2011 LSBC 15
Report issued: June 06, 2011
Citation issued: March 18, 2010

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

Edward Earle Bowes

Respondent

Decision of the Hearing Panel on Facts, Determination and Disciplinary Action

Hearing date: March 23, 2011
Panel: David M. Renwick, QC, Chair, E. David Crossin, QC, Gregory Petrisor

Counsel for the Law Society: W. Lindsay MacDonald, QC
Counsel for the Respondent: Henry C. Wood, QC

Background facts

[1] The citation in this matter was issued March 18, 2010. The Schedule to the citation alleges that the Respondent, after giving an undertaking that reads "neither I nor anyone in my firm will act on behalf of any of the parties in this proceeding," subsequently breached that undertaking. The proceeding referred to was a shareholders' dispute.

[2] An amendment to the Schedule made on September 1, 2010 added an alternative allegation that the Respondent acted in a conflict of interest when he, in addition to acting as corporate solicitor for some of the corporate defendants, provided legal services to the majority shareholder and personal defendant, which services conflicted with his duties owed to the corporate clients and/or the minority shareholder. The alternative allegation in the Schedule to the citation was withdrawn by the Law Society at the outset of the hearing.

[3] Counsel submitted an Agreed Statement of Facts. In summary, those facts are as follows:

1. The Respondent, as part of his practice, acted on a part-time basis as in-house corporate counsel for a group of companies. A dispute between the majority shareholder and the minority shareholder in those companies led to an oppression proceeding commenced by the minority shareholder in the Supreme Court of British Columbia against the corporations and the majority shareholder (the "Oppression Action").

2. The Respondent entered an initial appearance to the action on behalf of "all corporate respondents" in the Oppression Action.

3. The minority shareholder's counsel in the Oppression Action served a Notice of Motion seeking "a declaration that the Respondent be disqualified and cease to be solicitor of record for the corporate respondents."

4. The Respondent wrote a letter to the minority shareholder's counsel denying that he was in a conflict

of interest, but agreed to withdraw to avoid the parties having to spend time, effort and resources fighting over his involvement instead of the core issues in the Oppression Action. In return for the Motion being adjourned generally, the Respondent provided his undertaking as described above.

5. The Respondent was not replaced as counsel on behalf of the corporate defendants in the Oppression Action, and continued to act as part-time corporate counsel to the corporations to the knowledge of the minority shareholder and his counsel. The majority shareholder did subsequently appoint new counsel in the Oppression Action.

6. The Respondent continued to provide legal services and advice to the corporate defendants and the majority shareholder related to the litigation, including preparing Affidavits and engaging in discussions regarding settlement proposals.

[4] The Respondent admits that he breached his undertaking by continuing to act on behalf of the majority shareholder and some or all of the corporate defendants in the action after he gave his undertaking not to do so and by providing legal advice and services in respect of the action to the majority shareholder and/or some or all of the corporate defendants.

[5] The Respondent admits that his actions constitute professional misconduct.

Determination

[6] The Panel accepts the admission of the Respondent and finds that he breached his undertaking, as alleged in the citation. We also accept the Respondent's admission that his conduct constitutes professional misconduct.

Disciplinary Action

[7] The Respondent was called to the Bar of British Columbia on May 14, 1976. His Professional Conduct Record is brief. In a report dated July 5, 2006, a Conduct Review Subcommittee, after conducting a conduct review, recommended that no further action be taken. The subject matter of that conduct review was unrelated and not similar to the conduct that is the basis of this hearing.

[8] Counsel for the Law Society and counsel for the Respondent jointly submitted that the Respondent should pay a fine in the amount of $3,000, and costs in the amount of $1,500.

[9] Counsel agreed that the Respondent's record is not an aggravating factor.

[10] Counsel for the Respondent explained on behalf of the Respondent that, in the Respondent's mind, there was a difference between simply acting for the majority shareholder and the corporations, and acting "in the proceeding" as counsel.

[11] Such a misunderstanding is troubling. Clearly, the essence of the Motion filed and the undertaking sought from, and given by, the Respondent is to avoid his acting in a conflict situation. His continuing to act, even if not as counsel of record, and even if "behind the scenes" in essence, illustrates a profound lack of appreciation of the basis upon which the undertaking was sought, and of the gravity of the Respondent adhering to the undertaking he gave.

[12] Of further concern is the fact that the breach of undertaking alleged, and admitted by the Respondent, is an ongoing breach that occurred over a period of time, rather than a single isolated error in judgment.

[13] The Respondent, through counsel, assured the Panel that he has reflected a good deal on the matter since the issuing of the citation, and understands why his actions constitute professional misconduct.

[14] Counsel submitted several decisions of the Benchers in which lawyers were punished for breaches of undertaking, and generally the range of penalties is between $1,000 at the low end and $5,000 at the high end. In one decision, *Law Society of BC v. Heringa* 2004, BCCA 97, the Court described that respondent's "cavalier approach to the fulfillment of undertaking obligations" and imposed a penalty outside of the general range, specifically one month suspension and imposed a condition on that respondent to discharge a mortgage. Both counsel in this matter submit that a $3,000 fine is in the middle of the range of decisions with facts reasonably similar to the facts in this matter.

[15] Counsel cited *Rault v. Law Society of Saskatchewan*, 2009 SKCA 081 in support of the proposition that joint submissions in respect of discipline matters should be given considerable deference, unless those submissions are wholly inappropriate.

[16] Upon review of the circumstances and in light of the Respondent's admissions, which made a protracted hearing unnecessary, we find the joint submissions of counsel in respect of disciplinary action and costs within an appropriate range, and accordingly we accept the joint submissions. As a result, we order that the Respondent:

(a) pay a fine in the amount of $3,000; and

(b) pay costs to the Law Society in the amount of $1,500.

[17] The Respondent has 30 days from the date this decision is issued in which to pay the fine and costs.