2012 LSBC 22
Report issued: June 27, 2012
Oral Reasons: April 18, 2012
Citation issued: September 15, 2012

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

Brian Clark Rea

Respondent

Decision of the Hearing Panel

Hearing date: April 18, 2012
Panel: Kenneth Walker, Chair, Gavin Hume, QC, Lois Serwa

Counsel for the Law Society: Leonard Doust, QC and Jaia Rai
Counsel for the Respondent: Grant Gray

introduction

[1] On April 18, 2012 we orally accepted the Respondent's conditional admission of a disciplinary violation. We also accepted the proposed disciplinary action. The Respondent will serve a further six month suspension, commencing upon the release of these written reasons, together with carefully crafted practice conditions that will protect the public. The effective period of suspension for the Respondent is more than three and a half years. For the reasons stated later, we have concluded that a three-year suspension should be the minimum disciplinary action in a similar case. These are our written reasons.

PRELIMINARY ISSUE RELATING TO APPREHENSION OF BIAS

[2] During the afternoon of April 17, 2012 Panel member Gavin Hume was contacted by the hearing administer Michelle Robertson and asked if he could cover for a panel member on the following day who had a family emergency and, as a result, was unable to attend the hearing scheduled for April 18, 2012. In that conversation Mr. Hume was asked if he recalled the case. Mr. Hume responded to Ms. Robertson that he knew there was an issue because of the publicity associated with the matter but had no other recollection.

[3] In the morning prior to the commencement of the hearing on April 18, 2012, Mr. Hume was reminded that, as President of the Law Society of British Columbia during 2011, he had had a role to play. He was reminded and did recall a meeting with Mr. Tim McGee, Chief Executive Officer and Ms. Deborah Armour, Chief Legal Officer of the Law Society to discuss the Law Society's handling of the matter. In addition, he was advised that he had a subsequent meeting with the vice-chair of the Discipline Committee along with Mr. McGee and Ms. Armour.

[4] At the commencement of the hearing, Mr. Hume advised the parties and their counsel that he recalled the meeting with Mr. McGee and Ms. Armour and that he had been advised of a subsequent meeting with the vice-chair of the Discipline Committee, Mr. McGee and Ms. Amour. He also informed the parties and their

counsel that he had no recollection of the results of the meetings. He further advised that he had read all of the materials, including the Agreed Statement of Facts, that had been provided to the Panel members, and that did not jog his memory. He offered to inform himself of the meetings. He also advised the parties and their counsel that, if they wished him to recuse himself given the reasonable apprehension of bias, they should make those submissions. He indicated that might result in an adjournment in order to find another panel member. He expressed the view that, under the circumstances, he thought he could exercise his judgment fairly.

[5] The parties were given an opportunity to ask questions of Mr. Hume and did. In response to one of the questions, he advised that he had no recollection of discussing any appropriate sanction during the course of the two meetings.

[6] After an adjournment and considering the issue, both parties advised they did not wish Mr. Hume to make any further inquiries with respect to what occurred at the meetings and that they were prepared to immediately proceed with him as a panel member.

[7] Based on the agreement of the parties, and in the circumstances, the Panel decided it was in a position to fairly hear this matter.

Background

[8] This disciplinary hearing proceeded by an Agreed Statement of Facts. The Respondent accessed child pornography using his computer in his home in 2006. He pleaded guilty to the *Criminal Code* charge of accessing child pornography contrary to s.163.1 (4.1) of the *Criminal Code*. The plea and sentencing took place on April 15, 2010. He was sentenced to 14 days jail, and he was placed on a two-year probation order that contained terms intended to protect boys under the age of 16. The conditions in the order also had rehabilitative conditions that required the Respondent to take sex offender treatment and a sex offender maintenance care program. Pursuant to *Criminal Code* provisions, the Respondent is required to not attend public places where children under 16 are present or expected to be present. The conditions of that order continue until April 15, 2015.

[9] The Law Society became aware of these allegations around the time of the arrest of the Respondent in December, 2008. An investigation was commenced by the Law Society, which was subsequently held in abeyance pending conclusion of the criminal proceedings at the Respondent's request. Steps were taken to protect the public. The Respondent recognized the need for these measures. The Respondent stopped practising law in March 2009. In May 2009, the Respondent applied to change his practice status to "non-practising" and gave a written undertaking that he would not engage in the practice of law until released from this undertaking under the Law Society Rules. In October 2009 the Respondent gave a written undertaking to the Discipline Committee to provide 60 days written notice of any application to be released from his undertaking to not engage in the practice of law. The public was protected by these conditions

[10] The Law Society's investigation continued after his plea to the criminal charge in April 2010. With the consent of the Respondent and at the request of the Law Society, the Respondent was examined by psychiatrist Roy O'Shaughnessy. Dr. O'Shaughnessy prepared a report dated August 23, 2011. The Panel accepts that Dr. O'Shaughnessy is duly qualified and is one of the leading psychiatrists in this Province. His opinions contained in his report are a fundamental basis upon which we have made our decision.

[11] The matter came before us as a "conditional admission" pursuant to the Law Society Rules. It was for us to either accept the admission or reject it. A respondent has the right to apply to the Discipline Committee

for such an admission. The Discipline Committee comprises both lawyers and members of the public. The conditional admission and disciplinary action were considered and approved by the Discipline Committee. We must give some deference to that approval. We have been guided in our decision with the reasoning found in *Law Society of BC v. Rai*, 2011 LSBC 02 (paragraphs [6] to [8]):

> This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
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> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"
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> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

ANALYSIS

Appropriateness of Disciplinary Action

[12] The *Professional Conduct Handbook* Chapter 2, Rule 1 sets out the standard of conduct expected of a lawyer:

> 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.

That Rule was commented on by the Benchers on review in *Law Society of BC v. Berge*, 2007 LSBC 07 at para. [38]

> … A lawyer does not get to leave his or her status as a lawyer at the office door when he or she leaves at the end of the day. The imposition of this high standard of social responsibility, with the consequent intrusion into the lawyer's private life, is the price that lawyers pay for the privilege of membership in a self-governing profession. Conduct unbecoming not only includes the obvious examples of criminal conduct and dishonesty, but it also includes "any act of any member that will seriously compromise the body of the profession in the public estimation." See *Hands v. Law Society of Upper Canada* (1889), 16 OR 625.

[13] The conduct that constitutes “conduct unbecoming” is the use of the internet to view child pornography. There were 94 images of child pornography found on the computer. Some of the images of abuse were of very young children. We find that the Respondent was not interested in the images of the very young children but was interested in images of boys of teenage years. We also find that the images were viewed in his home. There was no connection to the conduct and the practice of law.

[14] The conduct was very serious. It perpetuates violation and abuse of children. It not only makes victims of the children who were abused in the pictures, it also makes possible future abuse and violation of children. The sentencing Judge reviewed this conduct, and we adopt her comments found in paragraphs 23 to 27 in the Reasons for sentence.

> 23. The Crown has provided *R. v. Gurr*, 2007 BCSC 1586, which is a decision of the British Columbia Supreme Court. … Mr. Justice Powers provides a useful summary of the law and the social evils to which these sections in the Criminal Code are designed to address.
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> 24. The learned justice cites *R. v. Jakobsen*, [2006] BCJ No. 2008, again a charge of possession of child pornography. That case states that these matters are serious because possessors of child pornography create a market for those who abuse and exploit children. Eliminating a market for child pornography will go far to eliminating the motivation to harm children who are violated, used and abused, in the production of such repugnant material. Those who possess child pornography perpetuate the harm to society in general, and to vulnerable children in particular.
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> 25. *R. v. North* (2002), 165 CCC (3d) 393, an Alberta Court of Appeal decision, was also cited, and that case states:
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> > The primary goal of child pornography laws is to prevent harm to children … Child pornography inflicts harm on children in several ways. Children are clearly abused in its production, it can be used to groom or seduce victims, and it may reduce pedophiles’ inhibitions respecting abuse of children. Because the market for child pornography is fuelled by the demand of those who wish to possess it, criminalizing it may reduce the demand …
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> 26. As I said in my description of the materials, some of these images clearly depict repugnant, horrific, and violent acts against children and infants for the sexual pleasure and titillation of adults.
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> 27. Even when a case is over, a child, the victim whose image is posted on the Internet, is abused continually and will be abused for the rest of their life, because images never disappear from the Internet.

Personal Circumstances including Medical Evidence

[15] The Respondent is 47 years old and was admitted to the bar in British Columbia in 1992. In March, 2009 he stopped practising law but remains a member of the bar. He practised in Kelowna and region for about 14 years. We have reviewed the letters from colleagues in the practice of law. We accept that the Respondent was courteous and dedicated. They believe, if he is permitted to practise, he will apply himself diligently to serve his clients in a professional and ethical manner.

[16] We had the benefit of medical evidence. The Respondent attempted suicide following the disclosure of the conduct. Dr. Farid Ullah opined in February of 2010 that the Respondent had continuing “significant depressive symptoms and anxiety.” Dr. Heather M. McEachern, Ph.D, R. Psych., concluded that the Respondent had “developed same sex interest in his teens.” He was described as “a quiet, soft spoken, conservative fellow who deplores his own behaviour.” She described his conduct as “… viewing teenage boys … limited to internet sites without interaction.” She also indicated that “… Mr. Rea has reduced this

risk considerably and is in my opinion unlikely to re-offend."

[17] Dr. O'Shaughnessy found that the Respondent became aware of homosexual interests in his teens but was unable to accept or tolerate such thoughts. The doctor referred to the Respondent's conduct as "hebephilic behaviour". The doctor believed the Respondent was truthful when he stated there had been no sexual activity with children. Dr. O'Shaughnessy also believed the ultimate goal of ongoing therapy would be to "help him to accept his sexual orientation." The doctor believes there is no evidence to suggest that the Respondent is at risk to act on his sexual interests with teenage boys.

[18] We find that Dr. O'Shaughnessy expressed two relevant opinions. First, "Based on the information available, I do not consider him to be a significant risk to act out on his sexual impulses." Secondly, "I do not think his difficulties would interfere with his capacities to practise law. As above, I believe he is able to control his impulses and conduct."

[19] There is no case like the one before us. *Adams v. Law Society of Alberta*, 2000 ABCA 240, [2000] AJ No. 1031, went to the Alberta Court of Appeal. The disbarment of the lawyer was confirmed in circumstances where the lawyer had sexually exploited his 16 year old client. In *Law Society of Upper Canada v. Budd*, 2011 ONLSAP 2, [2011] LSDD No. 6, the lawyer's licence was revoked in circumstances where he sexually exploited teenage girls. In *Law Society of Upper Canada v. Johnston*, [2001] LSDD No. 59, the lawyer was disbarred in circumstances where the lawyer had sex with minors. The lawyer had met one of the young women when she was a witness at a trial where he acted as prosecutor. In *Law Society of Manitoba v. Dolovich*, 2010 MBLS 11 (CanLII) the lawyer was disbarred in circumstances where he was in possession of child pornography, but he was also distributing that child pornography. In *Dolovich*, the lawyer was also actively engaged in on-line chats discussing violent abuse of children. The circumstances of *Dolovich* were very aggravating. After considering these cases, we conclude the Respondent's conduct does not warrant disbarment, but rather a lengthy suspension.

PUBLICATION AND RULE 5-6 NON-DISCLOSURE OF EVIDENCE RULING

[20] During the hearing we were advised a third party wished to make written submissions concerning publication. We gave the third party two weeks to file written submission. We are told that, after hearing the decision to impose a suspension, the third party abandoned his application. We view publication of this decision naming the respondent is mandatory pursuant to the Rules and, in any event, important to the public.

[21] Also, at the end of the hearing counsel for Mr. Rea advised that he would make written submissions on the issue of non-disclosure of medical evidence filed at the hearing. We have had the benefit of the submissions of counsel on behalf of Mr. Rea and from counsel on behalf of the Law Society. In our decision we have summarized some of the information and quoted from some of the reports. The summary and quotes made were necessary to make the reasoning for our decision understandable. The information contained in the medical reports is of a highly personal and sensitive nature, and in this situation more disclosure of information is not needed. Therefore, pursuant to Rule 5-6(2)(a), except for the use made in our reasons, the information contained in the medical reports found in Exhibit 4 tabs 1-4 inclusive must not be disclosed or available for public inspection.

CONCLUSION

[22] We accept the admission made and find that the Respondent has committed conduct unbecoming a lawyer. We accept the disciplinary action of a six-month suspension. The total effective period that the Respondent has not practised law exceeds three years. We have concluded that a suspension for similar

circumstances ought to be three to four years.

[23] The six-month suspension will begin on issuance of this decision.

[24] We also order that the Respondent be subject to the following conditions on his return to practice:

1. The Respondent must not represent any persons under the age of 16 until such time as he is relieved of this condition by the Discipline Committee.

2. The Respondent must not practise in the area of family law until such time as he is relieved of this condition by the Discipline Committee.

3. The Respondent must continue in the care of his psychologist, Dr. McEachern or any other psychiatrist approved by the Practice Standards Committee (the "Treating Psychologist or Psychiatrist") and

(a) adhere to any advice or treatments recommended by the Treating Psychologist or Psychiatrist, aimed at treating the psychological conditions or concerns referenced in the independent medical examination report prepared by Dr. O'Shaughnessy dated August 23, 2011 or any other medical or psychological condition(s) that may be diagnosed in the course of treatment, and

(b) require the Treating Psychologist or Psychiatrist to provide progress reports to the Practice Standards Committee of the Law Society as requested by that Committee.

4. The Respondent must submit to the jurisdiction of the Practice Standards Committee and abide by any orders, directions and recommendations of that Committee, within the time frames directed by that Committee, including any orders, directions and recommendations aimed at effecting and monitoring the condition set out in paragraph 3 above.

5. A failure by the Respondent to abide by any order, direction or recommendation made by the Practice Standards Committee within the time frames directed by that Committee will constitute a breach of this Hearing Panel order, which may trigger further disciplinary action, as would a breach of any other term of this Hearing Panel order.

[25] The Respondent must pay costs to the Law Society of $10,000, payable by April 30, 2015.

[26] A publication of the circumstances summarizing this admission will be made pursuant to Rule 4-38, and such publication will identify the Respondent.

[27] The Executive Director is instructed to record the Respondent's admission on his professional conduct record.