

2008 LSBC 20

Report issued: July 9, 2008

Citation issued: November 7, 2006

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

Alan James Short

Respondent

Decision of the Hearing Panel
on Facts and Verdict

Hearing date: June 9, 2008

Panel: David Renwick, QC, Chair, Meg Shaw, QC, David Mossop, QC

Counsel for the Law Society: Jaia Rai

Counsel for the Respondent: Reginald Harris

Background

[1] On November 7, 2006 a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society on the direction of the Chair of the Discipline Committee. The citation directed that this panel inquire into the Respondent's conduct as follows:

1. You breached your written undertaking to the Law Society dated January 14, 2003 by failing to abstain from the consumption of alcohol.
2. Subsequent to providing your written undertaking to the Law Society dated 14 January 2003 you appeared in court while impaired by alcohol.

[2] The requirements for service of this citation upon the Respondent were admitted.

Statement of Agreed Facts

[3] The parties approved a Statement of Agreed Facts, which is set out below:

1. The Respondent was called to the Bar in British Columbia on September 11, 1978.
2. On September 7, 2006, the Respondent was suspended, pursuant to section 39 of the *Legal Profession Act* and Rule 4-17 of the Law Society Rules, pending the disposition of the citation herein or until further order pursuant to Rule 4-19.
3. From the time of his call to his suspension, the Respondent was a practising lawyer except for brief periods in 1981 and 1987 when his membership was ceased.
4. Since 2001 until his suspension, the Respondent had been practising as a sole practitioner with a practice consisting primarily of criminal defence.
5. The Respondent is an alcoholic. He has been the subject of prior Law Society

discipline proceedings concerning misconduct associated with his drinking.

6. In December 2001, a Conduct Review was authorized by the Discipline Committee as a result of the Respondent's conduct in having conducted a criminal trial while under the influence of alcohol and prescription drugs. The Conduct Review Subcommittee made certain recommendations as a result of which the Respondent provided the following written undertaking to the Law Society dated January 14, 2003:

1. I will abstain from the consumption of alcohol,
2. I permit the Law Society to obtain quarterly reports from my treating physician, Dr. Salim Parker, concerning my treatment program for alcoholism, and my adherence to this program, the first report to be obtained forthwith.

(the "Undertaking")

7. The Discipline Committee accepted the Undertaking at its meeting on February 6, 2003.

8. The Law Society subsequently requested and received several reports between May 2003 and February 2005 from various treating physicians who advised that the Respondent had been reporting abstinence.

Investigation of Complaints Resulting in Current Citation

9. In the summer of 2006, the Law Society received complaints from Sheriff Robert Kearns, who at the time worked at the Port Alberni courthouse, and Barbara Smith, who at the time was a practising lawyer, concerning the Respondent's conduct including his drinking and appearing in Court while impaired.

10. As a result, the Professional Conduct Department of the Law Society commenced an investigation.

11. On July 13, 2006, Ruth Long and Gurprit Gill, staff lawyers in the Professional Conduct Department, spoke to the Respondent concerning Sheriff Kearns' s complaint. On July 24, 2006, Ms. Gill wrote to the Respondent confirming their discussion and requesting further information concerning his consumption of alcohol since February 2005.

12. On the same date, Ms. Gill wrote to Dr. Lipsey, the Respondent's physician at the time, requesting a progress report concerning the Respondent.

13. Dr. Lipsey provided the report dated July 26, 2006.

14. In his report, Dr. Lipsey stated:

As you know, I last submitted a report February 15, 2005. Since that time, I have seen the patient with respect to episodic care for a recurrent dental abscess, September 19, 2005 and November 23, 2005. Other than that, I saw the patient today [July 26, 2006] when he reported that he continues to abstain completely from alcohol and other drugs. He is working full-time and feels well. He continues to attend AA and is committed to his continued abstinence...

15. On August 1, 2006, Ms. Gill wrote to the Respondent noting that Dr. Lipsey made no mention of the Respondent having consumed alcohol since his report in February 2005 and requesting the Respondent advise whether he informed Dr. Lipsey of having consumed alcohol and if not, his explanation for not informing Dr. Lipsey.

16. On August 8, 2006, Ms. Gill spoke with the Respondent about Barbara Smith's complaint. On August 10, 2006, Ms. Gill wrote to the Respondent confirming their discussion, enclosing a copy of Ms. Smith's complaint letter, and requesting a response.

17. The Respondent requested and was granted extensions to provide his responses to Ms. Gill's letters dated July 24, 2006 and August 10, 2006. Responses were not received and on September 5, 2006, the Chair of the Discipline Committee directed the issuance of a citation against the Respondent for his conduct in having breached his Undertaking to the Law Society by failing to abstain from alcohol and for his conduct in having appeared in Court while impaired by alcohol. The Chair also referred the matter to three Benchers pursuant to section 39 of the *Legal Profession Act* and Rule 4-17 of the Law Society Rules to determine whether the Respondent should be suspended or have conditions placed on his practice pending final disposition of the citation

18. The section 39 proceeding was held on September 7, 2006 before three Benchers. The Respondent appeared with counsel and gave evidence.

19. At the conclusion of the proceeding, the three Benchers concluded that the Law Society established, on the balance of probabilities, that allowing the Respondent to continue in the practice of law would be dangerous or harmful to the public or his clients. Accordingly, the three Benchers ordered that the Respondent be suspended, effective immediately, until final disposition of the citation or until further order pursuant to Rule 4-19. The written Decision of the Benchers was issued on September 12, 2006.

20. The citation herein was subsequently issued on November 7, 2006.

Evidence of Mr. Short's Impairment Post Undertaking

21. The Respondent admits that in 2005 and between January 2006 and July 2006, there were occasions where he drank and occasions where he appeared in and around the courthouse while impaired by alcohol.

22. In addition, the Respondent admits drinking on the specific occasions referenced below.

2005 Incident Outside Port Alberni Courthouse

23. At the material times, Barbara Smith was a practising lawyer with an emphasis on criminal defence. She was the President of the local Bar Association in Port Alberni and agent for the Legal Services Society. As agent, her duties included acting as Duty Counsel and assigning other lawyers to act as Duty Counsel.

24. Ms. Smith has known the Respondent since the 1980s or 1990s. They had mutual friends and socialized together. She came to know the Respondent on a professional level in the late 1990s. Ms. Smith was aware that the Respondent had a reputation for being a serious drinker. The first time she became concerned about his drinking and appearing in Court was in 2005 when she saw him

sitting on the curb outside the Port Alberni courthouse.

25. Her recollection of that incident is as follows:

1. The Respondent dropped by her office to get a referral that afternoon. When he was there, she received a call from a Sheriff about someone in custody who needed Duty Counsel.
2. As she was very busy, she asked the Respondent to go.
3. She saw the Respondent in her office and he was showing signs of having drunk [sic]. He was very red-faced, pugnacious and slurring enough for her to pick up on the fact that he was not sober.
4. After he left, she felt queasy about what she had done and rushed to the courthouse.
5. By the time she got there, there would have been enough time for him to have gone into Court and come back outside.
6. The Respondent was sitting on a curb. She thinks he said to her that he went inside and got some information. He had a look of anguish about him and she told him that he should not be doing this and that she would take over. He said thank you to her. She is pretty sure she told him not to drive.
7. After she finished in Court, she thinks she asked the Sheriff to check to see if the Respondent's car was still in the parking lot, and she thinks the answer was yes.

January 2006

26. Todd Patola is the acting Federal Crown in Port Alberni and in his capacity as such has had dealings with the Respondent.

27. In January 2006, Mr. Patola detected alcohol on the Respondent's breath. On this date, he observed the Respondent leaving the courthouse in an impaired state.

April 2006

28. The Respondent admits drinking alcohol over a 6 day period in April 2006.

June 27, 2006

29. Sheriff Kearns has observed the Respondent in Court when the Respondent appeared impaired on various occasions in 2005 and 2006.

30. Leah Fontaine is a practising lawyer and has been employed as Provincial Crown Counsel in Port Alberni since May 1, 2006.

31. On June 27, 2006, Ms. Fontaine was Crown Counsel on a preliminary inquiry held in courtroom 2. The Respondent was defence counsel.

32. Ms. Fontaine observed the Respondent in Court impaired by alcohol on that date.

33. Her evidence concerning her dealings with and observations of the Respondent is set out below and admitted:

Prior to appearing in the courtroom in the morning, Mr. Short came and spoke with me in court at which time I could smell a faint odour of alcohol. I thought the odour was perhaps due to Mr. Short drinking the night before. I thought the odour was perhaps coming from his body through perspiration for example. We commenced the preliminary inquiry later that morning and the odour was getting a little bit stronger throughout the morning.

After the lunch break that lasted about one and a half hours, Mr. Short came and spoke with me prior to entering the courtroom. By this time, the smell of alcohol on his breath and coming off his body was quite strong, his face was red, his eyes were glossy, his speech was slurred, and he was being a little bit louder than he normally is. He appeared to be intoxicated by this point.

During the preliminary inquiry, Mr. Short at one point, as he was attempting to make an objection, grumbled and made some sort of sound. Judge Klaver asked him, "Is that an objection?" Mr. Short stood up, swaying a bit, and said something to the effect of, "Yes, Your Honour, I guess that's going to be how I'm going to object from now on."

34. On the same date, Sheriff Kearns had dealings with the Respondent in Court and observed that he was in an impaired state.

Evidence of Gordon Baines

35. Gordon Baines was called to the Bar in B.C. in May 2000 and joined Provincial Crown Counsel in Port Alberni in November 2000. He met the Respondent shortly thereafter.

36. Mr. Baines has seen the Respondent in various degrees of impairment in Court from 2003 onwards and describes the signs of the Respondent's impairment as including a redder complexion, strong odour of liquor, thick slurred speech and impaired demeanour.

37. No particular appearance or date sticks out in Mr. Baines's mind because Mr. Baines would see the Respondent in an impaired state in cycles and for two to three months prior to August 2006, he saw the Respondent in an impaired state "pretty much every time [he] saw him."

38. Mr. Baines says that he was not concerned that the Respondent was not giving proper representation to his clients at these appearances.

Client Complaints

39. On two separate occasions in 2005 or 2006, two clients of the Respondent, both of whom were in custody, made comments to the Sheriffs at the Port Alberni courthouse concerning the Respondent's lack of sobriety.

Admissions

40. The Respondent admits that he breached his Undertaking to the Law Society dated January 14, 2003 by failing to abstain from the consumption of alcohol and admits that, subsequent to providing the Undertaking, he appeared in Court while impaired by alcohol, as alleged in the Schedule to the citation.

41. The Respondent further admits that his conduct in breaching the Undertaking and

appearing in Court impaired amounts to professional misconduct.

[4] Letters were also admitted and form part of the Statement of Agreed Facts.

Issues

[5] Did the Respondent breach his written Undertaking to the Law Society dated January 14, 2003?

[6] Subsequent to providing the above written Undertaking, did the Respondent appear in court while impaired by alcohol?

[7] The provisions of the *Professional Conduct Handbook* that are relevant to these proceedings are as follows:

CHAPTER 8

THE LAWYER AS ADVOCATE

Prohibited conduct

1. A lawyer must not:

(i) appear before a court or tribunal while impaired by alcohol or a drug.

CHAPTER 11

RESPONSIBILITY TO OTHER LAWYERS

Undertakings and trust conditions

7. A lawyer must

(i) not give an Undertaking that cannot be fulfilled,

(ii) fulfill every Undertaking given, and

(iii) scrupulously honour any trust condition once accepted.

Analysis

[8] The evidence is overwhelming in this case. The Statement of Agreed Facts refers to admissions by the Respondent and corroborating evidence from other counsel and court officials. The facts make it clear that the Respondent has:

(a) breached his written Undertaking to the Law Society dated January 14, 2003, not to consume alcohol; and

(b) on more than one occasion, appeared in court while impaired by alcohol.

Conclusion

[9] The Panel finds that the Respondent's conduct constitutes professional misconduct in respect of both allegations in the citation.