2011 LSBC 10
Report issued: March 11, 2011
Oral Reasons: October 19, 2010
Citation issued: January 16, 2006

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

**Re: Lawyer 11**

Applicant

**Decision of the Benchers on Review**

Review date: October 18 and 19, 2010
Benchers: Bruce LeRose, QC, Chair, Haydn Acheson, Leon Getz, QC, Peter Lloyd, Thelma O'Grady, Lee Ongman, Gregory Petrisor

Counsel for the Law Society: Dennis T.R. Murray, QC and Fiona McQueen
Counsel for the Applicant: David S. Mulroney

## History of Proceedings

[1] On January 16, 2006, the Law Society issued a citation against the Applicant that alleged:

> 1. Your conduct in participating in a scheme or design to mislead the Supreme Court of British Columbia by arranging the acquisition and/or registration of security of a loan from GM, a family member, RM, a family member, and/or attempting to obtain a judgment on that loan for the purpose of putting into place a reduction in the assets of RM prior to and for the purposes of his "*Rowbotham*" application.
>
> 2. Your conduct in participating in a scheme or design to misrepresent the expenses or liabilities of the P and/or K Hotel businesses by:
>
> > a) Providing false or misleading information to the Supreme Court of British Columbia on the "*Rowbotham*" application of RM, and for the purpose of misrepresenting the value of his assets, by claiming the existence of previously undisclosed liabilities for unpaid wages now alleged to be owing to you and/or other family members;
> >
> > b) In respect of the K Hotel business, providing false or misleading information to the Business Development Bank of Canada, and for the purpose of obtaining or attempting to obtain a benefit dishonestly for the K Hotel business, by failing to disclose liabilities for unpaid wages now alleged to be owing to you and/or other family members;
>
> contrary to Chapter 1, Rule 2(3) and Chapter 4, Rule 6 of the *Professional Conduct Handbook*.
>
> 3. As set out in paragraphs 1 and 2 above, your engagement in dishonourable or questionable conduct that casts doubt on your professional integrity and/or competence or reflects adversely on the integrity of the legal profession or the administration of justice contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook*.

[2] A hearing in respect of constitutional issues raised by the Applicant took place on July 24 and 25, 2007. In that hearing the Applicant sought rulings from the Hearing Panel that:

> (a) the Applicant not be compelled to give evidence in proceedings under the *Legal Profession Act*; and,
>
> (b) the evidence given at the *Rowbotham* hearing was not admissible in the hearing of citation.

[3] The Hearing Panel dismissed the Applicant's application in respect of those constitutional issues.

[4] The hearing of the citation took place over 11 days between September 8 and November 13, 2008, inclusive. During the course of proceedings, counsel on behalf of the Applicant brought a no-evidence motion regarding each allegation of the citation. On September 12, 2008, during proceedings, the Hearing Panel allowed the Applicant's application with respect to allegation 2(b) of the citation but dismissed the balance of his application. In its report on Facts and Verdict issued September 9, 2009 (2009 LSBC 26), the Hearing Panel found:

> (a) no professional misconduct by the Applicant was proven in respect of the allegations contained in allegation 1 of the citation;
>
> (b) the Applicant had sworn an affidavit that was filed with the Court in the *Rowbotham* proceedings, that was false, or at least, misleading;
>
> (c) the Applicant, as a witness and as an Officer of the Court, had a duty to ensure that the Court was not misled by anything he said as a lawyer, or as a witness, and the Applicant was, in the drafting of his affidavit, reckless;
>
> (d) there was no evidence that the Applicant provided misleading information to the Court in concert with any other person, and as a result the Applicant was not proven to have participated in a "scheme" or "design" as alleged by the Law Society;
>
> (e) using the analogy of a lesser included offence the Applicant's providing misleading information to the Court, even if not part of a "scheme" or "design" as alleged in allegation 2(a), still constituted professional misconduct, and accordingly, the Applicant was guilty of professional misconduct; and
>
> (f) allegation 3 of the citation was also dismissed, because allegations 1, 2(a) and 2(b) were not proven as alleged.

[5] On December 5, 2009, the penalty phase of the hearing took place, and the Hearing Panel issued its decision on January 5, 2010 (2010 LSBC 01).

[6] Counsel for the Applicant subsequently filed a Notice of Review dated February 10, 2010. To summarize, the Applicant seeks a Review of the Hearing Panel's decision on the following grounds:

> (a) the Hearing Panel, after concluding that the allegations as set out in the citation were not proven, could not otherwise, including as a result of the reckless drafting of an affidavit; fairly find the Applicant guilty of professional misconduct;
>
> (b) the evidence given by the Applicant in the *Rowbotham* proceeding was not, and should not, have been found by the Hearing Panel to be misleading; and
>
> (c) the Hearing Panel wrongly applied an objective test in the determination of whether or not the Applicant's affidavit evidence in the *Rowbotham* proceeding was misleading, and should have considered the Applicant's state of mind, his intentions, and the nature and quality of the Applicant's actions.

[7] The Law Society issued a Notice of Review dated February 19, 2010, seeking a Review of the Hearing Panel's decision in its dismissal of allegation 3 of the citation. The Law Society issued a supplemental Notice of Review dated May 11, 2010 in respect of the Hearing Panel's dismissal of allegation 1 of the citation against the Applicant. The Review Panel, in a decision issued September 24, 2010 (2010 LSBC 22), dismissed the Law Society's supplemental Notice of Review as a result of its late filing.

[8] No review was sought by the Law Society in respect of the Hearing Panel's finding that the allegations in paragraph 2(a) and 2(b) of the citation were not proven.

## Issue

[9] At the outset of the Review, counsel for the Law Society conceded that, if the Benchers do not uphold the Hearing Panel's finding of professional misconduct, the Law Society cannot succeed on the claim for relief sought in its Notice of Review. Accordingly, we asked both counsel for submissions limited to the grounds of review related to allegation 2(a), and, depending on the decision in respect of those grounds, submissions regarding the grounds of review related to allegation 3 to be heard afterward if necessary.

[10] The issue to be decided by the Review Panel is:

> In light of the Hearing Panel's determination that the allegations against the Applicant contained in 2(a) of the citation were not proven, can the Hearing Panel's conclusion that the Applicant's reckless drafting of a misleading affidavit, although not consistent with the allegations in the citation, nonetheless support a finding of professional misconduct?

## Discussion

[11] The test to be applied by the Benchers on review under Section 47 of the *Legal Profession Act* is that of "correctness", as is set out in *Re: Lawyer 3*, 2005 LSBC 35, and confirmed in *Re: Lawyer 10*, 2010 LSBC 02.

[12] As previously stated, the Law Society did not seek a review of the Hearing Panel's finding that the Applicant was not proven to have committed professional misconduct by participating in a scheme or design to misrepresent the expenses or liabilities of the businesses owned, in whole or in part by the Applicant's father, by claiming the existence of previously undisclosed liabilities for unpaid wages. Accordingly, the only substantial question before us is whether the finding of professional misconduct through the reckless drafting of an affidavit is justifiable and consistent with the requirements of natural justice, having regard to the allegations in the citation.

[13] Any finding of professional misconduct must be based not only on the evidence presented, but also on the allegations as framed in the citation. The Hearing Panel's analogy of a "lesser included offence" is, in our view, misconceived. The allegation that the Applicant participated in a scheme or design is not mere superfluous decoration; it was an essential ingredient of the allegations the Applicant faced.

[14] The purpose of a citation is to advise the Applicant, with reasonable precision, of the allegations he or she is facing. The citation sets the parameters of the inquiry. Section 38(1) to 38(4) of the *Legal Profession Act* reads as follows:

> 38 (1) This section applies to the hearing of a citation.
>
> (2) A hearing must be conducted before a panel.
>
> (3) A panel must

(a) make a determination and take action according to this section,

(b) give written reasons for its determination about the conduct or competence of the Applicant and any action taken against the Applicant, and

(c) record in writing any order for costs.

(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the Applicant has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming a lawyer;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the Applicant is not a member, conduct that would, if the Applicant were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

(c) make any other disposition of the citation that it considers proper.

[15] Section 38(1) provides that this section applies to the hearing of a citation. Section 38(4) directs a Hearing Panel to, among other actions:

(a) dismiss the citation ... or

(c) make any other disposition of the citation that it considers proper.

[16] The Panel is required to dispose of the citation and, in doing so, must consider all of the evidence given but must consider the evidence within the framework of what is alleged in the citation and not otherwise.

[17] Rule 4-14 of the Law Society Rules reads as follows:

4-14 (1) A citation may contain one or more allegations.

(2) Each allegation in a citation must

(a) be clear and specific enough to give the Applicant notice of the misconduct alleged, and

(b) contain enough detail of the circumstances of the alleged misconduct to give the Applicant reasonable information about the act or omission to be proved against the Applicant and to identify the transaction referred to.

[18] A citation does not by its very existence give sufficient notice to the Applicant that any or all of his or her conduct may be the basis for punishment. The impugned conduct must be clearly identified in the citation.

[19] In our view, the allegations in the citation cannot reasonably be interpreted to embrace the reckless drafting of an affidavit. Reckless drafting could include inadvertence or carelessness without a necessary intention to mislead. The Hearing Panel found the Applicant's affidavit false or, at least, misleading, but found no evidence of the Applicant's participation in any scheme. The Applicant admitted that his affidavit was badly drafted and could mislead. An inquiry into an allegation of reckless drafting is quite different in

nature from an inquiry into participation in a scheme designed to mislead. Both the evidence and possible defence strategies in the one case could differ from those available or chosen in the other. Counsel for the Law Society, before the Hearing Panel, submitted that the Hearing Panel must find the existence of a scheme or design before considering the degree of participation of the Applicant. Neither counsel seemed to anticipate the possibility of a finding of professional misconduct based on the "reckless" drafting of the Applicant's affidavit.

[20] The decision of the Supreme Court of British Columbia in *Donegan v. Association of Professional Engineers and Geoscientists of British Columbia*, 2001 BCSC 1448 is of assistance on this point. In that case, a hearing panel found a member negligent on the basis of sealed pre-construction drawings. The member conducted his defence based on the "as built" design, which did conform to applicable building codes. The Notice of Inquiry issued to the member alleged negligence or professional misconduct, in that "... design of support and seismic restraint for electrical cable tray systems was deficient and was not in compliance with the requirement of the 1992 British Columbia Building Code ... ." The Court held, at paragraph 40:

> … The Association may properly complain that Mr. Donegan's sealed drawings were defective and that he was negligent in releasing them, but I find that that is not what he was charged with. I find that the language of the charge is ambiguous, and therefore offends the rule of *audi alteram partem*. In this case I find Mr. Donegan did not have adequate notice of the charge against him.

[21] A useful perspective is offered by the majority decision of the Saskatchewan Court of Appeal in *Kapoor v. Law Society of Saskatchewan*, (1986) 52 Sask. R. 110. At paragraph 158, the Court cited McKay J. in *Novak v. Law Society of British Columbia*, [1972] 6 WWR 274 (BCSC) at 283:

> I am not, however, dealing with a criminal or quasi-criminal charge but rather with a disciplinary hearing before an administrative tribunal. In *Re: Benchers of Law Society of British Columbia*, [1945] 4 DLR 702, Farris CJSC, in delivering the judgment of a special visitorial tribunal of five Judges of the Supreme Court of British Columbia, sitting in appeal from a decision of the Benchers of the Law Society suspending a solicitor from practice, said [p. 703]:
>
> > … administrative tribunals performing judicial or semi-judicial functions are required to act judicially but are not required to follow court procedure.
>
> … I think it can also be said that such administrative tribunals performing judicial functions are not bound by the technical rules involved in the drafting of indictments and informations, provided always that the provisions of the statute involved are carried out and the proceedings are conducted within the bounds of "natural justice".

The majority of the Court in *Kapoor* went on to add:

> Such freedom, however, does not extend to charging a member of the Law Society with conduct unbecoming by contravening the rules in a particular fashion, discovering that there was other conduct which could have constituted conduct unbecoming, and making a determination of conduct unbecoming on the facts discovered and proved at the hearing, which do not conform to the charges as particularized. I refer to *R. v. Custer*, [1984] 4 WWR 133 at 153-4; *Order of Chartered Accountants of Que. v. Goulet*, [1981] 1 SCR 295. As noted by Bayda CJS in *Custer* (p. 154):
>
> > In that case [*Goulet*], a certified general accountant was charged [p. 98] under a provincial statute of Quebec [*Professional Code*, 1973 (Que.) c. 43] with "'act[ing] in such a way as to lead to the belief that he was authorized to engage in a professional activity reserved to

> members of the Professional Corporation of Chartered Accountants of Quebec ...”’ The court found [at p. 101] that the evidence “could perhaps have been a basis for a finding that respondent was guilty on a charge of having engaged in public accountancy, but not on one of acting in such a way as to lead to the belief that he was authorized to do so.” The court found, in short, that the charge as laid was not made out. That, of course, was not to say that, had the charge been worded differently, there was not evidence upon which the charge could be supported.

[22] If Law Society counsel had sought leave to amend the citation during the hearing to include an allegation of reckless drafting of the affidavit, the Applicant's counsel would doubtless have sought an adjournment on the basis that a new and unforeseen allegation had been made and that it would be a denial of natural justice to force him to proceed without a proper opportunity to prepare to meet that allegation. We think it probable that an adjournment would have been granted.

[23] Moreover, such an additional allegation could stand on its own. The Applicant could be found to have committed professional misconduct through reckless drafting of his affidavit, regardless of disposition of the other allegations, because the allegation of reckless drafting is a fundamentally different and independent allegation.

[24] As is stated in *Kane v. Board of Governors of University of British Columbia*, [1980] 1 SCR 1105, at paragraph 31, citing *Abbott v. Sullivan*, [1952] KB 189 at 198, “A high standard of natural justice is required when the right to continue in one's profession or employment is at stake.”

[25] None of the citation, the evidence called or the submissions of counsel before the Hearing Panel squarely addressed the issue of reckless drafting. The Applicant did not have a reasonable opportunity to address that issue before the Hearing Panel gave its decision on Facts and Verdict. The deprivation of that opportunity for the Applicant was a denial of natural justice.

[26] Accordingly, the finding of professional misconduct made by the Hearing Panel is hereby set aside, and as a result, the citation is dismissed in its entirety.

[27] We feel constrained to add this. It may be, as the Hearing Panel found, that the Applicant was indeed reckless in the drafting of his affidavit and that his conduct in doing so amounted to professional misconduct. We express no opinion on either aspect of the matter since, as we have tried to explain, we do not think that either issue was properly before the Hearing Panel or before us.

## Decision on Costs

[28] The parties are in agreement that costs will follow the event. They disagree, however, as to the calculation of costs. The Applicant seeks special costs and submits that the conduct of the Law Society in pursuing this case was reprehensible. The Society relies on the latest reported cases and the Law Society's Policy Statement on Costs in 2008 as authority for an award of costs based on the principles of “reasonableness” subject to partial indemnity in the range of 30 to 40 percent.

## Background

[29] During the course of criminal proceedings against his father, the Applicant assisted the defence team and his father in bringing on a “ *Rowbotham*” application for government funding.

[30] The judgment of a Judge of the Supreme Court of British Columbia contained remarks in paragraphs 49, 50, 73, 74 and 82 that raised concerns about the conduct of the M family and specifically the Applicant.

The Judgment naturally came to the attention of the Law Society, which then began its investigation into the conduct of the Applicant.

[31] The history of proceedings and the results up to the s.47 Review hearing are summarized as follows:

> (a) Constitutional hearing brought by Applicant was dismissed;
>
> (b) Hearing of the citation - neither party completely successful, no costs awarded;
>
> (c) Penalty Hearing - reasonable costs of the Constitutional challenge awarded to the Law Society, indemnified at 30 per cent for a total award of $2,520.60.

## Submissions

### Special costs

[32] The Applicant submits that, at most, the Law Society's evidence proved that he was guilty of making an innocent error in an affidavit presented to Court. He says the Law Society was on a witch hunt and wanted to punish "a M" and that the proceedings were tantamount to an abuse of process. In these circumstances, he says, special costs are appropriate. The Applicant specifically accuses two of the counsel for the Law Society of incompetence, of failing to read the Court file before recommending that a citation be issued, and of issuing the citation blindly. Through his counsel, the Applicant contends that allegation 2(a) of the citation alleges a scheme or design to mislead the court and that this is simply another way of phrasing an allegation of fraud. The failure to prove fraud is another reason for ordering the Law Society to pay special costs. In support of his position we were provided with an extensive list of authorities. All of them, we note, concern civil disputes.

[33] Counsel for the Law Society refers to *Law Society of BC v. Jeletzky*, 2005 LSBC 2:

> It is of great importance to the public of British Columbia that incidents of professional misconduct by lawyers should be thoroughly investigated and vigorously prosecuted by the Law Society. …

[34] The Law Society also relies on the fact that it is the body duly constituted for the purpose of regulation of the legal profession. It says that, in this case, it discharged its duties entirely in keeping with its statutory obligations.

[35] Law Society counsel submits that the decisions in the most recent Law Society discipline cases and the 2008 Policy Statement of the Law Society on Costs are applicable. The appropriate level of costs is a partial indemnity of reasonable costs in the range of 30 to 40 per cent.

### Discussion

[36] Section 3 of the Act sets out the objects and duties of the Law Society:

> (a) to uphold and protect the public interest in the administration of justice by
>
> (i) preserving and protecting the rights and freedoms of all persons,
>
> (ii) ensuring the independence, integrity and honour of its members, and
>
> (iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and
>
> (b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members

[37] It is clear that the primary duty of the Law Society is to protect the public interest. The self-regulation of the profession makes the discipline of its members imperative in ensuring that the public is protected from breaches of the Act, the Rules and the *Professional Conduct Handbook*.

[38] In this case, the complaint and investigation stemmed from the statements of a Supreme Court Justice in a very public case who made highly critical comments on the behaviour of the Applicant. In these circumstances it should not occasion any surprise that the Law Society initiated an investigation and decided that the facts warranted the issuance of a citation. In our view, the Law Society did neither more nor less than perform its duties under the Act and Rules. We found no evidence in the material before us of improper motives or behaviour by the Law Society that would justify an order that it should pay special costs.

[39] That being our conclusion on the facts, it is not in our view necessary to deal with the authorities on this subject that were cited to us by counsel for the Applicant.

[40] Our conclusion, in sum, is that no ground exists to require the Law Society to pay special costs.

## Calculation of costs

[41] We turn, now, to the calculation of costs.

[42] In the evolution of costs in Law Society disciplinary proceedings, *Shpak v Institute of Chartered Accountants of BC*, 2003 BCCA 149 stands as authority that, where rules to determine costs are not defined in an administrative tribunal's empowering legislation, then the Rules of Court would apply and be used in the circumstances. This supplies a tariff that, in most ordinary circumstances, would be reasonable. The Act includes provisions to permit the Benchers to determine their own principles and rules for costs, and therefore the Law Society is not bound to follow the tariff set out in the Rules of Court. However the case is useful in understanding the formation of the now accepted concept of reasonable costs as the appropriate starting point in determining the award of costs in Law Society disciplinary proceedings.

[43] The decision in *Law Society of BC v Jeletzky*, supra, referred to the *Shpak* decision. The panel in that case emphasized that reasonableness of the costs must be considered. The panel considered the following: whether the allegations were proper and well founded, whether the time spent and hourly rates were reasonable, whether there was any waste of panel time, the success of the Law Society and of the respondent, and the duty of the Law Society to vigorously investigate complaints of professional misconduct. The panel ordered the respondent to indemnify costs at approximately 30 per cent, based on reasonableness.

[44] In the decision *Law Society of BC v. Racette*, 2006 LSBC 29, the hearing panel stressed that full indemnity for costs is not automatic even though the Law Society was successful. It depends on the relevant criteria applied in the case.

[45] In the decision in *Law Society of BC v. Edwards*, 2007 LSBC 4, the hearing panel followed the proposition that the costs must be reasonable, but full indemnity of the "reasonable costs" based on the facts was ordered.

[46] In 2008 the Benchers approved a policy on costs that stated, on an interim basis, pending further consideration of the issue, the Law Society should only seek costs when successful, on a partial rather than full indemnity basis. Law Society counsel were instructed to calculate their hourly rate at $175 per hour. This

interim measure has been utilized in discipline proceedings regularly since then.

[47] As a current example, following the unsuccessful Constitutional challenge by the Applicant herein, costs were awarded in favour of the Law Society. The order was for reasonable costs, partially indemnified at the rate of 30 per cent, which resulted in an order for $2,520.60 payable by the Applicant. The same principles logically apply to either the Law Society or the Applicant in assessing costs that follow the event.

[48] We reviewed the six invoices of Mr. Mulroney dated September 4, 2008, September 12, 2008, September 22, 2008, January 5, 2009, October 30, 2009 and December 11, 2009, which invoices were applicable to services rendered from the beginning of his retainer through to the conclusion of the penalty phase of the Hearing. We also reviewed the retainer letters dated August 19, 2008 covering the hearing phase and October 8, 2009 covering the penalty phase. In each case Mr. Mulroney agreed to cap his total costs at $100,000 and $20,000 respectively. The aforementioned six invoices coincide with the retainer agreements in that the total of the four invoices covering the hearing portion of this matter total $100,000 precisely, and the total amount of the two invoices for the penalty phase is some $291 more than the $20,000 cap set out in the retainer letter.

[49] We find that the amounts set out in the aforementioned invoices are reasonable, taking into consideration the time and effort expended on this matter by Applicant's counsel, and moreover, that they accurately reflect what the Applicant's reasonable costs would have been had he hired Mr. Mulroney at the outset. It is interesting to note that, from August 19, 2008 to September 15, 2008, which time frame covers Mr. Mulroney's first three invoices, these three bills charge out five people totaling 403.5 hours. It is our view that much of the time and effort covered by this large block of time in a short period is overlap or duplication of the efforts of the Applicant's first counsel.

[50] We conclude that the amounts billed by Mr. Mulroney up to the conclusion of the penalty portion are reasonable in this case, and should have been very similar had he had conduct of this matter from the beginning. As a result, we will restrict our calculations on costs to those provided by Mr. Mulroney and will disregard the bill of Mr. Gary Nelson for the reasons already stated.

[51] We find that the total amount of fees charged and paid for in the six invoices totals $97,302.60 and, applying the principle of partial indemnity, the Applicant is entitled to 35 per cent of $97,302.60, which is $34,055.91. In addition, and according to the Law Society's present policy, the Applicant is entitled to full indemnity for the reasonable disbursements incurred and the taxes paid. As we have already found that the amounts in the six invoices are reasonable, the Applicant is entitled to recover the total amount of the disbursements and taxes set out in the six invoices totaling $22,988.66.

[52] The costs to be awarded for the Review will also be based on the retainer arrangement as set out in Mr. Mulroney's letter of December 11, 2009 in which he expressly agrees to do any and all appeals and the Section 47 Review for a fee of $40,000 plus taxes. There is no breakdown on how much of this $40,000 would be allocated to the Review and how much to a Court of Appeal challenge. We find therefore that it should be allocated equally and that the reasonable costs for the Review would be $20,000. We did review the work in progress statement provided by Mr. Mulroney that apparently covers time expended from January 5, 2009 to November 1, 2010 but have concluded that this is an internal document and does not assist in ascertaining what are reasonable costs. Since there is no evidence of the disbursements incurred or taxes paid for the work done on the Review, all that can be awarded then is 35 per cent of the reasonable cost of $20,000, which amounts to $7,000.

[53] The total amount of costs, including disbursements and taxes, that the Applicant is entitled to is $64,044.57. From this total will be deducted the $2,520.60 awarded to the Law Society for the unsuccessful Charter application made by the Applicant as a preliminary matter. In the result, we order that the Law

Society pay costs in the amount of $61,523.97 to the Applicant.