2008 LSBC 13
Report issued: May 08, 2008
Citation issued: March 7, 2006

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

Sheldon Goldberg

Applicant

Decision of the Benchers on Review

Review date: February 12, 2008

Benchers: Gordon Turriff, QC, Chair, Kathryn A. Berge, QC, Robert C. Brun, QC, Peter B. Lloyd, David W. Mossop, QC, David M. Renwick, QC, Marguerite (Meg) Shaw, QC

Counsel for the Law Society: Jean P. Whittow, QC
Appearing on his own behalf: Sheldon Goldberg

[1] This is a Review by the Benchers, on the record, of the decision of a hearing panel who determined, on the authority of section 38(3) of the *Legal Profession Act*, S.B.C. 1998, c. 9, that the Applicant, Sheldon Goldberg, a lawyer:

1. had committed professional misconduct by making serious allegations against a former lawyer, JB, for which there was no proper or sufficient evidentiary foundation; and

2. had incompetently performed his duties as counsel in the prosecution of four appeals in the Court of Appeal for British Columbia.

[2] In a nutshell, the Law Society had alleged that, as part of his work for each of the appellants, the Applicant had repeatedly made unsubstantiated statements about JB's character and conduct and that, in his efforts on the appeals, he had incompetently prepared and presented cases about JB's ineffectiveness as the appellant's trial counsel.

[3] The Applicant was called upon to answer a citation issued on March 7, 2006. The hearing of the citation occupied the panel for seven days in 2006. The panel's determination against the Applicant was issued on January 10, 2007. The subject of penalty was addressed at a further hearing on May 18, 2007. The panel's penalty decision, made on the authority of s. 38(5) of the *Act*, was issued on September 7, 2007. A majority of the panel decided that the Applicant must be suspended from the practice of law for 90 days; that he must make a practice supervision agreement that would require him, before arguing at Court that another lawyer had acted ineffectively, to submit to a practice supervisor, for review, any written material relating to the proposed argument; and that he must pay the costs of the hearing on the citation as provided for by Law Society Rule 5-9. (We understand that the costs have not yet been quantified.) One member of the panel agreed with his colleagues' determination and with the costs order, but would have suspended the Applicant

for 180 days.

[4] The Applicant applied for this review, which encompasses the panel's determination, the penalty and the costs order. We understand that the Law Society called for a review of the penalty but later withdrew its review application. In the circumstances, we have not been asked to decide whether the penalty imposed by the majority of the panel was insufficient, even though we may have the power to make such a decision: See section 47(1), (3) and (5)(b) of the *Legal Profession Act*, S.B.C. 1998, c. 9.

[5] The hearing of the Review was concluded in the day that had been reserved for it by agreement of the parties.

[6] Before beginning to argue his case on the Review, the Applicant made an application relating to Ms. Whittow, QC, who appeared as counsel for the Law Society on the Review hearing. She had not been involved in the proceedings that led to the Review. Mr. Van Ommen had represented the Law Society before the panel. Although the Applicant did not articulate his application concerning Ms. Whittow very clearly, it appeared that he sought an order disqualifying her from appearing as counsel against him.

[7] As we understood it, the Applicant asserted that Ms. Whittow was in a position of conflict of interest because, many years ago, she had acted for the Law Society in discipline proceedings involving the same JB against whom the Applicant had made the allegations that resulted in the citation that produced the determination and penalty decision with which we are now concerned. The Applicant appeared to be arguing:

1. that, in the course of her earlier representation of the Law Society, Ms. Whittow must have acquired information about JB that supported the case the Applicant had sought to make against JB in the Court of Appeal; and

2. that the information she must have acquired might assist him in proving what we have observed he wanted to use the Review to try to prove, which was that he has always been right to assert that JB could not have, and had not, effectively represented the appellants for whom the Applicant had acted in the Court of Appeal.

[8] The Applicant cited no authority for his conflict argument. We dismissed his application, saying that we were satisfied that there was no conflict. While not germane to the Review, except, perhaps, on the question of costs, it is noteworthy that the Applicant's application concerning Ms. Whittow revealed his inability or unwillingness to understand that the discipline proceeding that resulted in the panel's determination was a proceeding that addressed his conduct, not JB's conduct.

[9] On the Review, the Applicant did not suggest that Ms. Whittow was wrong to have argued that the standard of review on the Review was correctness. We accept that correctness is the applicable standard. We have therefore asked ourselves whether the panel was correct:

1. to have determined that the Applicant had committed professional misconduct;

2. to have determined that he had performed his duties incompetently;

3. to have imposed the 90-day suspension and to have required the practice supervision agreement; and

4. to have ordered the Applicant to pay the costs his misconduct had caused.

We have concluded that the panel was correct in each respect.

[10] In a letter to the Law Society dated October 16, 2007, the Applicant listed the decisions of the panel that he disputed. His points (the sixth of which we found hard to comprehend) were that the panel erred:

1. by proceeding with the hearing on the citation where no member of the panel was a lay Bencher;

2. by denying the Applicant the opportunity to call as his witness at the hearing JB and two of the appellants for whom the Applicant had acted;

3. by finding that the evidence the Applicant had filed for the purposes of the appeals on which he had acted was inadequate;

4. by accepting commentary of the Court of Appeal concerning the Applicant's representation of his clients in the Court of Appeal;

5. by failing to consider an event relating to JB that occurred after JB had represented the people at trial for whom the Applicant had acted on appeal

6. by failing to find that the Court of Appeal was wrong to have said that it could not understand his argument that Richard Peck, QC, had been in a position of conflict of interest because Mr. Peck, as a Bencher of the Law Society, had been a member of a panel that considered a citation arising from a complaint made against JB by a person for whom Mr. Peck had previously acted, and where Mr. Peck had later acted for the Attorney General in certain proceedings;

7. by ignoring the conflict of interest said to have resulted from the Law Society having appointed counsel from the firm of which Mr. Getz, QC (who was part of the panel), was a member, to investigate a complaint made against Mr. Van Ommen and his firm;

8. by considering the Applicant's refusal to apologize to JB, it being the Applicant's position that he was effectively cited for professional misconduct for having refused to give the apology;

9. by ignoring the institutional and statutory conflict of interest said to have resulted from the Law Society having been represented by counsel in the Court of Appeal in the appeals on which the Applicant was engaged, in response to an application his clients had made for an order requiring the Law Society to produce documents provided to the Law Society by JB when, after JB had participated in the trials that led to the appeals, he had applied to the Law Society for reinstatement as a member;

10. by not acknowledging that it was the Applicant's duty to make unpalatable arguments in the Court of Appeal; and

11. by punishing him excessively.

[11] Although we expressly invited the Applicant to argue each of his points and to say, by reference to the record, how the panel got it wrong, he chose not to do so. He also chose, although invited to do so, not to address the deficiencies listed in paragraph [51] of the panel's decision on Facts and Verdict. Instead, to use his words, he employed a " broad brush." In some, if not in large measure, that approach entailed his reiterating the arguments he had made in the Court of Appeal about JB's ineffectiveness and his criticizing the Law Society for not having prevented JB from representing any of the people for whom the Applicant later acted in the Court of Appeal. For her part, Ms. Whittow addressed each of the points from the Applicant's October 16, 2007 letter. She used four appendices to her written argument to summarize the evidence from the Court of Appeal record, which the panel had considered, of what the Applicant had led as

evidence about JB in the Court of Appeal.

[12] Because the Applicant did not formally abandon the first 10 of his 11 points, we address them here, even though he chose not to develop them. We also address his eleventh point. For the reasons that follow, we are satisfied that there is no merit to any of the points.

1. Nothing requires that a panel include at least one lay Bencher.

2. Neither JB nor the two appellants could have given any evidence before the panel that was relevant to the allegations made in the citation.

3. The evidence compiled by the Applicant for use on the appeals was patently inadequate.

4. The panel could properly consider what the Court of Appeal had said about his work in that Court. The panel was not required to ignore the remarks of the Court (particularly when it is so very rare for a Court to make such remarks), and in any event, the Applicant had a full opportunity before the panel to challenge the reliability of the statements the Court had made about his work. (Having said that, we do question whether it was right for the Court of Appeal to have characterized the Applicant's conduct as " unprofessional" . (See *Novak v. British Columbia (Attorney General)* unreported, January 15, 1973, Vancouver Registry [no number available], BCCA, which suggests that " professional misconduct" and " unprofessional conduct" can be used synonymously.) It is one thing for the Court to compare the adequacy of the Applicant's work with the adequacy of work done by other counsel and to say that his work fell below the Court's standard. It is another thing for the Court to say that the Applicant's conduct was or was not unprofessional. It is not for the Court to judge whether any lawyer has or has not acted professionally, no matter how much might be said about the poor quality of the lawyer's work. This is so because the determination of whether a lawyer has committed professional misconduct is reserved to the Benchers. In some cases, it may be a small step from proven inadequacy of performance to proven professional misconduct, but in other cases, inadequate performance may reflect incompetence only, and it is for the Benchers alone to determine whether professional misconduct has been committed.)

5. What JB might have done after he appeared as counsel for the appellants the Applicant represented was not relevant to the allegations made in the citation.

6. Nothing Mr. Peck might or might not have done was relevant to the allegations made in the citation.

7. There was no indicated, much less proved, material connection between the investigation of a complaint about Mr. Van Ommen and the consideration by the panel, whether Mr. Getz was a panel member or not, of the allegations made in the citation.

8. If the Panel took into account the Applicant's refusal to apologize to JB, and it is not clear that it did (the refusal is mentioned in paragraph [21] of the panel's penalty decision), it did so with reference to penalty only, and if it did so, it did so appropriately, having regard to the accepted penalty considerations articulated in *Law Society of BC v. Ogilvie*, [1999] LSBC 17.

9. The question of whether the Law Society should have had to produce documents for use in the appeals on which the Applicant was engaged was unrelated to the question of whether the Applicant had said things about JB that were unsubstantiated, and was unrelated to the question of whether the Applicant had acted incompetently.

10. At paragraph [36] of its decision on the merits of the allegations made against the Applicant, the

panel stated that it had borne in mind the need to ensure that counsel are able to advocate fearlessly and vigorously for their clients.

11. The penalty imposed was not excessive, either in the chosen length of the suspension or in the imposition of the supervision condition. Both parts of the penalty are in the public interest and neither is inappropriate having regard to the *Ogilvie* factors, particularly where, as the panel noted, there was an " overwhelming" need for specific deterrence. On the question of penalty, we were not assisted by the Convocation decision of The Law Society of Upper Canada in the case of *Re: Clark*, 1996 CanLII 4876 (Ont. LSDC), to which the Applicant referred us. There Mr. Clark was reprimanded for professional misconduct that was different in its nature from the Applicant's misconduct, and the Benchers in Ontario had not found that Mr. Clark had acted incompetently.

[13] It was also not wrong for the panel to have ordered the Applicant to pay costs; he cannot realistically expect other lawyers to pay for his unsuccessful defence of the citation.

[14] It is necessary for us to say a little more about the Applicant's third and tenth points. They are linked. In answer to our question about the adequacy of the evidence he had compiled for use on the appeals, the Applicant told us that his work was 90% or 95% " right" and that it was trivial to focus on the other 10% or 5%. As we see it, the panel correctly concluded that the Applicant's work in the Court of Appeal was deficient, consisting as it did of the retailing of allegations about JB that were not supported by admissible evidence. Even on the most sympathetic review of the record before the Court of Appeal, and by that we mean sympathetic to the Applicant, it cannot be said, qualitatively or quantitatively, that he got it 95% or even 90% right. That record demonstrates that he exposed JB to severe criticism without a proper foundation for the allegations he made. He incompetently tried to build his client's cases on allegations that he knew or should have known were unsubstantiated.

[15] Incompetence is the want of ability suitable to the task (see *Mason v. Registered Nurses' Association of British Columbia* (1979), 13 BCLR 218 (SC) and the Applicant's work on the appeals shows a plain want of ability suitable to the task of proving the allegations made about JB and of proving that JB had acted ineffectively for any of the appellants.

[16] Certainly it is the case that counsel, even very experienced and very capable counsel, sometimes seek to adduce evidence that a Court decides is irrelevant or inadmissible. As long as they have acted honestly, and acting honestly must include acting with intellectual honesty, counsel must have freedom to be wrong, sometimes. Society would rue the day that lawyers were allowed no latitude in determining what evidence may be required for the proper prosecution or defence of their clients' cases. (On the subject of the freedom of counsel, see, e.g., *Young v. Young* (1990), 50 BCLR (2d) 1 (CA), at pp. 62 - 64; *aff'd* [1993] 4 SCR 3). The freedom to be wrong, sometimes, is tempered by the responsibility to take care at all times, and taking care means that counsel must understand in any given case what facts must be proved and how to prove them, having regard to the rules of evidence. Counsel, as independent as they must be, have no right to lead just any evidence or to say just anything in court.

[17] This point has recently been made in the House of Lords in England where, in *Medcalf v. Weatherill*, [2002] UKHL 27, Lord Bingham of Cornhill said, at para. 22, about " allegations of the most damaging kind" (made in that case by one party against another):

> ... the receipt of instructions [to make damaging allegations] is not of itself enough. Counsel is bound to exercise an objective professional judgment whether it is in all the circumstances proper to lend his name to the allegation. As [paragraph 606 of the Code of Conduct of the Bar of England and Wales] recognises, counsel could not properly judge it proper to make such an allegation

> unless he had material before him which he judged to be reasonably credible and which appeared to justify the allegation. At the hearing stage, counsel cannot properly make or persist in an allegation which is unsupported by admissible evidence, since if there is not admissible evidence to support the allegation the court cannot be invited to find that it has been proved, and if the court cannot be invited to find that the allegation has been proved the allegation should not be made or should be withdrawn.

[18] The same point was made in *Medcalf* (*supra*) by Lord Rodger of Earlsferry who quoted an extrajudicial remark of Lord MacMillan, at para. 78:

> ... where a person's reputation is at stake, the pleader should not " trespass ... a hair's breadth beyond what the facts as laid before him and duly vouched and tested, will justify."

[19] The general duty of counsel, which Lord Bingham said was recognized in the paragraph from the English Code of Conduct to which His Lordship referred, is the same general duty that the Benchers in British Columbia, in the exercise of their power to guard the proper standards of professional and ethical conduct (as confirmed by *Re: Prescott* (1971), 19 DLR (3d) 446 (BCCA), at 452), require British Columbia lawyers to discharge. The panel correctly concluded that the Applicant had not discharged the duty and also correctly concluded that he had acted incompetently.

[20] The Applicant's Review application is dismissed, with costs to the Law Society.