2009 LSBC 13
Report issued: April 30, 2009
Citation issued: January 19, 2006

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

Douglas Hewson Christie

Applicant

Decision of the Benchers on Review

Review date: December 11, 2008

Quorum: G. Glen Ridgway, QC, Chair, Haydn Acheson, Leon Getz, QC, Thelma O'Grady, David Renwick, QC, Meg Shaw, QC, Ronald Tindale, Dr. Maelor Vallance

Counsel for the Law Society: Jean P. Whittow, QC and Andrew Buchanan
Appearing on his own behalf: Douglas H. Christie

Introduction and Background

[1] On January 19, 2006 a citation was issued directing a hearing to enquire into the Applicant's conduct in the course of his representation of the plaintiffs in an action, *Rovnyshyn and others v. Drys,* in the Supreme Court of British Columbia (the " Rovnyshyn Action"). Specifically, the hearing was directed to the Applicant's alleged conduct in causing three documents, each entitled " Subpoena for Documents" , and described respectively as the " Bank Subpoena" , the " Hospital Subpoena" and the " California Subpoena" , to be prepared and delivered, in each case, it was alleged, for the purposes of improperly obtaining documents from a non-party.

[2] The hearing took place between December 5, 2006 and December 17, 2007. The Panel heard evidence about the circumstances surrounding the preparation and delivery of the three subpoenas and the Applicant's involvement in them. In its Decision on Facts and Verdict issued September 11, 2007 (the " Verdict" - 2007 LSBC 41) the Panel concluded, unanimously, that the Applicant had committed professional misconduct. On December 17, 2007, after hearing submissions on penalty, the Panel ordered that the Applicant pay a fine of $2,500 and an additional $20,000 in costs (the " Penalty Decision" - 2008 LSBC 01). In addition, on December 5, 2006 the Panel orally rejected an application by the Applicant for a stay of proceedings on the grounds of delay and followed this decision with written reasons dated May 29, 2008 (the " Delay Decision" - 2008 LSBC 15).

[3] The Applicant seeks a review of each of the Verdict, the Penalty decision and the Delay decision. In his written submission to us he identified six respects in which, he contended, the Panel erred. These, as stated by him, are: " the error of law in holding that there is only one way to compel production of documents to a trial from a third party," " patent unreasonableness in inferring intent from the use of the words ‘ prepared subpoenas'," " patent unreasonableness in failing to consider the issue of stress and health on the issue of knowledge and intent of the member," " error of law and patent unreasonableness in inferring that prior knowledge of an application under Rule 26(10) or 28(5) implies a dishonest belief in proceeding under Rule

40(39) which is an invalid inference in law and patently unreasonable in fact," " the penalty being excessive in view of the fact of a $2,500 fine plus $20,000 in costs being imposed where the Applicant had asked for, and been denied knowledge of the penalty being requested or particulars," and " an unreasonable and prejudicial delay in the proceeding of the complaint brought about by the combination of the actions of Mr. Armstrong [1] and the Law Society itself, for two years from the date of the known incident, which was immediately under investigation by the Society itself."

Standard of Review

[4] Many words have been written concerning the jurisdiction of the Benchers on a Review application such as this and the standard of review. We will not add to them. The following propositions, set out in the written submission of counsel for the Law Society, accurately summarize the applicable principles:

> i) the Hearing Panel's findings of fact regarding the Applicant's conduct are entitled to deference, and the Review Panel should not substitute its own view of these facts unless the Hearing Panel has made a clear and palpable error;
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> ii) the Review Panel may substitute its own view as to whether the conduct found constitutes professional misconduct as alleged in the citation; and
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> iii) the Review Panel may substitute its own view of the appropriate penalty for the professional misconduct (if any).

[5] Against this background we consider each of the decisions that the Applicant has challenged. We are constrained to say, however, that it has sometimes been difficult to disentangle the skein of arguments that he has put to us in support of his claims of error by the Panel.

The Delay Decision

[6] The essential facts on which the Applicant's application to the Panel to stay the proceedings was based are set out in the Delay Decision. We will not repeat them here.

[7] The Panel reviewed the applicable legal principles. It noted (Delay Decision, paragraph [5]) that the authorities require that the delay must be " inordinate or unacceptable" and concluded (Delay Decision, paragraph [14]) that, on the facts, this condition was not satisfied. It added: " [T]here was no evidence that the Respondent was unable to respond to the citation fully, nor was there any evidence that he had suffered prejudice in the form of significant duress and stigma from an unacceptable delay."

[8] The Applicant did not challenge the Panel's view of the law. His contention, so far as we understood it, was that the Panel erred in concluding that: (a) there had been no inordinate or unacceptable delay; (b) his ability to make a full response to the citation had not been compromised; and (c) he had not been exposed to significant duress and stigma from an unacceptable delay.

[9] The Applicant has not identified anything that shows that the Panel's conclusions were clearly and palpably wrong. He has not pointed to any evidence, aside from the fact that he disagrees with those conclusions.

[10] The Panel did not err in any of the respects claimed by the Applicant. Accordingly, there being no proper reason to interfere with the Delay Decision, we uphold it.

The Verdict

[11] In its Verdict, following an exhaustive and careful review of the evidence, the Panel reached the following conclusions:

> [51] The Panel concludes that the Respondent, perhaps wrapped up too much in the perceived justice of J.K.'s [2] and the Plaintiffs' cause, directed the preparation of the three documents, signed them and gave them to J.K. for service, with a view to compelling document production in a manner which was impermissible under British Columbia law.
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> [52] In this case, the conduct of the Respondent was dishonourable. He knowingly changed Form 21, a subpoena, into three documents, each entitled " Subpoena for Documents" intending to compel the recipients to provide documents in a way in which he knew (because he had just a couple of months earlier, embarked on a Rule 26 application) was not provided for in the Supreme Court Rules or otherwise in the laws applicable in this jurisdiction. His zeal in pursing the case on behalf of J.K. and the Plaintiffs caused him to overlook his professional responsibilities. When the recipient of the California " Subpoena for Documents" was outside of the jurisdiction, the form of document prepared by the Respondent (no doubt assisted by the forged stamp applied by J.K. without the Respondent's knowledge) was successful in compelling production of documents to which the Respondent was not entitled. The Panel notes that, throughout his testimony, the Respondent took the position that he was entitled to these documents -he is wrong in that assertion in the sense that, while he might have been entitled to those documents had he gone through the normal Court process, there was no entitlement other than going through the normal Court processes.
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> [53] The Panel recognizes that there may have been other factors at work, in particular the stresses placed on the Respondent by his own health issues and, most importantly, by the serious battle with cancer being waged by his spouse. While those are factors that may be considered in regard to penalty, they cannot be used to excuse his unprofessional conduct.
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> [54] In the circumstances, the Panel finds the citation to be made out and concludes that the Respondent's conduct in causing the preparation and delivery of the Bank, Hospital and California documents each constitutes professional misconduct.

[12] The evidence considered by the Panel included a written legal opinion and certain oral evidence of James P. Taylor, QC concerning the permissible methods of compelling document production by a non-party.

[13] The Applicant challenged the Verdict on a number of grounds. We shall deal with each of them.

> **The Panel committed an error of law in holding that there is only one legal method of compelling a non-party to provide documents.**

[14] The Applicant contends that paragraph [52] of the Verdict implies, contrary to *Reischer v. Love* (2005), 10 C.P.C. (6th) 211, [2005] B.C.J. No. 865 (S.C.), that there is only one legal method of compelling a non-party to provide documents and that this is by complying with Rule 26(11) of the Rules of Court. He says that in this respect the Panel was wrong and fell into error.

[15] The Panel undertook a careful review of Mr. Justice Bouck's judgment in *Reischer v. Love.* There is nothing in the Verdict that suggests that the Panel did not understand that judgment or that the Verdict itself fails to reflect properly the relevant law as set out in that case. On the contrary, in our view, the Panel got the law on the subject right. We are quite unable to find any support for the implication that the Applicant seeks to draw, either in paragraph [52] or in any other part of the Verdict.

[16] Accordingly, in our view this attack on the Verdict fails.

The Panel erred in concluding that the Respondent was involved in the preparation of the subpoenas.

[17] At paragraph [33] of the Verdict, the Panel referred to an admission that the Applicant made in a letter of July 11, 2005 that he " prepared" the subpoenas. It referred as well, in paragraph [34], to the Applicant's claim, under cross-examination by counsel for the Law Society at the hearing before the Panel, that the 2005 admission was " wrong" , that he was mistaken in making it and that he " did not prepare those subpoenas, and [he] did not instruct their preparation."

[18] The Panel noted (Verdict, paragraph [35]) that the Applicant's evidence was inconsistent not only with his letter to the Law Society but also with a position that he had taken in the course of submissions (quoted at paragraphs [29] and [35] of the Verdict) to the judge at the trial of *Rovnyshyn and others v. Drys*. It concluded (Verdict, paragraph [36]):

The Panel does not accept the Respondent's evidence that it was not on his instruction that the three documents in questions were prepared. The evidence on that point is not believable. In our view, the extracts from the Proceedings at Trial set out in paragraphs 29 and 35, make it clear that the Respondent was involved in the preparation of the documents. During the exchange he spoke in the first person with respect to the preparation of the documents.

[19] At paragraphs [38] to [40] of the Verdict, the Panel referred to several other facts that reinforced it in its conclusion that the Applicant was actively involved in the preparation of the subpoenas.

[20] Beyond the simple proposition that the Panel erred in reaching its conclusion on this aspect of the matter, it is not easy to say with confidence what errors the Applicant contends the Panel made in this respect. As best we understand it, however, he says that the Panel wrongly rejected his evidence that he was not involved in the preparation of the subpoenas and placed inappropriate reliance on the admission that he says he mistakenly made in his letter of July 11, 2005. He says, as we understand him, that that admission was taken out of context. It was made, he claims, in the context of his response to an entirely different matter relating to subpoenas, namely the use of a subpoena with a forged stamp. This subject is referred to at paragraphs [13] and [14] of the Verdict. The Panel notes (Verdict, paragraph [14]) that " the citation does not relate to the fraudulent use of the stamp, which was entirely a frolic of JK."

[21] The fraudulent use of the stamp on one of the subpoenas had been the subject of a separate complaint to the Law Society in February 2004. In the course of its investigation of that complaint, the Law Society communicated with the Applicant and asked him certain questions. He answered those questions, and on July 19, 2004, having completed its investigation, the Law Society wrote to him telling him that it had found no impropriety on his part with reference to that complaint and had closed its file.

[22] The Applicant's assertion that his July 11, 2005 letter to the Law Society was concerned with the stamp issue, and not his participation in the preparation of the improper subpoenas is, in our view, simply untenable. If, as he suggested, he thought he was responding to the " fraudulent stamp" issue, one might have expected to find some reference to that issue in his letter. There is not a single word in it, however, that even the liveliest of creative imaginations could interpret as relating to the stamp issue.

[23] This is not surprising. In the Law Society's letter to which the Applicant's July 11 letter was a response, the stamp issue, having long since been disposed of, was explicitly excluded as a subject of interest. The Law Society wrote:

> You will note that Mr. Armstrong has raised the issue of the forged Court Registry stamp and I have

> advised Mr. Armstrong that we have previously investigated that limited part of his complaint. *Therefore, I am not requiring you to address that particular issue.*

[24] In our view, the Panel took nothing out of context. The evidence before it fully justified its conclusion about the Applicant's involvement in the preparation of the subpoenas. He has not come close to identifying, in this respect, any clear and palpable error in that conclusion. Moreover, the Applicant has not pointed to a scintilla of evidence in the record that justifies his suggestion that the Panel's reliance on his admission was inappropriate.

[25] Even if we had been inclined to the view that the evidence supported conclusions different from those reached by the Panel, those conclusions were quite explicitly based on its assessment, having heard the Applicant's evidence, of his credibility on the point. In those circumstances, the findings of the Panel are entitled to the greatest deference. The Applicant has shown us no ground for not according the Panel that deference.

[26] This ground of attack on the Verdict accordingly fails.

The Panel erred in concluding that the Respondent acted intentionally, rather than merely negligently.

[27] The Panel's conclusion (Verdict, paragraph [52]) that the Applicant acted knowingly and deliberately is expressly based on two elements:

> (a) that a significant part of his practice over the years had been in the field of civil litigation and that it was, therefore, " inconceivable" that he was " unaware of the appropriate procedure for obtaining documents" (Verdict, paragraph [39]);
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> (b) that shortly before the subpoenas were prepared, the Applicant had made a proper application for production of documents by a non-party in accordance with the Rules of Court and that on that application he had been specifically advised by the presiding Master of the steps required to achieve the desired result (Verdict, paragraph [40]).

[28] The nub of the Applicant's complaint, as we understand it, is that the Panel wrongly concluded from this evidence that, in his words, he had an " evil intent" and, in doing so, ignored other evidence before it that showed that he was merely mistaken in believing that the procedure that he employed was proper and appropriate.

[29] In his evidence to the Panel, the Applicant said, on a number of occasions, that he simply could not recall what had been in his mind when he gave instructions concerning the subpoenas, or when he signed them. That being the case, the " other evidence" that he says the Panel ignored, and that he contends shows that he was at worst negligent, must surely be considered no more than speculation on his part. Moreover, that other evidence consists of a number of different theories or possible explanations of what happened - for example, that he had not been involved in the preparation of the documents and so did not know that they sought to do something that was not permissible; and that he understood what the documents purported to do but thought that the Rules of Court permitted it.

[30] In these circumstances, we do not think it can reasonably be said that the other evidence that the Applicant relies on in this connection is sufficiently clear or consistent to outweigh the evidence that the Panel relied on in support of its conclusion that he had acted intentionally. The Panel was entitled to weigh the evidence in the manner that it did and, having had the opportunity not available to us to make a determination as to credibility, to reach the conclusion that it did.

[31] The Applicant has failed to show that, in this respect, the Panel committed any palpable and overriding error. This ground of attack on the Verdict accordingly fails.

The Panel erred in holding that evidence concerning Mr. Christie's health and the stress that he was under, was not relevant to the question whether his conduct amounted to professional misconduct.

[32] In its discussion of whether the Applicant's conduct amounted to professional misconduct, the Panel reviewed several of the leading authorities and, by way of summary (Verdict, paragraph [44]) of the decision of a review panel in *Law Society of BC v. Hops*, [1999] LSBC 29, noted that " professional misconduct is conduct done deliberately (negligence without more will not suffice) that is wrong when applied to the standards of the profession."

[33] Having recounted all of the evidence before it, the Panel (Verdict, paragraph [45]) formulated the questions to be answered as being whether:

> (a) the Respondent knew that the " Subpoena for Documents" forms he signed were not permitted by the Supreme Court Rules and knew that what he was doing in issuing these " forms" was an inappropriate way to obtain documents;
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> (b) the Respondent should have known that what he was doing was inappropriate but didn't have actual knowledge; or
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> (c) the Respondent's conduct was merely lack of care and was not culpable in these disciplinary proceedings.

The Panel concluded (Verdict, paragraph [52]) that (a) above, accurately described the position. It described his conduct as " dishonourable" . The conclusion followed that he was guilty of professional misconduct within the meaning of the authorities.

[34] Before us, the Applicant contended that the Panel erred in rejecting as irrelevant to its analysis of whether he was guilty of professional misconduct, certain evidence that was before it and that it summarized in paragraphs [20] and [21] of the Verdict, about health issues affecting both his spouse and him. He says that the Panel should have taken it into account and ought to have concluded that these issues were so distracting to him at the time that he could not have acted deliberately. At worst, he had been negligent and " negligence without more will not suffice" to support a finding of misconduct. The failure of the Panel to take account of these considerations in this way constituted a palpable and overriding error.

[35] With all respect to the Applicant, we think he has misapprehended the Verdict. The Panel said, quite explicitly (Verdict, paragraph [53]) that the other considerations could not be invoked *" to excuse*" misconduct, that is, to exculpate someone against whom a finding of misconduct has been made. The Panel did not say, as the Applicant contends, that the other considerations are irrelevant to whether, on the evidence as a whole, such a finding is warranted.

[36] As we have noted (above, paragraph [29]) the Applicant repeatedly testified that he could not recall what was in his mind at the time. While there is little doubt that the evidence before the Panel showed that he was subject to significant stress, nowhere in his evidence did he point to this as an explanation for his conduct. While it was doubtless possible for the Panel to infer that the stress affected his conduct, it was equally open to it to conclude that it did not outweigh the rest of the evidence and that, considering the evidence as a whole, the Applicant acted deliberately.

[37] Accordingly, it is our view that this ground of attack on the Verdict must fail.

[38] In sum, the Applicant has not persuaded us that the Panel committed any clear and overriding error in the Verdict, either in its conclusion that his conduct constituted professional misconduct or in the findings of fact upon which that conclusion was based.

The Penalty Decision

[39] In its submissions to the Panel on penalty, the Law Society recommended a fine of between $7,500 and $10,000 and also sought indemnification in full for its costs of $50,000. The Applicant contended that a reprimand rather than a fine was appropriate but that, if the Panel concluded that he should be fined, the fine should not be more than $5,000. He also argued that, in the circumstances, no award of costs should be made.

[40] The Panel imposed a fine of $2,500, payable by June 17, 2008 and ordered reimbursement of $20,000 of the Law Society's costs, payable by January 15, 2010. Pursuant to Rule 5-14 of the Law Society Rules, the Applicant's obligation to pay any amount on account of costs was suspended pending this Review.

[41] The question before us is whether the Penalty Decision is correct: *Law Society of BC v. Berge*, 2007 LSBC 07; *Law Society of BC v. Welder*, 2007 LSBC 29. If we conclude that it is not, we may substitute our own view as to the appropriate penalty.

[42] It seems clear that the Applicant's principal attack is on the costs element of the Penalty Decision, although he does not limit himself to this. He argued that the penalty is excessive because:

> (a) the costs represent one half of his annual income;
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> (b) the Law Society had refused to give any advance indication of its position on penalty, despite having been asked on two occasions to do so, and he was therefore denied the opportunity to avoid a hearing by paying a fine;
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> (c) neither considerations of general nor of specific deterrence required the imposition of a penalty greater than a reprimand since: (i) it is clear that he was subject to considerable stress at the time of the events that gave rise to the citation; (ii) there was no evidence of any general practice of inappropriate use of subpoenas to compel the production of documents by non-parties and no suggestion was made that he was likely to repeat the impugned conduct;
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> (d) in the only case that might be considered comparable, *Nova Scotia Barristers' Society v. Conrad*, [2002] L.S.D.D. No. 4, the respondent had merely been reprimanded; and
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> (e) the Penalty Decision had provoked highly damaging and prejudicial media publicity.

[43] In reaching its conclusions as to penalty, the Panel considered (Penalty Decision, paragraph [15]) the evidence in the light of the now well-known and widely accepted catalogue of possibly relevant considerations outlined in *Law Society of BC v. Ogilvie,* [1999] LSBC 17 at paragraph 10. It also took account of the observations of the hearing panel in *Law Society of BC v. Goddard,* 2006 LSBC 12 at paragraphs [7] to [9] as to the purposes to be served by a determination as to penalty.

[44] In our view, the Panel gave fair and balanced consideration to all of the relevant elements. It properly attached significant weight to the Applicant's blemish-free Professional Conduct Record over more than 30 years; to the fact that his motivation in doing what he did was not to secure any personal gain; to the fact that at the material time he had been under considerable stress; and to the fact that the testimonials to his character were numerous and spoke eloquently of his passion for justice and his devotion to the interests of

his clients. It properly took account of the fact that considerations of deterrence, both general and specific, were not significant in this case.

[45] The Panel weighed these elements, together with its findings that he had engaged in what it described as a " serious abuse of the Rules of Court," that he had acted deliberately, knowing that what he was doing was improper, that what he had done was capable of misleading non-parties as to their obligations in response to subpoenas, and that his evidence about his knowledge of the impropriety of his conduct was consistent only in its denial of such knowledge but in other material respects was inconsistent and contradictory.

[46] While the Panel summarized (Penalty Decision, paragraphs [4] and [5]) the material facts of *Nova Scotia Barristers' Society v. Conrad* (*supra*) it did not expressly say that it considered that case distinguishable on the facts from the present. In our view, however, it clearly is distinguishable, if only in the important respect that the conduct there did not involve any deliberate alteration of the prescribed form of subpoena.

[47] We have given careful consideration to the Applicant's contention that if he had been told what penalty the Law Society was seeking, he might very well have agreed to settle the complaint and so obviate the need for a hearing, but was denied the opportunity to do so.

[48] The Applicant made precisely this submission to the Panel. In what we think must be considered a related submission, the Applicant submitted to the Panel that the Law Society's draft Bill of Costs was excessive.

[49] In response, counsel for the Law Society explained that, while it attempts to resolve citations through negotiation rather than a hearing, for a number of reasons it had not been possible in this case to give an early indication of the penalty it might seek. The reasons for this are fairly summarized by counsel for the Law Society before us, based on the transcript of the submissions before the Panel, in the following way:

> (a) the Applicant had not made any helpful admissions of fact prior to the hearing, despite being provided with a draft agreed statement of facts;
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> (b) despite being advised to retain counsel, the Applicant was self-represented at two pre-hearing conferences, making it difficult to conduct effective discussions towards a negotiated resolution;
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> (c) prior to hearing the Applicant's testimony and cross-examination, the Law Society was not in a position to advise the Applicant of what penalty they would be seeking in a worst case scenario; and
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> (d) the Law Society's penalty position depended on the evidence adduced at the hearing, and in particular on the Applicant's explanations for issuing the subpoenas.

[50] Counsel for the Law Society suggested to the Panel that these, among other considerations that were identified, had a significant impact on the amount of counsel time that had to be devoted to the Christie citation. In addition, she referred the Panel to the decision in *Law Society of BC v. Mah Ming*, [1999] LSBC 48 in which the panel observed (at paragraph [10]) that " given a choice as to whether the costs should be borne by the lawyers of British Columbia collective, or the respondent, the respondent was a clear choice, as his misconduct had caused the proceeding whereas the lawyers of the Province were blameless" .

[51] The Panel said (Penalty Decision, paragraph [16]) that it was " satisfied that the time, costs and expenses presented by counsel for the Law Society are reasonable and justified." It added that " generally speaking, full indemnity for those costs should be granted."

[52] The Panel went on to give specific consideration to the Applicant's financial circumstances. Disclaiming any desire " to create a situation whereby inability to pay costs might create a ‘ de facto disbarment'" , and acknowledging the Applicant's " valuable contribution to our free society" , the Panel, on a consideration of all the circumstances, ordered him to pay costs of $20,000.

[53] In our view the Panel's discussion of the matter of penalty, including costs, does not fail to consider any relevant principles or facts, nor does it take account of any considerations that ought not to have been considered. In those circumstances we do not think it can be said that the Panel erred in fixing the amount of costs payable by the Applicant.

[54] The Panel allowed the Respondent until June 17, 2008 to pay the fine and until January 15, 2010 to pay the award of costs. However, we consider that, in all of the circumstances, it would be appropriate to allow the Applicant more time to pay the aggregate of $22,500 that he has been ordered to pay. We think that Section 47(5) of the *Act* permits us to vary the Panel's order in that respect.

[55] Our order, accordingly, is that the decisions of the Panel as to verdict, penalty and costs are confirmed, and that the Applicant must pay the entire $22,500 in full, without interest, no later than two years from the date of this Review Decision.

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[1] Mr. Armstrong acted as counsel for the Defendant in *Rovnyshyn and others v. Drys* and made the complaint that led to the citation.

[2] The panel described JK as " the person responsible for prosecuting the case" [i.e. *Rovnyshyn and others v. Drys*], noting, however, that " he had no legal interest in the proceedings."