

2011 : No. 2 Summer

Lawyer 11

Discipline hearings : July 24 and 25, 2007, 11 days between September 8 and November 13, 2008 and December 5, 2009

Panel : Gordon Turriff, QC, Chair, (concurring decision) David Renwick, QC and Warren Wilson, QC

Bench Review : Oral decision - September 1, 2010 (supplemental notice of review) and October 18 and 19, 2010

Benchers : Bruce LeRose, QC, Chair, Haydn Acheson, Leon Getz, QC, -Peter Lloyd, Thelma O'Grady, Lee Ongman, Greg Petrisor, Alan Ross (Supplemental Notice of Review); Bruce LeRose, QC, Chair, Haydn Acheson, Leon Getz, QC, Peter Lloyd, Thelma O'Grady, Lee Ongman, Gregory Petrisor (review)

Reports issued : November 5, 2007 (2007 LSBC 49), September 9, 2009 (2009 LSBC 26), January 5, 2010 (2010 LSBC 01), September 24, 2010 (2010 LSBC 22) and March 11, 2011 (2011 LSBC 10)

Counsel : Maureen Baird, David Lunny and J. Chong for the Law Society, Gary Nelson for Lawyer 11 and Jonathan Penner and Jennifer Stewart for the Attorney General (Charter application); Maureen Baird, David Lunny and Nicole Ladner for the Law Society and David Mulroney and Christopher Siver for Lawyer 11 (facts and verdict); Maureen Baird, David Lunny and Nicole Ladner for the Law Society and David Mulroney for Lawyer 11 (penalty); Dennis Murray, QC for the Law Society and David Mulroney for Lawyer 11 (supplemental notice of review); Dennis Murray, QC and Fiona McQueen for the Law Society and David -Mulroney for Lawyer 11 (review)

Facts

During the course of criminal proceedings against his father, Lawyer 11 assisted his father's defence team in bringing on an application for government funding. The Supreme Court of BC judgment contained remarks that raised concerns about the conduct of Lawyer 11.

The Law Society's investigation resulted in a citation asserting the following:

Allegation 1 alleged a scheme or design to mislead the Supreme Court of BC with respect to a loan allegedly made to Lawyer 11's father's company.

Allegation 2 alleged that Lawyer 11 participated in a scheme or design either: (a) to mislead the Court, or alternatively, (b) to mislead a financial institution.

Allegation 3 alleged that, by conducting himself in the manner set out in allegations 1 and 2, which was dishonourable or questionable conduct, Lawyer 11 had cast doubts on his professional integrity and/or competence or reflected adversely on the integrity of the legal profession or the administration of justice.

decision of the hearing panel

In July 2007, Lawyer 11 sought rulings that he not be compelled to give evidence in proceedings and that the evidence given at the application for government funding hearing was not admissible. The panel dismissed his application in respect of these constitutional issues.

During the course of the hearing, Lawyer 11's counsel brought a no-evidence motion regarding each allegation of the citation. On September 12, 2008, the panel allowed Lawyer 11's application with respect to allegation 2(b) of the citation but dismissed the balance of his application.

The panel found that:

- no professional misconduct was proven in allegation 1;
- Lawyer 11 had sworn an affidavit that was filed with the court in the application for government funding proceedings that was false, or at least, misleading;
- Lawyer 11 had a duty to ensure that the court was not misled by anything he said as a lawyer or as a witness, and he was reckless in the drafting of his affidavit;
- there was no evidence that he provided misleading information to the court in concert with any other person and was not proven to have participated in a scheme;
- using the analogy of a lesser included offence, providing misleading information to the court, even if not part of a scheme, still constituted professional misconduct; and
- allegation 3 of the citation was dismissed because allegations 1, 2(a) and 2(b) were not proven.

On December 5, 2009, the panel issued its penalty decision. -Lawyer 11 was suspended from the practice of law for one month and ordered to pay costs of \$2,520.60.

On February 10, 2010, counsel for Lawyer 11 sought a review of the panel's decision.

On February 19, 2010, the Law Society issued a notice seeking a review of the panel's decision to dismiss allegation 3. The Law Society issued a supplemental notice of review on May 11, 2010 in respect of the panel's dismissal of allegation 1. The review panel dismissed the Law Society's supplemental notice of review because it was issued outside of the 30-day period allowed under section 47 of the Legal Profession Act.

Decision of the Benchers on review

The issue to be decided by the Benchers was, in light of the panel's determination that allegation 2(a) was not proven, could the panel's conclusion that Lawyer 11's reckless drafting of a misleading affidavit, although not consistent with the allegations in the citation, nonetheless support a finding of professional misconduct?

Any finding of professional misconduct must be based, not only on the evidence presented, but also on the allegations as framed in the citation. In the Benchers' view, the allegations in the citation could not reasonably be interpreted to embrace the reckless drafting of an affidavit. Lawyer 11 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.

The Benchers determined that none of the citation, the evidence called or the submissions to the panel squarely addressed the issue of reckless drafting. Lawyer 11 did not have a reasonable opportunity to address that issue before the panel gave its decision on facts and verdict. The Benchers took no position as to whether the affidavit was recklessly drafted, since that question was not properly before the hearing panel or the Benchers.

The Benchers ordered that the finding of professional misconduct made by the panel be set aside and that the citation be dismissed in its entirety. The Benchers concluded that the amounts billed by Lawyer 11's counsel were reasonable and ordered that the Law Society pay \$61,523.97 in costs to Lawyer 11.

Lawyer 11 sought special costs. The Benchers found no evidence of improper motive or behaviour by the Law Society that would justify an order that it should pay special costs.

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 without the respondent's consent.