2005 LSBC 28
Report issued: July 14, 2005
Citation issued: June 30, 2004

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

Howard Raymond Berge, Q.C.

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: March 23 and 24, 2005

Panel: Carol Hickman, Chair, Hugh Legg, Q.C., Dr. Maelor Vallance

Counsel for the Law Society: Herman Van Ommen
Counsel for the Respondent: Christopher Hinkson, Q.C.

Introduction

[1] On June 30, 2004, by direction of the Chair of the Discipline Committee of the Law Society of British Columbia, the Executive Director issued a citation against the Respondent, Howard Raymond Berge Q.C. (the "Respondent") , pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules. This Hearing Panel was directed to inquire into the Respondent's conduct. The nature of the conduct to be inquired into was set out in a schedule attached to the citation as follows:

> On October 2, 2002, after consuming a substantial amount of alcohol just prior to driving a motor vehicle and then causing an accident by driving without due care and attention you removed an open can of beer from your car to dispose of it or you acted in a manner that made it appear as if you intended to dispose of it and you used mouthwash prior to the arrival of the police in order to mask the smell of alcohol on your breath. (the "Schedule")

[2] At the commencement of the hearing counsel for the Respondent, Mr. Hinkson, admitted service of the citation pursuant to Rule 4-15 of the Law Society Rules (the "Rules") .

[3] However, Mr. Hinkson did raise a concern regarding the form of the citation, which was marked as Exhibit 1 in these proceedings. The original citation had several allegations, which included the following:

> a) whether you have done one or more of the following:
>
> i) professionally misconducted yourself;
>
> ii) conducted yourself in a manner unbecoming a member;
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> iii) contravened the Legal Profession Act or a rule made under it;
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> iv) incompetently carried out duties undertaken by you in your capacity as a member of the Society.

[4] Mr. Hinkson submitted that it was unfair to the Respondent to have all of these allegations raised when the Law Society indicated that they were only proceeding with the allegation of conduct unbecoming a member. Mr. Hinkson wanted the other allegations dismissed.

[5] Counsel for the Law Society, Mr. Van Ommen, was very clear that the Law Society was only proceeding with the allegation of conduct unbecoming a member. He indicated that these allegations did not involve any misconduct in the Respondent's practice as a lawyer. Mr. Van Ommen indicated that the citation was a "standard form citation" which lists the various findings the Panel could make and that it is not a "charge" .

[6] The Panel agreed with Mr. Hinkson that it is unfair to a member to list a number of allegations in a citation if the Law Society is not proceeding with those allegations. A member is entitled to know all of the allegations he must face at the hearing and the citation should clearly list these and nothing more. However, we were not prepared to dismiss these allegations because we had not heard evidence. Accordingly, pursuant to Rule 4-31 (2)(b) of the Rules the citation was amended to withdraw items (i), (iii) and (iv) listed above. The new citation was marked as Exhibit 11. The Schedule attached to the citation remained the same.

Issues

[7] The issues in this Hearing are as follows:

> (a) On October 2, 2002, did the Respondent consume a substantial amount of alcohol just prior to driving a motor vehicle; and
>
> (b) cause an accident by driving without due care and attention; and
>
> (c) remove an open can of beer from his vehicle to dispose of it or act in a manner that made it appear as if he intended to dispose of it; and
>
> (d) use mouthwash prior to the arrival of the police in order to mask the smell of alcohol on his breath.

[8] If so, does this constitute conduct unbecoming a member of the Law Society pursuant to section 38(4)(b)(ii) of the *Legal Profession Act*, S.B.C., 1989, C.9 (the "Act") .

Background

[9] The Respondent is 67 years of age and has been a member of the Law Society since May 12, 1967. His practice is in Kelowna, B.C. The Respondent had approximately 12 to 15 years experience in the practice of criminal law and in particular dealing with charges of impaired driving and driving with a blood alcohol reading over .08.

[10] The Respondent was married for 33 years and his wife passed away on October 5, 2000.

[11] The Respondent testified before the Panel that on the evening of October 2, 2002 when he was finishing work, he had received an email at approximately 7:20 p.m. and noted the date was two days before the second anniversary of his wife's death. He said that as a result of that, he was feeling "sorrowful or melancholy" . He had a 750 ml. bottle of Irish whisky in his desk that was about one-third full. He admitted to consuming 8 or 9 ounces in a very short period of time.

[12] When he packed up to leave the office, he took the empty whiskey bottle to the office kitchen to throw it away. While in the kitchen, he took a beer out of the fridge and had a "couple of short drinks out of that just

to clear the taste of the whisky" . When he was packing up his files, to deliver to the secretarial area, he put the can of beer in his jacket pocket. In direct examination he testified that, "I went out and got in my car and I realized I had it in my pocket and so I put it in the side pocket of the door.... intending to dispose of it at home."

[13] Under cross-examination the Respondent testified as follows:

> ...Because I had a bunch of files and things, I put it in my pocket and took the files out and put them on the desks and then the stuff went somewhere else. And then I would have set the alarm, turned the lights out, and got out and locked the door and locked the outside door. And that's when I forgot that I had the tin of beer in my pocket.

[14] The Respondent left his office and immediately commenced to drive to his home in the northern part of Kelowna, known as McKinley Landing. He testified that he did not follow his normal route home because there was a lot of traffic.

[15] At approximately 7:45 p.m., the Respondent was involved in a motor vehicle accident. The accident occurred at the intersection of Bernard Avenue and Glenmore. Glenmore is a continuation of Spall Avenue, which was on the Respondent's right. The Respondent drove east along Bernard Avenue and testified that he stopped at the traffic light, which was red. When the light turned green, he made a left turn into the left turn lane on Glenmore and then immediately turned into the right lane. He failed to allow for the width of the sidewalk on Glenmore and his right front wheel hit the curb. He was unable to straighten his steering because it was damaged. He said that he overreacted and his vehicle collided with a sign post and a rock retaining wall on Glenmore. He then crossed over two traffic lanes on Glenmore and collided into the median on his left in the centre of Glenmore.

[16] There were two witnesses, Chad Perry and Robert Wayne Wilson, who observed the accident. Both witnesses testified before the Panel.

[17] Mr. Wilson was stopped immediately behind the Respondent on Bernard Avenue. He observed the Respondent's vehicle proceed into the intersection, turn left, and go into the fast lane on Glenmore and then immediately go right into the rock wall.

[18] The Respondent attributed his error in judgment, in making the left turn and in failing to avoid the curb on Glenmore, to an optical illusion which occurred as he approached the intersection. He said the crown of the road on Glenmore appeared as a line along the rock wall.

[19] Mr. Wilson testified that Bernard Avenue is fairly level as you approach the intersection. He also stated that if you are at the stop light on Bernard, getting ready to turn left, you have a clear view of the lanes into which you are going to turn and the location of the curb.

[20] Mr. Perry was sitting at a red light on Spall (before it turns into Glenmore) and observed the accident. He testified that the Respondent made a perfectly controlled left turn and then the vehicle "dramatically turned right" . He testified that his concern was that someone had a "heart attach or physical ailment" because the change was so abrupt.

[21] Mr. Perry and Mr. Wilson stopped at the scene of the accident to assist the Respondent. Mr. Perry approached the Respondent's vehicle to see if he was okay. When the Respondent rolled down his window, Mr. Perry testified that he noticed a very strong smell of alcohol. Mr. Wilson also testified that he noticed the smell of beer in the Respondent's vehicle.

[22] After the accident, the Respondent got out of his vehicle to inspect the damage to his vehicle and to the

retaining wall.

[23] When the Respondent returned to his vehicle, Mr. Perry observed him sipping out of an "Evian (water) bottle" and then spitting into a rag. When he approached the Respondent's vehicle, he noticed a strong smell of mouthwash. Mr. Perry was standing at the front of the Respondent's vehicle looking in through his windshield. Mr. Wilson testified that the Respondent was bent over the console while he was doing this.

[24] In direct examination the Respondent admitted to using mouthwash following the accident. He said the purpose "was so that somebody wouldn't decide that I, that I should take a breathalyzer test."

[25] Under cross-examination, the following questions and answers were given:

> Q So you weren't concerned about the police arriving knowing that you'd been drinking and that you smelled like alcohol?
>
> A Yes, I was.
>
> Q You were worried about that?
>
> A I was concerned that if they did, I smelled like a brewery because of all the empty beer cans that had come into the car.
>
> Q And you knew that if the police arrived that one of the things that they consider in deciding whether or not to make a demand is the smell of alcohol?
>
> A Yes
>
> Q And I think you said that with respect to the use of mouthwash you said you did it to ensure someone didn't decide you'd have to take a breathalyzer?
>
> A I'm sure I said something like that, but that is the reason.
>
> Q That is the reason?
>
> A H'mm-mmm.

[26] Later in cross-examination, the evidence was as follows:

> Q And so the only reason, then, was because you wanted to avoid a demand for a breathalyzer?
>
> A Exactly, yes.

[27] Mr. Perry had called 911. While waiting for the emergency crews to arrive, the Respondent got out of his vehicle and stood by his car. Mr. Perry testified that the Respondent then went to the console on the left side door, reached down, pulled out the can of beer and slipped it into his suit pocket. He saw the Respondent take five or ten steps toward Mr. Wilson's pick up truck, which was parked near to the Respondent's vehicle. When the Respondent reached the back wheel of the truck, Mr. Perry saw the Respondent reach into his suit pocket. At that point, Mr. Perry told The Respondent "not to bother, that he smelt like alcohol and people are already on their way and it was too late."

[28] Mr. Wilson had been flagging traffic from the rear of the Respondent's vehicle. He then went back to his pick up truck. He saw the Respondent getting out of his vehicle and heading towards his pick up. He testified that he saw the Respondent putting his hand inside his coat and pull out the beer can and try to put it inside the back of his pick up truck. He said the Respondent was right up against the truck, which was 3 or 4 feet from the Respondent's vehicle. He also testified that at that point, both he and Mr. Perry said "Don't try

that we know what you have there." The Respondent then put the beer can back inside his coat pocket.

[29] The Respondent also gave evidence about this incident. In direct examination, the following question and answer were given:

> Q Do you recall being in the vicinity of Mr. Wilson's truck and hear Mr. Perry saying, "Don't do that, we know you have a beer" or words to that effect?"
>
> A Somebody said something and I don't remember exactly what it was but that was the import of that.

[30] In direct examination, the Respondent admitted to removing the can of beer from the door pocket of his vehicle after the accident. When asked by Mr. Hinkson if he removed the can from his coat pocket, he responded as follows:

> What I think happened at that point was I – was inside sports jacket pocket. And I was – I may have been adjusting it or I don't know. But I don't dispute the fact that I could have had my hand in my pocket and I was adjusting the tin of beer because I wasn't particularly wanting it to spill on me either.

[31] However, the Respondent denied that he had the intention to dispose of it. He testified that he did this because he did not want the beer to spill if somebody slammed the car door or when his vehicle was being towed. Under cross-examination, the Respondent testified that he was not worried about the beer splashing around while he was driving.

[32] The Respondent had recently moved and testified that he had approximately 200 empty beer tins in the trunk of his car to take for recycling. He testified that the force of the accident had caused several empties to come through the front of the car "and they hit the windshield and the dash and the backs of the seats and there was this liquid, plus me, and I was just covered with this stuff...." Mr. Perry and Mr. Wilson also testified that they saw empties in the Respondent's vehicle.

[33] When questioned about whether he knew it was an offence to carry open liquor in his car, the Respondent testified that, "It's the sort of thing that people do all the time because when you take empties to recycle them you have a carload of empties. It's not something anyone that I know is very excited about one way or another."

[34] The Respondent's vehicle was inoperable as a result of the accident. There was serious damage to the front passenger quarter panel and the right wheel was bent underneath the car.

[35] All witnesses testified that the police arrived at the scene of the accident quite quickly. The Respondent was taken to the police detachment and later charged with impaired driving and driving with a blood alcohol reading in excess of .08 contrary to the *Criminal Code of Canada*.

[36] The criminal trial proceeded in Kelowna Provincial Court on October 9, 2003 before The Honourable Associate Chief Judge E.M. Burdett.

[37] After several witnesses had testified, the Respondent entered a guilty plea to section 144 of the *Motor Vehicle Act of British Columbia*, driving without due care and attention. The sentence was a $1,000 fine and a three month driving prohibition.

[38] The Respondent appealed the sentence. This matter was heard by Mr. Justice Barrow of the Supreme Court of British Columbia on March 29, 2004. The appeal was dismissed.

[39] Mr. Van Ommen sought to have the Reasons for Judgment from both the Provincial Court and Supreme Court proceedings entered as an exhibit in these proceedings. Mr. Hinkson was opposed to this, primarily

on the basis that the Respondent did not testify before Associate Chief Judge E.M. Burdett. Mr. Van Ommen submitted that the Reasons are "prima facie proof" of the Judge's findings on the aggravating factors. Both counsel referred us to several cases.

[40] After considering the submissions of counsel and reviewing the cases, we allowed the transcripts to be marked as an Exhibit, pursuant to Rule 5-5(6)(c) of the Rules which states that the hearing panel may accept any evidence it considers appropriate. However, we did not agree with Mr. Van Ommen that the Reasons were prima facie proof of any facts. As set out in the decision of *Law Society of BC v. Hart,* [1999] LSBC 26 "we may, not must, treat the previous judicial findings as prima facie evidence..."

[41] Another preliminary issue that arose during these proceedings was regarding some material that was provided to one of the Panel members by Law Society staff. This material included case authorities, an article from Continuing Legal Education and a memoranda, including a summary of decisions. Mr. Hinkson was most concerned about the memoranda and the summary of decisions. He submitted that this material should have never been provided to the Panel member by the Law Society staff.

[42] After reviewing all of this material, Mr. Hinkson did not object to the Panel continuing as constituted on two conditions. Firstly, provided the Panel member could disabuse his mind of the material provided, and secondly, that the other two Panel members not look at the material. Mr. Van Ommen was content to proceed on that basis as well.

[43] The Panel agreed with Mr. Hinkson that it was inappropriate for the Law Society staff to provide any members of a hearing panel with anything more than the Hearing Authorities Book, which is available to all Benchers and includes previously decided cases. The Panel agreed with the suggestions of counsel and accordingly, the hearing continued with the Panel as originated.

DISCUSSION

[44] The Schedule attached to the citation can be broken down into four parts. The first allegation states that, "On October 2, 2002, after consuming a substantial amount of alcohol just prior to driving a vehicle..." .

[45] The facts on this part of the Schedule are clear. By his own admission, the Respondent testified that he drank 8 to 9 ounces of whiskey and a couple of short drinks of beer at approximately 7:20 p.m. on the night in question. Shortly thereafter, he left his office and proceeded to drive his car.

[46] The first allegation in the Schedule has been clearly proved.

[47] The second allegation in the Schedule states that, "... then causing an accident by driving without due care and attention" .

[48] Again, the facts in this part of the Schedule are clear. In proceedings before Associate Chief Judge E.M. Burdett of the Provincial Court of British Columbia, the Respondent pled guilty to the offence of driving without due care and attention and the Respondent admitted to causing the accident.

[49] There is no allegation in the Schedule that the accident was caused by the consumption of alcohol. In fact, in the Reasons of Associate Chief Judge Burdett, she stated that she accepted the evidence of the expert that the Respondent's blood alcohol reading at the time of driving would have been .05. On appeal, Mr. Justice Barrow, of the Supreme Court of British Columbia agreed that Associate Chief Judge Burdett had correctly noted this alcohol reading at the time of the accident.

[50] It is clear from the evidence of all of the witnesses, as well as the Respondent's guilty plea that the second allegation in the Schedule is clearly proved.

[51] The third and fourth allegations in the Schedule are as follows:

> You removed an open can of beer from your car to dispose of it or you acted in a manner that made it appear as if you intended to dispose of it and you used mouthwash prior to the arrival of the police in order to mask the smell of alcohol on your breath.

[52] The Respondent admitted to using mouthwash prior to the arrival of the police in order to mask the smell of alcohol on his breath.

[53] It is clear from the evidence that by using mouthwash, the Respondent tried to hide the fact that he had been drinking so that the police would not follow the normal investigation procedure and make a demand that he provide a breath sample. As a result, the fourth allegation in the Schedule is clearly proved.

[54] The Respondent admitted to removing the can of beer from the door pocket of his vehicle after the accident. He also admitted that he had his hand on the can of beer, in his jacket pocket, and was adjusting it. However, he denied that he had the intention to dispose of it.

[55] We are unable to accept that denial. His evidence that he took the can of beer out of the door pocket to avoid spillage is not believable. He had just been in a significant accident. He had hit the retaining wall with the front passenger corner of his vehicle, bounced across two lanes of traffic ending up on the median on the left side of the road. This resulted in two impacts. The front wheel of the car was damaged to the extent that it was inoperable and required several thousands of dollars of repair. The Respondent testified that the force of the two impacts had caused empty cans of beer that were in the trunk of his car to come through the back seat and land on the passengers side in the front of the car. He testified that there were a couple hundred beer tins that sprayed residue all over the vehicle and on him. His concern that one can of beer might be spilled a little further is not credible.

[56] The Respondent testified that he was concerned about being asked to provide a breath sample. An open, partially consumed, can of beer in the car would certainly have increased the likelihood of his being asked to provide a breath sample. The fact that there had been an accident, plus an open can of beer in the car, would certainly be grounds for the police to use in deciding whether or not to make a demand. This is something that the Respondent would have known as a result of his criminal practice in this area.

[57] After hearing all of the evidence, including that of the Respondent, we adopt the findings of Mr. Justice Barrow, at paragraph 52, where he stated as follows:

> In my view, particularly, when viewed collectively, the evidence supports the inference drawn by the trial judge. The appellant's conduct in relation to the beer can in his breast pocket, does not, on the evidence, reasonably support any conclusion other than that he was in the process of attempting to dispose of it. As to the mouthwash, when the appellant consumed it, he had just been involved in a serious motor vehicle accident prior to which he had been drinking. He consumed it while bent over in the front seat of his vehicle. The effect of doing so would be, among other things, to mask the smell of beer on his breath....

[58] In addition, it is clear from the provisions of section 44(2) and (3) of the *Liquor Control and Licensing Act* that it is an offence to have an open can of beer in the car. It is not an offence to have open cans of beer in the trunk of the car. In our view, the Respondent removed the partially consumed can of beer from his car in order to avoid the police relying upon its presence in the car as a ground for making a breathalyzer demand. Moreover, by removing the partially consumed can of beer, the Respondent was also removing evidence that tended to prove he was in violation of the provisions of the *Liquor Control and Licensing Act*.

[59] After reviewing the evidence in support of the four allegations contained in the Schedule of the citation, we are convinced beyond a reasonable doubt that the Law Society has proved these allegations.

[60] The next question is whether this conduct is "conduct unbecoming a lawyer" .

[61] The *Act* defines conduct unbecoming a lawyer in section 1, in these terms:

> "conduct unbecoming a lawyer" includes a matter, conduct or thing that is considered, in the judgment of the benchers or a panel,
>
> (a) to be contrary to the best interest of the public or of the legal profession, or
>
> (b) to harm the standing of the legal profession.

[62] Section 3 of the *Act* sets out the objects and duty of the Law Society, as follows:

> (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.....

[63] In *Pierce v. The Law Society of British Columbia* S.C.B.C. No. A923939, A921866 and A921598, May 5, 1993, Mr. Justice Clancy considered the meaning of the words "best interests of the public" . At page 17 he stated:

> In my view the public interest or the best interest of the public is capable of being given a constant, settled or workable meaning. When the definition of conduct unbecoming is read in the context, the best interest of the public clearly refers to the interest of the public in matters of conduct and competence. There are in existence guidelines on the question of what constitutes the public interest. The guidelines discussed provide a basis for legal debate within which the benchers are able to balance competing interests. It follows that the phrase "best interest of the public" is not impermissibly vague. The benchers are not entitled, as suggested by the petitioner, to pursue "personal predilections" . Legal debate can occur within the framework of the guidelines defining the public interest. There is no danger of a "standardless sweep" when the benchers consider whether the conduct of a member is contrary to the best interests of the public. The same framework also provides guidance for legal debate when considering the definition of "conduct unbecoming" in its broader aspects.

[64] Mr. Hinkson submitted that the decision in *Pierce* should not be followed and that we are bound by the decision of the Court of Appeal in *Hoem v. The Law Society of British Columbia* (1985) 63 B.C.L.R. 36. He quoted from page 54 of the *Hoem* decision where Mr. Justice Esson stated that the general words of the *Act*, then section 45, must be restricted to the "fitness of the matter" . He argued that Mr. Justice Esson considered that the grant of powers to the Benchers were very wide but not necessarily as wide as the literal words of the *Act*. He submitted that Mr. Justice Clancy in *Pierce* , interpreted the definition of conduct unbecoming a lawyer as depositing unlimited jurisdiction on the benchers or a panel to consider whether "any matter, conduct or thing was (a) contrary to the best interests of the public or the legal profession" .

[65] Mr. Hinkson submitted that the decision in *Hoem* "does not appear to have received… any attention from Mr. Justice Clancy."

[66] Mr. Justice Clancy did refer to the decision of the Court of Appeal in *Hoem* at page 16 of the *Pierce* decision, when he concluded, on the authority of *Hoem,* that "the powers of the benchers are wide but not beyond limits" . The Court, in considering the issue of limits on discretion, found that the purpose of the *Act*

was to enable the benchers to maintain high professional standards in the practice of law.

[67] We do recognize that our powers of judging whether conduct alleged in the particulars of a citation is conduct unbecoming a lawyer is limited in accordance with the decision of Mr. Justice Clancy in *Pierce* and the decision of Mr. Justice Esson in *Hoem.*

[68] Further guidance on the meaning and application of the words "best interests of the public" are found in the Canons of Legal Ethics (the "Canons") published by the Law Society and issued to all members.

[69] The introductory paragraphs of the Canons state that they are a "general guide, and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned." They go on to say that a lawyer is:

> a minister of justice, an officer of the courts, a client's advocate, and a member of an ancient, honourable and learned profession.
>
> In these several capacities it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

[70] Under the heading, "To the State", the Canons state:

> (1) A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel, or assist any person to act in any way contrary to the law....

[71] Under the duty to oneself, the Canons state that "all lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity."

[72] Chapter 2 of the Canons is entitled "Integrity" . Under the heading "Dishonourable conduct" it states:

> A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[73] Further guidance on the standard of conduct required of a lawyer can be found in the Canadian Bar Association Code of Professional Conduct (the "CBA Code") . Chapter 1 of the CBA Code is also entitled "Integrity" . Under the heading, "Guiding Principles", it states:

> 1. Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If the client is in any doubt about the lawyer's trustworthiness the essential elements in the lawyer-client relationship will be missing. If personal integrity is lacking the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.
>
> 2. The principle of integrity is a key element of each rule of the Code.
>
> 3. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the lawyer, the integrity of the legal profession and the administration of justice as a whole. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, a governing body may be justified in taking disciplinary action.

4. Generally speaking, however, a governing body will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the integrity of the legal profession or the lawyer's professional integrity or competence.

[74] In Chapter XIII of the CBA Code, under the heading "The Lawyer and the Administration of Justice", under Rule 3, it states:

> The obligation outlined in the Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. The lawyer's responsibilities are greater than those of a private citizen. The lawyer must not subvert the law by counselling or assisting in activities that are in defiance of it and must do nothing to lessen the respect and confidence of the public in the legal system of which the lawyer is a part....

[75] Chapter XIX of the CBA Code deals with "Avoiding Questionable Conduct" . Under this heading, one of the "guiding principles" states, "Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided."

[76] Counsel for the Law Society relied on this particular statement of the obligation of the lawyer to avoid irresponsible conduct and to avoid even the appearance of impropriety in support of his submission that the allegation in the citation that "you removed an open can of beer from your car to dispose of it or you acted in a manner that made it appear as if you intended to dispose of it" was conduct unbecoming.

[77] In *The Law Society of British Columbia v. Watt* [2001] L.S.B.C. 16, at page 3, the Benchers considered the concept of conduct unbecoming. They stated:

> In this case the Benchers are dealing with conduct unbecoming a member of the Law Society of British Columbia. We adopt as a useful working distinction that professional misconduct refers to conduct occurring in the course of a lawyer's practice while conduct unbecoming refers to conduct in the lawyer's private life.

[78] Paragraphs 19 and 20 of the *Watt* decision state as follows:

> 19. "Conduct unbecoming a lawyer" is an inclusively-defined term in Section 1(1) of the *Legal Profession Act* which refers to the conduct being considered in the judgment of the Benchers to be either contrary to the best interest of the public or of the legal profession or to harm the standing of the legal profession. Justice Clancy, of the Supreme Court of British Columbia, held, in *Re Pierce and the Law Society of British Columbia* (1993) 103 D.L.R. (4 th) 233 at 247:
>
> > When considering conduct unbecoming, the Benchers' consideration must therefore, be limited to the public interest in the conduct or competence of a member of the profession.
>
> 20. The Benchers discipline Members for some "off-the-job" conduct because lawyers hold positions of trust, confidence, and responsibility giving rise to many benefits but imposing obligations not shared with most other citizens. For most other citizens, the criminal proceeding for possession of cocaine is all the formal proceeding they would face. For some, in addition to the criminal proceeding, possession of cocaine might also entail loss of employment or virtually-forced resignation from public office. For some, essentially those in the professions, there may be disciplinary proceedings in addition to the criminal proceedings. Mr. Watt's act, because of his privileged professional standing, has more than one aspect and gives rise to more than one legal consequence. *Regina v. Wigglesworth* (1984) 11

> CCC (3d) 27 @ 32-33 is to that effect. If a lawyer acts in an improper way, in private or public life, there may be a loss of public confidence in the lawyer, in the legal profession generally, and in the self-regulation of the legal profession if the conduct is not properly penalized in its professional aspect. It is possible that conduct unbecoming may lead to controversy about the legal profession and lawyers, which may disrupt the proper functioning of lawyers in British Columbia as they relate to clients, interested third parties (such as witnesses, police officers, and service providers), other lawyers (within and without the jurisdiction), the judiciary, the press, and, put generally, anyone who may be expected to rely on lawyers behaving in a dependable, upright way. The behaviour of lawyers must satisfy the reasonable expectations which the British Columbia public holds of them. By their behaviour, lawyers must maintain the confidence and respect of the public; lawyers must lead by example. In this, Mr. Watt, as he has acknowledged, failed.

[79] The Respondent was well aware of the intricacies of impaired driving investigations. His attempt to dispose of the open can of beer, and his consumption of mouthwash were conscious efforts to thwart any police investigation or police demand for a breathalyzer.

[80] This conduct was a breach of his duties under the Canons.

[81] Mr. Hinkson suggested that the Law Society should not be involved in a lawyers conduct if it relates to simple matters, such as jaywalking or driving over the speed limit. He suggested the Law Society has no authority to "police every activity of an individual simply because he or she is a member of the Law Society" . We agree, this is limited by the *Act* itself, as well as the cases referred to above.

[82] Mr. Hinkson also submitted that the off duty conduct of members of the Law Society may only properly come under the scrutiny of the Law Society if the member's conduct is criminal or overtly dishonest. He submitted that in the authorities relied upon by Counsel for the Law Society there was no finding of conduct unbecoming in the absence of a finding of dishonesty or criminal conduct.

[83] He went on to suggest that there was nothing wrong with a member of the Law Society consuming 8 or 9 ounces of whiskey just prior to driving a motor vehicle because the blood alcohol reading of .05 at the time of driving, which was confirmed by the finding of Associate Chief Judge Burdett, did not establish the commission of an offence. He also submitted that the Law Society had no jurisdiction to review the conduct of a member as a result of driving without due care and attention.

[84] However, that submission fails to recognize that the Respondent's conduct of drinking a substantial amount of alcohol just prior to driving was only the first part of the course of conduct being examined in this hearing. The drinking was followed by driving, which resulted in causing an accident as a result of driving without due care and attention. This was then followed by using mouthwash to mask the smell of alcohol on his breath and removing a can of partially consumed beer, so that the police would not demand a breath sample. Accordingly, we must reject that submission.

[85] The drinking of a substantial amount of alcohol just prior to driving is conduct which public authorities, concerned with public safety, urge members of the public to avoid. The causing of an accident by driving without due care and attention is unlawful and a breach of section 144 of the *Motor Vehicle Act*. This section is a direction to all members of the public not to drive in this manner.

[86] The carrying of an open can of beer in a vehicle is contrary to the provisions of the *Liquor Control Act* and must be read as a direction to members of the public that is contrary to the best interests of the public to conduct themselves in this manner.

[87] The attempt to mask the smell of alcohol on his breath with the use of mouthwash and the attempt to dispose of the open can of beer were done to avoid facing the consequences of performing a breathalyzer

test. In our view this conduct was irresponsible and in breach of the Canons and the CBA Code. As such, this was conduct whereby public confidence in the administration of justice and in the legal profession might be eroded.

[88] In our opinion, the combined effect of this conduct is tantamount to dishonest conduct and is conduct unbecoming. For all of the foregoing reasons, we are convinced beyond a reasonable doubt that the Respondent is guilty of conduct unbecoming a lawyer.