2005 LSBC 53
Report issued: December 19, 2005
Citation issued: July 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 Penalty

Hearing date: October 21, 2005

Panel: Carol W. 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] The facts and verdict are set out in our decision issued July 14, 2005.

[2] What we must determine is the appropriate penalty that the Respondent, Howard Raymond Berge, Q.C. (the "Respondent") should receive pursuant to Rule 4-35 of the Law Society Rules. The range of penalties available are set out in Section 38(5) of the *Legal Profession Act*, S.B.C., 1989, C. 9 (the "Act") .

Issues

[3] Section 38(5) of the Act states as follows:

> (5) If an adverse determination is made against a respondent, other than an articled student, under subsection (4), the panel mustdo one or more of the following:
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> (a) reprimand the respondent;
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> (b) fine the respondent an amount not exceeding $20,000;
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> (c) impose conditions on the respondent's practice;
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> (d) suspend the respondent from the practice of law or from practice in one or more fields of law
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> (i) for a specified period of time,
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> (ii) until the respondent complies with a requirement under paragraph (f),
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> (iii) from a specific date until the respondent complies with a requirement under paragraph (f), or
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> (iv) for a specific minimum period of time and until the respondent complies with a requirement under paragraph (f);

(e) disbar the respondent;

(f) require the respondent to do one or more of the following:

(i) complete a remedial program to the satisfaction of the practice standards committee;

(ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;

(iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

(iv) practise law only as a partner, employee or associate of one or more other lawyers;

(g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.

[4] Counsel for the Law Society submitted that the appropriate penalty should be a reprimand, a suspension from the practice of law from one to three months, and an order that the Respondent pay the costs of the hearing pursuant to Rule 5-1(a) and 5-9(0.1). He did not ask for any conditions, pursuant to Section 38(c) and (f).

[5] Counsel for the Respondent submitted that the penalty should be limited to a reprimand and an order that the Respondent pay the costs of the hearing.

[6] In view of those submissions the Panel has agreed that there should be a reprimand. The remaining issues are whether the Respondent should be suspended from the practice of law and the issue of costs.

BACKGROUND

[7] The background is set out in our Reasons on Facts and Verdict issued July 14, 2005 (the "Reasons") . However, it is important to repeat some of those facts in this decision.

[8] The Respondent is 67 years of age and has been a member of the Law Society for 38 years. His practice is in Kelowna, B.C.

[9] The Respondent became a Bencher of the Law Society in 1992. We were provided with a list of the Committees the Respondent has served on at the Law Society from 1992 to 2004. The Respondent became the First Vice President of the Law Society in 2002 and became the President of the Law Society in 2003.

[10] The Respondent was married for 33 years and his wife passed away on October 5, 2000. The incident, which resulted in the citation being issued, occurred on October 2, 2002, which was near the two year anniversary of his wife's death.

[11] On October 2, 2002, the Respondent admitted to consuming 8 or 9 ounces of alcohol in a very short period of time. After doing so, he left his office and immediately commenced to drive to his home. He was involved in a motor vehicle accident.

[12] In direct examination before us, the Respondent admitted to using mouthwash following the accident.

[13] The police arrived at the scene of the accident and the Respondent was later charged with impaired

driving and driving with a blood alcohol reading in excess of .08 contrary to the *Criminal Code of Canada*.

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

[15] 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.

[16] 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.

[17] After hearing all of the evidence, including that of the Respondent, we adopted the findings of Mr. Justice Barrow, at paragraph 52 of his Reasons, 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....

[18] The members of this Panel found that the Respondent's 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, which conduct was a breach of his duties under the Canons of Legal Ethics (the "Canons") published by the Law Society and issued to all members.

[19] In conclusion, we found that the combination of the Respondent's actions, specifically the consumption of a substantial amount of alcohol, just prior to driving a motor vehicle and then causing an accident by driving without due care and attention and then removing the can of beer from his car to dispose of it and using mouthwash to mask the smell of alcohol on his breath prior to the arrival of the police was tantamount to dishonest conduct and conduct unbecoming a lawyer.

[20] At the hearing on Penalty, counsel for the Respondent provided us with a book of reference letters, which were marked at an Exhibit in these proceedings. Mr. Hinkson did not refer us to any specific letter. They were provided to us to read, which we have done.

[21] Upon reviewing the above, it is clear that the Respondent has a record of exceptional service to the Law Society and the legal profession. The letters provided are from notable members and former members of the Law Society across the Province of British Columbia, as well as from Saskatchewan and Ottawa. Some of the comments made by these authors should be noted and are as follows:

> "Howard was known as one of the most engaged and hardest working of the Benchers."
>
> "I consider Howard to be a person of excellent character, a man of integrity, a caring father and husband and a leader in our legal community."
>
> "He devoted himself absolutely to his duties as a Bencher and willingly contributed thousands of hours to the profession during his tenure."
>
> " From my experience, I know Howard to be a highly honest and principled individual, who not only took his responsibilities as a lawyer very seriously but also took the responsibilities of a Bencher most

seriously."

[22] With regard to the circumstances that occurred on October 2, 2002, the theme repeated throughout the letters indicate that in the authors'opinions, the Respondent's behaviour was "completely out of character" .

[23] Following his guilty plea before Chief Judge E.M. Burdett, the Respondent resigned as President of the Law Society on October 10, 2003.

DISCUSSION

[24] 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.....

[25] Both counsel referred us to the decision of the Hearing Panel on penalty concerning the decision of *Law Society of British Columbia v. Ogilvie* [1999] LSBC 17.

[26] In that decision the Panel listed a number of factors which it considered worthy of general consideration in disciplinary dispositions. Those factors which are helpful to us are as follows:

> (a) The nature and gravity of the conduct proven.
>
> (b) The previous character of the Respondent including details of any prior disciplinary proceedings.
>
> (c) The age and experience of the Respondent.
>
> (d) The impact of the Respondent's conduct.
>
> (e) Whether the Respondent has acknowledged the misconduct and the presence of other mitigating circumstances.
>
> (f) The impact on the Respondent of criminal or other sanctions or penalties.
>
> (g) The need for specific and general deterrence.
>
> (h) The need to ensure public confidence in the integrity of the profession.

[27] It is important to go through each of these factors individually and apply them to the case before us.

The nature and gravity of the conduct

[28] The important findings of fact in the Reasons are set out in paragraphs 79, 85 - 88, which are as follows:

> [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.
>
> [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.

[29] Counsel for the Law Society submitted that the Respondent's conduct was a serious breach of his duties to the state by attempting to thwart a police investigation. He also submitted that the Respondent has a duty to himself and the legal profession generally to maintain integrity in his personal life.

[30] Counsel for the Respondent submitted that the Respondent had not resiled from the position that it was his preference not to be asked to submit to a breathalyzer test. There was no allegation in the schedule to the citation that the accident was caused by the consumption of alcohol. In fact, Associate Chief Judge Burdett had found that the Respondent's blood alcohol level at the time of the accident was .05. Counsel for the Respondent went on to submit that no citizen, including a lawyer, was obliged to engage in self-incrimination. The Respondent was not engaged in any criminal activity at the time he drove and simply tried to avoid the embarrassment of a breathalyzer demand.

[31] These submissions do not lessen the gravity of the conduct proven. The Respondent not only drank a substantial amount of alcohol just prior to driving. He then drove his vehicle without due care and attention, causing an accident. He then used mouthwash to mask the smell of alcohol on his breath and removed a can of partially consumed beer so that the police would not issue a demand for a breath sample.

[32] Counsel for the Respondent relied upon a judgment of Bastarache J., of the Supreme Court of Canada in *R. v. Bunn* 140 CCC (3d) 505 at page 517 in support of his submission that we must not consider that the Respondent's conduct was more aggravated by virtue of his status as a lawyer, Bencher and President of the Law Society.

[33] The judgment of Bastarache J. was a dissenting judgment, in a case that considered whether Mr. Bunn, a lawyer, who had practiced in Manitoba and had been convicted of breach of trust and theft, should receive a conditional sentence.

[34] The reasons of Bastarache J. which counsel relies can be found at paragraphs 34 and 35, which state as follows:

34. Finally, judges must be particularly scrupulous in sentencing lawyers in a manner that dispels any apprehension of bias. A lawyer should receive, and be seen to receive, the same treatment as any other person convicted of a similar crime. While they are not to be singled out for harsher penalties than others convicted in comparable circumstances, any perception that a lawyer might receive more lenient consideration by the courts must be guarded against (Ryan, supra; R. v. Shandro (1985), 65, A.R. 311 (C.A.)). In this regard I would adopt the reasoning of my colleague Justice L'Heureux-Dube, then a member of the Quebec Court of Appeal, in R. v. Marchessault, C.A. Mtl., No. 500-10-000035-848, July

> 12, 1984 [reported 41 C.R. (3d) 318 at pp. 321-22]: [TRANSLATION] On a subjective level, it is clear that whenever a crime is committed by a public figure, a person in authority, a star, etc., all the factors mentioned, or almost all, are present: the crime and the punishment receive greater publicity, the shame and opprobrium are that much greater, the financial loss resulting from the loss of employment is commensurate with the high income . . . Popular wisdom has it that the further one falls, the more it hurts . . . [T]he higher the rank or position the figure occupies in society, the more well known he or she is, the lighter the sentence should be and, conversely, the more humble or obscure the figure is, the harsher it will be. I do not accept this proposition: the scales, could not accommodate these two unequal measures. Justice must be the same for everyone, great or small, rich or poor. **[page 522]**
>
> 35. Even if I were to accept that the Court of Appeal correctly relied on the introduction of the conditional sentencing regime to revisit the sentence on the Dunn principle, I would still decline to impose a conditional sentence in this case.

[35] This passage was cited by Mr. Justice Barrow in his reasons for judgement on appeal by the Respondent of the sentence imposed on him by Chief Judge Burdett.

[36] Although the reasoning of Bastarache J. in the passage quoted above is not binding upon this Panel, because it was made in a dissenting judgement, it is entitled to great respect.

[37] We apply this principle, in considering the Respondent's conduct in the same way as we would consider the conduct of any lawyer cited for conduct unbecoming in these circumstances. We also apply this same principle to the penalty imposed.

The Previous Character of the Respondent

[38] The Respondent has no previous discipline record. In fact, as indicated above, he has a record of outstanding service and contribution to the Law Society and to the legal profession. We have referred to the above letters of reference provided on behalf of the Respondent from prominent members and former members of the Law Society.

The age and experience of the respondent

[39] As indicated above, the Respondent is 67 years of age and was called to the Bar in 1967. The Respondent has over thirty five years experience. He is an experienced litigator and is knowledgeable about impaired driving offences.

[40] As indicated above, the Respondent became a Bencher of the Law Society in 1992. He sat as a member of the Discipline Committee in 1997, 2000, 2001 and 2002. He also sat on numerous other Committees and panels.

[41] On October 2, 2002, the Respondent was the first Vice President of the Law Society and became the President in January 2003. He resigned from this position on October 10, 2003 after the comments of Chief Judge E.M. Burdett were made public on October 9, 2003, following the Respondent's plea of guilty to an offence under section 144 of the *Motor Vehicle Act of British Columbia.*

The Impact of the Respondent's Conduct on the Victim

[42] Counsel for the Law Society submitted that the victim of the Respondent's conduct was the Law Society and the legal profession. By virtue of his position as a lawyer the Respondent's conduct had received

significant attention by the media. Counsel submitted that there was no doubt that this conduct had diminished the respect that the public has for the Law Society and the legal profession.

[43] Counsel for the Respondent took issue with this submission. He submitted that this argument distorted the meaning of the word "victim" . The word referred to only a person or persons and could not be extended to apply to the Law Society or to the legal profession. He argued that the victim of this conduct is the Respondent himself.

[44] We note that the decision in Ogilvie, does not provide a clear definition of the word "victim" . However, the decision does suggest the factors which might be given general consideration. In our opinion, the word "victim" when given its general meaning may be applied to the Law Society and the legal profession because they have been adversely affected by the publicity surrounding these events.

Whether the Respondent has Acknowledged the Misconduct and the Presence or Absence of Other Mitigating Circumstances

[45] Counsel for the Law Society submitted that the Respondent has "resolutely refused" to acknowledge that his conduct was unbecoming. Counsel submitted that the Respondent has not shown any remorse for his conduct, despite the fact that he has had time to reflect on his conduct and to acknowledge his wrongdoing. Had he done so, the damage to the profession and to the Law Society would have been significantly reduced, counsel submitted. Counsel suggested that this failure should be an aggravating factor against the Respondent when this Panel considers the appropriate penalty.

[46] Counsel for the Law Society further submitted that a significant aggravating factor is that the Respondent attempted to avoid responsibility for his actions by providing an explanation to this Panel which it found not to be credible. This can be found at paragraphs 54-55 of the Reasons.

[47] Counsel for the Respondent submitted that these submissions are contrary to the principle that a plea of not guilty did not justify the imposition of a more severe penalty. This is a long standing principle and in support counsel cited the decisions of the Divisional Court of Ontario in *College of Physicians and Surgeons of Ontario v. Boodoosingh*, 73 O.R. (2ds) 478 and 12 O.R. (3d) and in *College of Physicians and Surgeons of Ontario v. Gillen*, 1 O.R. (3d) 710 and 13 O.R. (3d) 385.

[48] In both of these decisions the Divisional Court held that the fact that each physician had entered a plea of not guilty in each of the disciplinary proceedings against them did not justify the imposition of a more severe penalty. A professional accused in proceedings brought by a professional disciplinary body was entitled to defend without incurring the risk of a harsher penalty. To conclude otherwise would deny the individual his or her entitlement to have the case against him or her proved by cogent evidence and to have the right to make full answer and defence without fear of an increased penalty.

[49] To quote from the *Gillen* decision, it is clear that "in no circumstances should denial serve to increase what would otherwise be an appropriate penalty" .

[50] Counsel for the Respondent did submit that the Respondent's conduct both before and after the Law Society citation show clear signs of remorse and acceptance of the consequences. He also submitted that the reference letters are further evidence of the Respondent's remorse.

[51] We cannot accept this submission and agree with counsel for the Law Society that the Respondent has failed to express any remorse for his actions or acknowledge that his conduct was unbecoming. We recognize that the Respondent likely regrets the events that occurred, however this is vastly different from remorse and acknowledging his behavior was inappropriate. Throughout the entire time the Respondent

appeared before us, we saw absolutely no sign of remorse or an acknowledgment that his actions were wrong.

[52] However, we do not agree with counsel for the Law Society that this is a ground for a harsher penalty. We have however considered it in determining whether there are mitigating circumstances that might justify a lesser penalty.

[53] The other mitigating circumstances that we have considered are the Respondent's record of outstanding service to the Law Society and the legal profession. As indicated above, the Respondent has made numerous contributions to the legal profession for many years which is impressive and cannot be overlooked when considering an appropriate penalty.

The Impact upon the Respondent of Criminal and Other Sanctions

[54] The Respondent was fined $1,000.00 and prohibited from driving for three months as a result of the criminal proceedings. The Court did consider his conduct to be an aggravating factor when the penalty was imposed.

[55] As indicated above, following the guilty plea to the charge of driving without due care and attention, the Respondent resigned as President of the Law Society on October 10, 2003. He has been the subject of considerable adverse publicity. We have taken into account the impact of these sanctions when determining whether the Respondent should be suspended from practice.

The Need for Specific and General Deterrence

[56] The Respondent's failure to acknowledge his wrongdoing indicates that some specific deterrence is required. His resignation as President of the Law Society and the adverse publicity that he has suffered go a long way towards satisfying any reasonable concerns with respect to specific deterrence. However, the citation was issued on June 30, 2004. His refusal to acknowledge wrongdoing has continued throughout these proceedings and shows that the need for specific deterrence is a continued consideration.

[57] As for general deterrence, while this type of conduct, of seeking to avoid or thwart a police investigation, is not prevalent, members need to be reminded that their conduct in their personal lives may reflect on their professional integrity. This is set out in the Canons.

[58] 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.

The Need to Ensure the Public's Confidence in the Integrity of the Profession

[59] Counsel for the Law Society referred to the fact that the Respondent's position had attracted a high level of public scrutiny to his conduct and to these proceedings. Counsel urged that the decision of this Panel must demonstrate to the members of the Law Society and the public that the Law Society can and does function properly to ensure that all members of the Law Society are held to account if their conduct is unbecoming and requires discipline.

[60] Counsel for the Respondent provided us with a copy of the decision of his Honour Judge Fratkin in the

case of *R. v. Robinson* [2004] BCA No. 1829. Counsel submitted that Judge Fratkin addressed the significance of Mr. Robinson's "fall from grace" when he imposed a conditional discharge and placed Mr. Robinson on probation for a period of one year. Judge Fratkin took into consideration Mr. Robinson's many achievements and his lifetime of public service and concluded that it was not "contrary to the public interest" to grant him a conditional discharge.

[61] Counsel for the Respondent submitted that we should take a similar approach when considering an appropriate penalty for the Respondent.

[62] We do not agree that Judge Fratkin's reasoning should be applied in this case. His reasoning has only limited application. In the *Robinson* decision, the accused pled guilty to a charge of theft of a very expensive ring. Judge Fratkin emphasized that by pleading guilty Mr. Robinson acknowledged that he had committed the offence charged.

[63] The Respondent has never admitted that he engaged in conduct unbecoming a lawyer. Indeed, during the hearing on facts and verdict, he stoutly resisted the Law Society's contention that the facts alleged in the schedule to the citation established that he had conducted himself in a manner unbecoming a member.

Similar Cases

[64] Both counsel have agreed that the circumstances of this case are so unique that there are no similar cases. Counsel for the Law Society did an extensive search and was unable to find any cases which have considered conduct unbecoming a senior official of the Law Society. However, the decision in *Law Society of British Columbia v. Laxton* [1999] L.S.D.D. No. 36 did deal with conduct unbecoming a senior lawyer who held a prominent position. Most of the recent cases on penalty for conduct unbecoming were the result of admissions by the member so the refusal to acknowledge wrongdoing did not arise.

[65] Counsel for the Law Society referred us to several cases in support of his submission that the Respondent should be suspended from practice.

[66] In *Law Society of British Columbia v. Stephen Neville Suntok* 2005 LSBC 29, Mr. Suntok pled guilty to a criminal charge of spousal assault when he was employed as a Crown Prosecutor. In the Law Society proceedings, Mr. Suntok admitted to conduct unbecoming and the Panel imposed a suspension of 90 days.

[67] In *Law Society of British Columbia v.Lori Ellen Stevens* [2001] LSBC 12, Ms. Stevens had previously been found guilty of an offence under the *Prevention of Cruelty to Animals Act.* In the Law Society proceedings, she admitted her conduct was unbecoming a member. The Panel imposed a penalty of a reprimand and costs.

[68] In *Law Society of British Columbia v. Watt* [2001] L.S.D.D. No. 45, the member admitted his conduct was unbecoming following a criminal conviction of possession of cocaine. The Hearing Panel ordered that Mr. Watt be reprimanded, pay a fine of $7,500.00 and pay the costs of the proceedings. On Review, the Benchers reduced the penalty imposed by the Hearing Panel to simply a reprimand and costs. The Benchers were satisfied that this was appropriate because Mr. Watt's had acknowledged the inappropriateness of his conduct and had sought medical treatment for his condition. They also felt that any recurrence was unlikely and a fine was not necessary.

[69] In the case of *Laxton,* referred to above, the member admitted to conduct unbecoming a member for making incorrect statements to the media, while Chairman of B.C. Hydro. Mr. Laxton agreed to a suspension of six weeks.

[70] In the case of *Law Society of British Columbia v. Robert Bruce MacAdam*, [1999] LSBC 24, Mr.

MacAdam had shot a grizzly bear but permitted his friend, who was with him, to take responsibility. He later pled guilty to the offence of killing an under-aged grizzly bear. In the Law Society proceedings, this was found to be conduct unbecoming a member. Mr. MacAdam was fined $5,000.00. The Panel considered that a suspension would be inappropriate because Mr. MacAdam was not practicing law at the time.

[71] In *Law Society of British Columbia v. Israels* [1994] L.S.D.D. No. 194, Mr. Israels had made inappropriate comments about a Judge to a reporter which were published in a national magazine. Mr. Israels admitted to conduct unbecoming a member and received a reprimand, a fine of $10,000.00 and costs of $18,000.00. In that decision, the Panel stated:

> "It is a truism to say that the public image of lawyers is poor. The effect of that perception is very dangerous. It can lead to various unhappy ends, including disrespect for the justice system on the whole.
>
> Clearly, the remarks of the member reached a large audience. That they have damaged public respect for the legal profession and our justice system is undeniable. While the member may not have known his remarks would be so widely heard, he ought to have appreciated that they were inappropriate in any event. His behaviour in making them is unprofessional. It is for these reasons that the panel imposed a substantial fine."

[72] Counsel for the Respondent cited several cases in support of his submission that a suspension from practice was too severe a penalty.

[73] In *Law Society v.Ian Douglas MacKinnon,* Discipline Digest, No. 02/01, February 2002, the member misled the Court in asserting, when he knew it to be untrue, that opposing counsel had consented to an adjournment of his application. He was fined and ordered to contribute to the Law Society's costs.

[74] In *Law Society of British Columbmia v. Fred Collins Marion Lowther*, Discipline Digest No. 02/06, April 2002, Mr. Lowther was found to have misled a Court Registry with respect to the availability of opposing counsel to attend a hearing and to have breached a consent order by failing to endorse drafts submitted to him. For this conduct he was reprimanded. He was also found in breach of another court order by failing to release funds as required. That conduct deprived a member of the public of the benefit of funds to which they were entitled. He was reprimanded, suspended for two weeks and directed to make a contribution to the Law Society's costs.

[75] In *Law Society of British Columbia v.Dipnarine Persad,* Discipline Case Digest 99/06, the member purported to witness a signature when he knew the person signing the document was not the person named in the document. He was found guilty of professional misconduct and was reprimanded and ordered to pay a fine and costs.

[76] Counsel for the Respondent also referred to the *MacAdam* decision, which is referred to above.

[77] In *Law Society of British Columbia v.Laird Russell Cruickshank,* Discipline Case Digest 98/08, the member had represented a client in proceedings in the Provincial Court. The client was successful and the two went out to celebrate. The member subsequently operated his motor vehicle while he was intoxicated and was involved in a collision. At the scene of the accident, Mr. Cruickshank permitted his client to advise the police that the client had been driving. The Hearing Panel concluded that Mr. Cruickshank placed his client at risk of charges under the *Criminal Code* and the *Motor Vehicle Act*. Mr. Cruickshank admitted that this was professional misconduct and received a fine of $6,000.00.

[78] Counsel for the Law Society also referred us to the matter of *Law Society of British Colmiba v. Kellie Ruth Hamilton* 2005 LSBC 05. Ms. Hamilton was found guilty of professional misconduct for attempting to

introduce the common-law spouse of her client as her assistant, while attending a Provincial Correctional Facility. While we recognize the egregious nature of this conduct and the distinction between professional misconduct and conduct unbecoming a member, some of the comments made by the Hearing Panel are helpful. In particular, paragraph 21, which state as follows:

> "While there is no particular assistance offered by the array of cases provided, it is perhaps necessary for this Law Society to note that as times change, so must our view of appropriate penalty in circumstances such as those before this Panel. In short, we must have less tolerance for behavior that seeks to denigrate the standing of the profession in the eyes of the general public. It will become increasingly important over time that we respond vigorously and with resolve to address any behaviour that might lower the esteem in which the legal profession is regarded."

[79] Counsel for the Respondent suggested that these comments are those of a single bencher and should not be given much weight. We disagree with Mr. Hinkson and endorse and adopt the position of the Hearing Panel in the *Hamilton* matter.

[80] We recognize the Respondent's conduct in the case before us is not professional misconduct and should not be treated as such. However, as indicated in the Reasons, his conduct was very serious. We found that his actions were a "conscious effort to thwart any police investigation or police demand for a breathalyzer" . We also found that the combined affect of his actions were "tantamount to dishonest conduct" . As a result, the Respondent must receive an appropriate penalty that coincides with this conduct, taking into account all of the factors set out above, including his previous record of outstanding service to the Law Society and the legal profession.

Conclusion

[81] After considering all of the facts and circumstances in this matter, including our decision on Facts and Verdict, the cases referred to by both counsel, consideration of the Respondent's record of outstanding service to the Law Society and the profession and the impact upon him of the criminal and other sanctions, we have reached the following conclusion and order that the Respondent:

a) be reprimanded;

b) be suspended from the practice of law for a period of one month, to commence on a date to be agreed upon by counsel. However, this should commence no later than April 15, 2006.

c) pay the costs of these proceedings, as agreed upon by counsel and deducting from the total costs the following:

i) the reasonable costs incurred by the Respondent as a result of the memorandum sent to a member of the Panel by a staff member of the Law Society.

[82] If counsel are unable to agree on the amount of costs they are at liberty to make further written submissions to this Panel.