

2012 LSBC 11

Report issued: March 07, 2012

Oral Reasons: December 21, 2011

Citation issued: December 16, 2010

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

## **DANIEL MARKOVITZ**

Respondent

### **Decision of the Hearing Panel on Facts and Determination**

Hearing date: December 21, 2011

Panel: Leon Getz, QC, Chair, Jennifer Chow, Dan Goodleaf

Counsel for the Law Society: Thomas Manson, QC

Counsel for the Respondent: Daniel Le Dressay

## Background

### **The Citation**

[1] The citation in this matter was authorized by the Discipline Committee on November 4, 2010 and issued on December 16, 2010. The citation was amended on May 13, 2011. Daniel Markovitz (the “Respondent”) has admitted that he was properly served with the citation.

[2] The citation sets out the nature of the conduct to be inquired into:

1. The Respondent’s conduct on or about November 30, 2008 in failing or refusing to comply with a demand made to him by a peace officer to provide breath samples, resulting in his guilty plea and conviction under Section 254(3) of the *Criminal Code of Canada* on April 19, 2010 in the Provincial Court of British Columbia.

This conduct constitutes conduct unbecoming a lawyer.

2. The Respondent’s conduct from approximately August 2009 onwards, in failing or refusing to provide regular and random urine and/or blood verification of abstinence [from alcohol or any mood or mind altering drugs], in breach of an undertaking he gave to the Law Society on December 17, 2008, and/or a Monitored Recovery Program agreement he entered into on December 15, 2008, and/or a Recovery Monitoring Contract he entered into on December 17, 2009.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer.

3. The Respondent’s conduct in failing or refusing to attend a minimum of three mutual support (AA, NA) meetings per week, in breach of an undertaking he gave to the Law Society on December 17, 2008, and/or a Monitored Recovery Program agreement he entered into on December 15, 2008.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer.

4. The Respondent's conduct in failing or refusing to attend the Professional Accountability Group at the Lawyers Assistance Program, in breach of an undertaking he gave to the Law Society on December 17, 2008 and/or a Monitored Recovery Program Agreement he entered into on December 15, 2008.

This conduct constitutes professional misconduct or conduct unbecoming a lawyer.

## **ADMISSIONS**

[3] The Law Society and the Respondent, through counsel, filed an Agreed Statement of Facts, which was marked as Exhibit 3 in these proceedings, and a Supplemental Agreed Statement of Facts, marked as Exhibit 4.

[4] The Agreed Statement of Facts sets out, among other things, the Respondent's several acknowledgements that:

- (a) his conduct as particularized in paragraph 1 of the amended citation constituted conduct unbecoming a lawyer; and
- (b) his conduct as particularized in each of paragraphs 2, 3 and 4 of the amended citation constituted professional misconduct.

## **Determination**

[5] At the conclusion of the hearing on Facts and Determination held on December 20, 2011 we:

- (a) orally announced our decision to accept the Respondent's admissions and indicated that we would provide full reasons at a later date; and
- (b) adjourned the sanctions stage of the hearing to February 20, 2012 on certain terms that had been agreed to between the Law Society and the Respondent and are set out in a letter of that date from counsel to the Law Society to counsel for the Respondent.

[6] These are the reasons for our earlier decision to accept the Respondent's admissions of conduct unbecoming a lawyer and professional misconduct.

## **THE FACTS**

[7] The following account of the relevant facts is based on the Agreed Statement of Facts.

1. Mr. Markovitz was admitted to the bar of the Province of British Columbia on May 14, 1993.
2. He has encountered problems with alcohol abuse.
3. In September 2005 Mr. Markovitz underwent a Practice Review. It was recommended that he attend at either the Lawyers Assistance Program ("LAP") or Interlock for assistance in dealing with the stresses in his life. A Practice Standards Follow-up Practice Review was undertaken on September 6, 2006. By letter dated October 3, 2006 Practice Standards counsel wrote to Mr. Markovitz noting that Mr. Markovitz had met with LAP a couple of times, but did not find it helpful.

4. In October/November 2007 Mr. Markovitz voluntarily completed a ten-day alcohol rehabilitation program at the Schick-Shadell Centre (“SSC”). This was not an AA model program.
5. In August 2008 he attended a five-day refresher alcohol rehabilitation program at the SSC.
6. Dr Baker, a medical practitioner who is qualified to opine on addiction and diagnostic criteria for alcohol dependence in January 2009 concluded that Mr. Markovitz met the diagnostic criteria for alcohol dependence. Mr. Markovitz does not wish to label himself as an alcoholic as, in his view, this label is derogatory and part of the AA program that he does not believe in.

#### **Facts Pertaining to Investigation File 20081102**

7. On November 30, 2008 Mr. Markovitz was detained and arrested for impaired driving. He was taken to the police station to provide breath samples. He provided two samples but refused to provide a third sample and was released on an Appearance Notice.
8. By letter dated December 8, 2008 Mr. Markovitz self-reported having been arrested on November 30, 2008 and proposed charges of impaired driving, driving while over .08, and refusing to provide a breath sample.
9. Subsequently Mr. Markovitz was provided with a Crown Narrative and Information. He admits that the facts were sufficient to maintain a conviction on the charge of refusal to provide a breath sample.
10. On January 12, 2009 Mr. Markovitz was charged under the *Criminal Code of Canada*.
11. On April 19, 2010 he pleaded guilty to the count of failing to provide a breath sample and was ordered to pay a fine of \$1,300 and prohibited for one year from operating a motor vehicle. The counts of impaired driving and driving over .08 were stayed.

#### **Facts Pertaining to Investigation File 2010002**

12. Following the self-report of the proposed criminal charges against him, Mr. Markovitz immediately entered into a Monitored Recovery Program (“MRP”) Agreement. The signed MRP Agreement dated December 5, 2008 (the “MRP Agreement”) as well as a 12 point undertaking dated December 17, 2008 (the “Undertaking”) and Recovery Monitoring Contract between Mr. Markovitz and Edgewood Addiction Services (“Edgewood”) dated December 17, 2008 (the “RMC”) were signed and returned by Mr. Markovitz to the Practice Standards Committee.
13. In the MRP Agreement Mr. Markovitz agreed, among other things, to:
  - (a) remain “abstinent from alcohol” and all mood-altering drugs;
  - (b) attend a minimum of three mutual support (AA, NA) meetings per week;
  - (c) join a home group, find and use a sponsor, and “apply the steps of the recovery program to my life”;
  - (d) enroll in the weekly Professionals Accountability Group at LAP and attend this until the end of the agreement; and
  - (e) provide regular and random urine and/or blood for verification of abstinence at the request of Edgewood and Dr. Rucker’s and/or Patrick Zierten’s office.
14. Mr. Markovitz’s Undertaking contains provisions to substantially similar effect.

15. On April 2, 2009 the Practice Standards Committee approved Patrick Zierten as the monitoring individual under the provisions of the Undertaking.

16. On or about December 17, 2009 Mr. Markovitz entered into a further RMC with Edgewood.

#### **Failure or Refusal to Provide Regular Random Urine Samples**

17. Between December 18, 2008 and December 22, 2009, Mr. Markovitz met on numerous occasions with an addiction counsellor at the Edgewood offices for recovery coaching. These meetings were at his expense (at a rate of \$250 per visit). In all, there were approximately 25 such meetings in this period.

18. In addition to the recovery coaching, when requested to do so Mr. Markovitz provided urine samples to Edgewood for verification of abstinence. The results of all samples provided were negative for all tested substances and did not indicate non-compliance.

19. From August 2009 onwards, however, on a number of occasions detailed in the Agreed Statement of Facts, Mr. Markovitz did not provide urine verification of abstinence when requested to do so by Edgewood and Patrick Zierten. We note, in passing, that the requests to do so were generally made by email on the day preceding the day on which he was required to provide the sample. On some occasions, it seems, Mr. Markovitz was in court or away from the lower mainland on the latter day.

20. On or about December 3, 2009 Mr. Markovitz met with an addiction counselor at Edgewood. He acknowledged that he was not attending a minimum of three mutual support meetings per week and was warned that Edgewood would report to the Law Society that he was not going to weekly meetings of the mutual support group or attending monthly meetings of the LAP program.

21. On or about Dec 22, 2009 Mr. Markovitz met with Patrick Zierten at Edgewood. They discussed the re-negotiation of the MRP Agreement and issues concerning urine verification of abstinence. Zierten proposed that rather than taking samples at Edgewood, Mr. Markovitz could provide samples at offices of BC Biolabs, which had more facilities around the Lower Mainland. While the cost of urine testing at Edgewood was \$75 per test, the cost of testing at BC Biolabs was \$150 per test. In addition to the \$150 fee, Mr. Zierten indicated that Mr. Markovitz would still have to pay a fee to Edgewood for counselling services.

22. Mr. Markovitz explained that this arrangement would cause both financial and practical difficulties. He explained that he was still paying sizeable alimony and child support to his former wife; that he had a two-year-old daughter with his current wife, a stay at home mother. Practically, in addition, the laboratories required attendance prior to 3:30 pm and court did not end until 4:30. Moreover, his driving prohibition made it difficult for him to attend laboratory appointments. Mr. Markovitz asked Mr. Zierten if he could continue with the current regime, but this request was refused.

23. On February 1, 2010 Mr. Markovitz sought the agreement of the Practice Standards Committee to amend the MRP Agreement to remove the requirement for random testing, but this request was refused.

24. On a number of occasions in February and March 2010 detailed in the Agreed Statement of Facts, Mr. Markovitz did not provide urine and/or blood verification of abstinence at the request of Edgewood and Patrick Zierten.

25. Edgewood cancelled the MRP Agreement by email from Patrick Zierten dated March 12, 2010. Mr. Zierten wrote:

... your difficulty in providing samples does not allow for random testing as required by our contract and your inability to meet with me to discuss costs, have nullified our agreement.

26. From at least March 2010 Mr. Markovitz has not seen Dr Rucker, Patrick Zierten, or anyone else for follow-up relapse prevention recheck visits to monitor:

- (a) his abstinence;
- (b) his compliance with the MRP Agreement; and
- (c) signs and symptoms of impending relapse.

27. From at least March 2010 Mr. Markovitz failed or refused to provide urine and/or blood verification of abstinence. His position in respect of attendance was confirmed by letter to the Law Society dated September 30, 2010.

#### **Failure or Refusal to Attend Mutual Support Meetings**

28. As required by the MRP Agreement and Undertaking, from or after December 2008 Mr. Markovitz began to attend mutual support meetings.

29. On or about July 30 2009 and from time to time thereafter, Mr. Markovitz met with an addiction counselor at Edgewood. He was given a meeting verification sheet to get signed at every mutual support group meeting he attended. As the meetings are anonymous, Mr. Markovitz declined to identify himself at these meetings.

30. From August 2009 onwards Mr. Markovitz failed to attend a minimum of three mutual support group meetings each week or to provide verification sheets to Edgewood.

31. By or about December 2009 Mr. Markovitz had ceased attending weekly meetings of the mutual support group.

32. From at least March 2010 Mr. Markovitz has not attended a minimum of three mutual support (AA, NA) meetings per week and was not willing to do so. He confirmed this in a letter to the Law Society dated September 30, 2010. He explained that these requirements “conflicted severely with his work” and that he did not attend regular meetings of AA and NA as after a while he realized that “the concept of ‘higher power’ that these meetings operated on was in conflict with his beliefs.”

#### **Failure to Attend PAG at LAP and Contact LAP Monthly**

33. As required by the MRP Agreement and Undertaking, Mr. Markovitz enrolled in the Professionals Accountability Group (“PAG”) at the Lawyers Assistance Program and in December 2008 attended 3 of 3 sessions of the PAG held that month. Between January and November 19, 2009, he attended 25 of 46 sessions of the PAG.

34. In view of his irregular attendance at the PAG meetings during 2009, Mr. Markovitz was notified that he was in breach the MRP Agreement and Undertaking and was warned that he would be suspended from the PAG should he continue to miss sessions. He was also told that he must advise another member of the group if he could not attend and he must do so before the applicable meeting.

35. Between November 19 and December 17, 2009 Mr. Markovitz attended 4 of 4 sessions of the PAG; and between January and April 1, 2010, he attended 5 of 13 PAG sessions.

36. On or about April 7, 2010 Mr. Markovitz was advised that as it appeared he had quit the PAG and

was flagrantly breaking the rules he was no longer welcome to attend. He has attended no meetings of the PAG since that date.

## DISCUSSION

[8] We are satisfied on the basis of the facts set out in the Agreed Statement of Facts that the Law Society has discharged its onus of proving on a balance of probabilities the allegations set out in the amended citation. We turn, then, to our reasons for accepting the Respondent's admissions that, in respect of the matters identified in allegation 1 of the amended citation, he was guilty of conduct unbecoming a lawyer; and in respect of the matters identified in allegations 2 to 4 of the citation, he committed professional misconduct.

### **Admission of conduct unbecoming a lawyer**

[9] "Conduct unbecoming a lawyer" is defined in section 1 of the *Legal Profession Act* to include:

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.

[10] Chapter 2, Rule 1 of the *Professional Conduct Handbook* reinforces this definition with the proposition that 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."

[11] We were referred to a number of cases in which hearing panels accepted admissions of conduct unbecoming a lawyer in circumstances in which the lawyer in question was convicted of a criminal charge – see *Law Society of BC v. Suntok*, 2005 LSBC 29; *Law Society of BC v. Rodgers*, 2005 LSBC 8; and *Law Society of BC v. Palkowski*, 2009 LSBC 15. These decisions offer virtually nothing by way of reasoning or analysis to explain the panels' conclusions and seem to support the proposition that a conviction is, as it were, per se evidence of conduct unbecoming a lawyer.

[12] We do not need to decide whether conviction on any criminal charge is, per se, conduct unbecoming a lawyer. We are satisfied that, on any view of the scope of that expression, the Respondent's conviction for refusing a proper request to provide a breath sample falls within it. We are satisfied therefore, that the Respondent's admission in this respect is appropriate and should be accepted.

### **Admissions of professional misconduct**

[13] As we have noted, the Respondent has admitted to professional misconduct in three respects:

(a) his breach, as detailed in the amended citation and the Agreed Statement of Facts, of his undertaking to the Law Society to provide regular and random verification of his abstention from alcohol;

(b) his breach, as detailed in the amended citation and the Agreed Statement of Facts, of his undertaking to the Law Society to attend a minimum of three mutual support meetings each week; and

(c) his breach, as detailed in the amended citation and the Agreed Statement of Facts, of his undertaking to the Law Society to attend meetings of the Professional Accountability Group at the

Lawyers' Assistance Program.

[14] In *Law Society of BC v. Dobbin*, 2006 LSBC 28, the Panel observed (at paragraph 14):

Breaches of undertakings relating to practice supervision and to reporting to the Law Society were held to be professional misconduct both in *Law Society of BC v. Barton*, 2004 LSBC 20, and in *Law Society of BC v. Davies*, 2003 LSBC 41. It is manifestly in the public interest that a lawyer's undertakings to the Law Society must be performed.

[15] These observations are apposite to the present case and we have nothing to add to them. We consider that the Respondent's admissions of professional misconduct are entirely appropriate and we accept them.

## Determination

[16] We conclude that the Respondent has committed conduct unbecoming a lawyer in respect of allegation 1 in the citation, and professional misconduct in respect of allegations 2, 3 and 4 in the citation.