T sworn April 18, 2006; and

(b) An affidavit of Mr. F sworn August 30, 2007.

[40] The affidavit of Mr. T speaks to a number of matters including:

(a) Judge Godfrey's attitude towards the Applicant and his application for a *Charter* remedy;

(b) Mr. T's discussion with and instructions to the Applicant to the effect that he would proceed with his trial alone without counsel.

[41] Mr. F, the Applicant's assistant, speaks in his affidavit about the alleged effect Judge Godfrey's ban of the Applicant from her courtroom has had on the Applicant and his clients.

[42] The authority for the Benchers to admit evidence in addition to the evidence that forms part of the record is set out in section 47(4) of the *Legal Profession Act* and Rule 5-17(2) of the Law Society Rules:

Section 47(4) states:

(4) If, in the opinion of the benchers, there are special circumstances, the benchers may hear evidence that is not part of the record.

Rule 5-17(2) states:

(2) If, in the opinion of the Benchers, there are special circumstances, the Benchers may admit evidence that is not part of the record.

[43] The Benchers considered the test for the admissibility of fresh evidence in *Law Society of BC v. Kierans* [2001] LSBC 6. At paras. 13 and 14, the Benchers considered the tests for admissibility in the criminal and civil context:

13. The leading authority on the exercise of an appellate court of its discretion under the provisions of the *Criminal Code* to admit fresh evidence is *Palmer v. The Queen*, [1980] 1 S.C.R. 759, in which the Supreme Court of Canada established the following tests:

The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;

The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

The evidence must be credible in the sense that it is reasonably capable of belief, and

It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

14. In a civil context, the test is established by the Court of Appeal decisions in *Cory v. Marsh* (1993), 77 B.C.L.R. (2d) 248 and *Appel (Public Trustee of) v. Dominion of Canada General Insurance Co.*, [1997] B.C.J. No. 1794 as being:

That the evidence was not discoverable by reasonable diligence before the end of the trial;

That the evidence is wholly credible;

That the evidence will be practically conclusive of an issue before the court.

[44] The Benchers in *Kierans* adopted the tests set out in *Palmer* and held that, if the proffered evidence fails to meet any of the *Palmer* tests, it cannot be admitted.[5]

[45] With respect to the affidavit of Mr. T, it conflicts with the Applicant's own evidence at the hearing and in his submissions to us that he did not speak to Mr. T. and obtain his approval to leave Mr. T unrepresented until after he had left him unrepresented. There are serious credibility concerns with Mr. T's affidavit evidence. In addition, it is clear from the record that the Applicant had contact with Mr. T prior to his initial response being given to the Law Society.

[46] The affidavit evidence of Mr. T does not satisfy the test noted above. It was discoverable by reasonable diligence before the hearing before the Hearing Panel, it raises credibility issues and is not conclusive of the issue before us.

[47] With respect to the affidavit of Mr. F, it relates to events occurring after the hearing and concerns the effects on the Applicant and his clients of Judge Godfrey's ban from her courtroom. The affidavit, while relevant to the issue of penalty, would not have affected the penalty imposed by the Panel since the Panel considered the ban and its effect in imposing the penalty. [6]

[48] There is therefore no basis for admitting either affidavit, and the application to adduce fresh evidence is dismissed.

[49] The decision of the Hearing Panel on Facts and Verdict is found to be correct. The decision of the Hearing Panel on Penalty is confirmed.

[50] No submissions were made to us on the matter of costs. The Hearing Panel ordered that costs of the hearings before them be payable by the Applicant. They ordered that if counsel for the Law Society and the Applicant were unable to agree on the costs, the Hearing Panel would accept submissions in writing on the issue. We also confirm the order of the Hearing Panel in respect of costs.

[51] With respect to the costs of this Review, we order that they be payable by the Applicant. If counsel for the Law Society and the Applicant are not able to agree on the costs of the Review, we will accept submissions in writing on the issue of costs.

[1] *LSBC v. Welder*, 2007 LSBC 29 at paragraphs 29-31

LSBC v Hordal, 2004 LSBC 36 at paragraph 10

LSBC v Hops, [1999] LSBC 29 at paragraphs 10-11

[2] *Hordal*, supra, at paragraph 11

See also, *Hops*, supra, at paragraphs 12-13

[3] *British Columbia (Attorney General) v. Christie*, [2007] S.C.R. No. 21; and *R. v McGibbon* (1988), 45 CCC (3d) 334 (Ont. C.A.).

[4] Decision on Facts and Verdict, 2007- LSBC 10, para. 60.

[5] *Kierans*, supra, at 8.

[6] Decision on Penalty, 2005 LSBC 22, para. 7.