

2010 LSBC 29

Report issued: December 20, 2010

Citation issued: May 11, 2007

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

**Vivian Chiang**

Respondent

**Decision of the Benchers  
on Review**

Review date: September 30, 2010

Quorum: G. Glen Ridgway, QC, Chair, Joost Blom, QC, Leon Getz, QC, Benjimen Meisner, Lee Ongman, Gregory Petrisor, Catherine Sas, QC

Counsel for the Law Society: Henry Wood, QC

Appearing on her own behalf: Vivian Chiang

**Introduction and Background**

[1] On May 11, 2007 a citation was issued directing a hearing to enquire into the Respondent's conduct in four respects, identified (as later amended) as follows:

1. Your conduct on March 11, 2005, when you appeared before Madam Justice Gill in Supreme Court Chambers in Vancouver Registry Action No. S051013 on behalf of F Inc. in respect of its Notice of Motion dated March 11, 2005, and did not inform her that you were appearing as counsel or were a member of the Law Society of British Columbia, which omission was contrary to your duty as an officer of the court, or may or did have the effect of misleading the court, or both.
2. Your conduct on March 15, 2005, when you appeared before Madam Justice Smith in Supreme Court Chambers in Vancouver Registry Action No. S051013 on behalf of F Inc. in respect of its Notice of Motion dated March 11, 2005 and did not inform her that on March 11, 2005 short leave had been granted only with respect to the claim for injunctive relief, and further made submissions with respect to all three claims for relief set out in the Notice of Motion, contrary to the leave granted by Madam Justice Gill on March 11, 2005. This conduct was contrary to your duty as an officer of the court, in breach of the terms of the short leave order. and/or may or did have the effect of misleading the court, or both.
3. Your conduct on June 15, 2005, when you filed a praecipe in Court of Appeal Action No. CA032912 to adjourn an application on behalf of your client F Inc. when you had asked for, but did not have consent of counsel for the respondents, to such an adjournment.
4. Your conduct on June 16, 2005, when you appeared in Supreme Court Chambers in Vancouver Registry Action No. S051013 on behalf of F Inc. and advised the court that Brook Greenberg, counsel for one of the defendants, had consented to an adjournment, when he had not,

which may or did have the effect of misleading the court.

[2] At the hearing of the citation in October 2008, the Law Society withdrew allegation 3.

[3] The Hearing Panel issued its decision on June 17, 2009 [2009 LSBC 19]. The Panel unanimously "dismissed" allegations 1 and 4 of the citation; and a majority of the Panel, with Mr. Alexander dissenting, also dismissed allegation 2.

[4] The Law Society asks us under section 47 of the *Legal Profession Act* to review and reverse the Panel's decision and to refer the matter back to determine appropriate sanctions under section 38(5) of the *Act*.

[5] Under section 47(5) of the *Act*, we may confirm the decision of the Panel or substitute any decision that it could have made under the *Act*.

## **Standard of Review**

[6] It is trite law that the test to be applied by the Benchers on review under section 47 of the *Legal Profession Act* is that of "correctness" .

## **The Law Society's Position at the Hearing and on Review - Professional Misconduct**

[7] The Law Society's position, both before the Hearing Panel and before us, was that the conduct of the Respondent specified in the citation constituted "professional misconduct" .

[8] "Professional misconduct" , it is now well accepted, is conduct that represents a "marked departure from the conduct the Law Society expects of its members." See *Law Society of BC v. Martin*, 2005 LSBC 16. The question before us, accordingly, is whether the Hearing Panel was correct in its decision to dismiss allegations 1, 2 and 4 of the citation.

## **Allegation 1 of the Citation**

[9] Allegation 1 of the citation asserts two separate propositions about the Respondent's failure on March 11, 2005 to advise Madam Justice Gill that she was appearing as counsel or was a member of the Law Society. Those propositions are that the failure:

(a) was contrary to her duty as an officer of the Court; and/or

(b) may or did have the effect of misleading the Court.

The Law Society contended that, in the circumstances, this failure amounted to professional misconduct.

[10] The Hearing Panel dealt with allegation 1 of the citation in the following way:

[38] That said, with respect to the first particular, when she appeared before Madam Justice Gill, it is clear that the Respondent did not identify herself as a member of the Law Society of British Columbia, licensed and insured to practise part-time. When invited, she properly identified herself as the owner of the Plaintiff F Inc. and then, on the invitation of the Court, went on to describe the requests F Inc. was making to the Court. The transcript and the Respondent's evidence as it unfolded demonstrate that, from that initial appearance and from that first invitation by the Court, the Respondent was confused, distracted and inexperienced in Chambers practice.

[39] Moreover, there was no satisfactory or convincing evidence of any advantage being

sought by the Respondent in failing to additionally inform the Court that she also had the status of a part-time practising member of the Law Society of British Columbia. Nor was there any evidence advancing support for the proposition that the Respondent, by failing to specifically add her status, could or did receive any advantage by assuming the mantle of essentially a lay litigant.

[40] In addition, the Panel is 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 the failure to do so indicates a lack of candour on the part of the member.

[11] We agree with the conclusion of the Hearing Panel that, in the circumstances, the Respondent was under no obligation as an officer of the Court to disclose her status as a member of the Law Society. We content ourselves with that limited proposition for two reasons. First, we agree with the Hearing Panel that there was no evidence that the Respondent, by reason of her omission to disclose her status, could or did obtain any material advantage or that if, as seems clear, Madam Justice Gill was under a misapprehension about the Respondent's status, that misapprehension was material to anything that transpired in court. It is, however, conceivable that, on some other set of facts, a different conclusion might properly be reached. We think it is unwise to say anything that would foreclose such a conclusion in a proper case.

[12] Secondly, the Hearing Panel seems to have grounded its conclusion, at least in part, on the absence of any authority. We think this is mistaken. In our view, particularly when the question to be decided requires a fact specific inquiry as to whether a given pattern of conduct constitutes a "marked departure from the conduct the Law Society expects of its members," the absence of prior authority on the point cannot be determinative of anything.

## **Allegation 2 of the Citation**

[13] On this aspect of the matter, a majority of the Hearing Panel concluded that the evidence did not justify a finding of professional misconduct. Mr. Alexander delivered a vigorous dissent.

[14] We have examined with some care not only the reasons of the majority and of Mr. Alexander but also the underlying evidence, including that reviewed by Mr. Alexander. We have come to the conclusion, respectfully, that on a proper analysis of all of the evidence the decision of the majority of the Hearing Panel to reject a finding of professional misconduct on the evidence was wrong.

[15] Mr. Alexander's conclusion is set out in paragraphs [102] and [103] of his dissenting reasons:

[102] I would find that the Respondent intentionally, and in the face of the specific Order of Madam Justice Gill to the contrary, proceeded to seek relief in respect of a portion of the Notice of Motion for which short leave had not been granted. With the exception of her stated desire to respond to the urgent need to preserve the inventory of produce, all explanations offered by the Respondent are inadequate to explain the behaviour.

[103] It is my view that the Respondent allowed her personal financial interest in F Inc. to overcome her professional judgment and in the result of that lapse she attempted to obtain an Order from Madam Justice Smith which she knew she did not have approval to seek. Misleading the Court in this manner represents a marked departure from behaviour that the Law Society expects of its members, and so, in that regard, I would have found that the Respondent has committed professional misconduct.

[16] We agree not only with these conclusions but also with the analysis that led Mr. Alexander to them. In our view, his analysis is comprehensive, balanced and careful. We have found it completely persuasive. We do not think that there is anything that we can usefully add to it.

[17] Our decision is that the complaint reflected in allegation 2 of the citation has been made out. Accordingly, under section 47(5)(b) of the *Legal Profession Act*, we determine that the Respondent committed professional misconduct, and we refer the matter back to the Hearing Panel to consider appropriate sanctions.

#### **Allegation 4 of the Citation**

[18] Having reviewed the evidence we agree with the unanimous view of the Hearing Panel that it does not support a finding that the conduct of the Respondent particularized in allegation 4 of the citation amounted to professional misconduct.