

2009 : No. 3 Fall

Vivian Chiang

Discipline hearing : October 7 and 8, 2008

Panel : *majority decision*: Thelma O'Grady, Chair, and Karl Warner, QC; *minority decision*:

Ralston

Alexander, QC

Report issued : June 17, 2009 (2009 LSBC 19)

Counsel : Maureen Boyd for the Law Society; Vivian Chiang on her own behalf

Facts

Under Law Society Rule 4-38.1(2) if all counts of a citation are dismissed, the hearing report summary must not identify the respondent.

A citation was authorized against Lawyer 9 alleging four counts of professional misconduct. One allegation was withdrawn, and the hearing proceeded on three allegations of acting contrary to the duty of an officer of the court or misleading the court. The Law Society also asked the panel to consider a finding of incompetence. At all times relevant to this citation, Lawyer 9 was a part-time, practising member of the Law Society.

Lawyer 9 was the majority shareholder in F Inc., which operated a wholesale produce business. After a dispute with several other produce companies regarding a shipment of mangos, a mandatory arbitration hearing was held by the Fruit and Vegetable Dispute Resolution Corporation (DRC) and F Inc. was fined \$13,000 US. The company refused to pay the fine and F Inc.'s membership in the DRC was suspended. A notice of suspension was circulated to DRC members, which had an alleged negative impact on the business.

With Lawyer 9 serving as counsel, F Inc. commenced proceedings against DRC and other defendants, filing an *ex parte* application to have the suspension set aside on the basis of wrongful interference with the business of F Inc. The application also sought retraction of the DRC's notice of suspension and a court order to stop DRC from issuing any further defamatory publications about F Inc.

The *ex parte* application was heard in Chambers on March 11, 2005 by Judge A. Lawyer 9 did not identify herself as a lawyer and instead acted in her capacity as an officer of F Inc.

The judge advised she was unable to grant the relief sought since the defendants were neither present nor had they been served with the Notice of Motion. She then turned the hearing into a Short Leave application. The judge further advised that only one aspect of the application could be considered on short leave, namely the plea for injunctive relief against DRC from making further allegedly defamatory publications; the other two items required a full hearing.

The judge provided a Notice of Short Leave and directed Lawyer 9 to serve this Notice along with the Notice of Motion and Affidavit material on counsel for DRC.

The Short Leave Requisition did not specify which parts of the motion were approved for short leave. Further, Lawyer 9 did not indicate there were limitations placed upon the application when serving materials on counsel for DRC. As a result, DRC prepared for and responded to all three claims for relief in Chambers before Judge B on March 15. At that hearing, Lawyer 9 spoke to all three claims.

On March 16, Judge B dismissed all three applications for relief. Lawyer 9 filed a Notice for Leave to Appeal on April 25, shortly after which DRC and another party filed a Notice seeking dismissal of F Inc.'s action in its entirety.

The dismissal motion was scheduled to be heard on June 23, 2005. On June 16, Lawyer 9 appeared in Chambers before Judge C without notice to any party and made an application for adjournment or, in the alternative, short leave on a motion to adjourn the hearing. Short leave was granted and the adjournment application was heard on June 17. At that time Lawyer 9 advised that, while one of the opposing parties was agreeable to adjournment, the other was not. As a result Judge C adjourned the matter until the next day and in the presence of all counsel, ordered the defendants' application be heard August 8.

The matter ultimately came before Judge D on August 8 and after a hearing the action was dismissed.

Verdict

Majority (Thelma O'Grady, Chair, and Karl Warner, QC)

The majority was guided in its deliberations by *F.H. v. McDougall*, 2008 SCC 53. Although not a discipline case, this judgment affirms that the burden rests on the Law Society to prove with evidence that is clear, convincing and cogent the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities.

Misleading the court

There was no satisfactory or convincing evidence to suggest Lawyer 9 sought an advantage by failing to inform the court she was a member of the Law Society. Nor was there any evidence she could or did receive an advantage by presenting herself as a lay litigant.

All members of the panel were unable to find authority for the proposition that, when a lawyer appears in court on behalf of a company of which the lawyer is a principal, that the lawyer is obliged to advise the court of the fact that he or she is a lawyer and that failure to do so is a lack of candour on the part of the member. Accordingly, there was no finding of professional misconduct for failing to identify as a member of the Law Society.

Lawyer 9 should have outlined the relief requested and the limitations of the Short Leave Order granted by Judge A at the outset of the Chambers hearing before Judge B, but did not. Instead, she embarked upon a discussion of the underpinning facts of the case.

The facts were relevant as background for injunctive relief and were therefore properly before the court. However, the majority found that the respondent erred by failing to state outright the limitation of the short leave order. This should have been done at the outset of the hearing.

However, the majority could find no instance in the transcript when the respondent did not respond other than truthfully when asked a question by the court.

When making the application for adjournment, Lawyer 9 was not as clear as she should have been with respect to her acceptance of the conditions upon which DRC's consent would be given for the adjournment. Her lack of clarity can be seen from the transcript, but it does not display an intended desire to mislead. The majority found no professional misconduct.

Incompetence

A finding of incompetence is based on a pattern over a number of cases involving delay, lack of knowledge over wide areas of law, severe problems of substance abuse, emotional or psychiatric difficulty, consistent abusive language or consistent disrespect for the courts.

No such patterns or instances of repetitive behaviour were offered in the evidence presented at the hearing. The majority could only observe that Lawyer 9 began a single action, mistakenly conceived from the outset, and jurisdictionally with little or no apparent merit.

While Law Society intervention may be appropriate when a single instance rises to demonstrate a potential lack of judgment, such an intervention is most frequently manifested by way of Conduct Review or through a recommendation to seek the assistance and guidance of senior counsel.

The majority did not find incompetence and trusted that Lawyer 9, by going through this serious process, had been sufficiently admonished to never allow her judgment to be clouded again and that she will never find herself practising in an area of the law so apparently foreign to her.

Minority (Ralston S. Alexander, QC)

The minority also adopted the reasoning in *F.H. v. McDougall, supra*, finding that the necessary clear, convincing and cogent evidence to support the allegation misleading the court by failing to disclose limitations on the short leave application imposed by Judge A had been adduced by the Law Society in the course of the disciplinary hearing.

There was no debate on the issue of whether or not the court was misled. Even the evidence of Lawyer 9 was consistent on the issue of her lack of entitlement to speak to all three paragraphs in her Notice of Motion seeking relief.

A determination of professional misconduct depends on intent. All available evidence pointed overwhelmingly to the fact that Lawyer 9 intentionally proceeded to seek relief in respect of a portion of the Notice of Motion for which short leave had not been granted by Judge A.

Lawyer 9's explanations as to why she proceeded despite the orders of Judge A were not credible. She acted wilfully and knowingly and without regard for her professional responsibilities to the court and the Law Society.

Misleading the court in this manner represented a marked departure from behaviour the Law Society expects of its members. The minority found professional misconduct.

Bencher review

The Discipline Committee has referred this decision under section 48 of the *Legal Profession Act* for review by the Benchers.