2005 LSBC 24
Report issued: July 25, 2005
Citation issued: February 19, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a section 47 review concerning

Kevin Patrick Doyle

Respondent

Decision of the Benchers on Review

Review date: May 26, 2005

Quorum: Anna Fung, Q.C., Chair, Patricia L. Schmit, Q.C., Michael Falkins, Dirk Sigalet, Q.C., Dr. Maelor Vallance, Margaret Ostrowski, Q.C., Carol Hickman, Bruce LeRose

Counsel for the Law Society: James A. Doyle
Counsel for the Respondent: Albert M. Roos

Background

[1] This is a Review pursuant to Section 47(1) of the *Legal Profession Act* on the record. The Review is brought by the Respondent seeking reversal of the decision of the Panel below, declining to order anonymous publication of its decision on verdict and penalty.

[2] Oral reasons were given by the Panel on February 3, 2005 and the Report was issued February 14th, 2005.

[3] The evidence at the Hearing and the Decision of the Panel were contained in the Record as required by Rule 5-14(3) of the Law Society Rules. That Record comprised the following:

1. An agreed statement of facts including admissions;

2. Transcript of the proceedings;

3. Exhibits composed of documents submitted by the Respondent.

[4] With respect to counts 1, 2, and 3 of the Amended Schedule to the Citation, dated February 19th, 2004 the Hearing Panel found that the Respondent's behaviour constituted professional misconduct. The counts alleged against the Respondent are:

"1. Your failure to register as required by the *Social Service Tax Act* as a vendor with the Consumer Taxation Branch of the Ministry of Finance of British Columbia until approximately May 2003.

2. Having collected the funds, you failed to remit Provincial Sales Tax as required by the *Social Service Tax Act* from approximately 1991 - 2003.

3. Having collected the funds, you failed to remit Goods and Services Tax to the Government of Canada as required by the *Excise Tax Act* from approximately 1991 to 2003."

[5] The Respondent made a conditional admission as to verdict and penalty and the Panel below accepted the admission and penalty pursuant to Rule 4-22.

[6] The Panel determined that the jointly submitted penalty was appropriate.

[7] The penalty was as follows:

(a) A fine in the amount of $2,000.00;

(b) Costs in the amount of $3,000.00;

(c) The Respondent would have 18 months to pay the fine and costs.

[8] No appeal was taken of the verdict.

[9] The Respondent sought an Order pursuant to Rule 4-38.1 that the Respondent's name not be published and that the decision on verdict and penalty be published anonymously. The Panel below declined to accede to his request, hence this Review.

Jurisdiction and Standard of Review

[10] The scope of review applicable in Section 47 of the *Legal Profession Act* is a broad power of review with discretion to substitute its own decision for that of the Panel below. (Rule 5-12 and *Hordal* [2004] LSBC, 36)

[11] The test to be applied by the Benchers on review is "correctness" . Thus, if the Benchers find that the Panel below was not correct the Benchers may substitute their own judgment for that of the Hearing Panel.

[12] The only caveat to this is that the Hearing Panel may be afforded deference on findings of fact, particularly where findings were made on viva voce evidence.

[13] The review analysis focuses on the overall correctness of the decision below, not on a minute analysis of each statement in the decision for specific correctness.

Law

[14] Any decision of the Benchers must begin with Section 3 of the *Legal Profession Act* which provides:

Public interest paramount

3 It is the object and duty of the society

(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, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

[15] Section 3 requires that the paramount object and duty of the Society is to uphold and protect the public interest.

[16] In recent years, in discipline matters the Benchers have determined that one of the means by which the public can be protected is to strive for optimal openness and transparency. The process of the Law Society has, therefore, been overhauled in order to move from a format of opacity to the general rule that the discipline process should be open and transparent and the results flowing from the discipline process should be published.

[17] The process which puts the name of a member subject to the discipline regime in the public domain begins with the issuance of the citation which is public record and is posted on the Law Society's website.

[18] Discipline hearings are open to the public.

[19] Once a hearing has taken place and the hearing panel has issued an adverse verdict, the default situation is that the Executive Director must publish and circulate to the profession a summary of the circumstances of any decision, reasons and actions taken and must identify the member. Rule 4-38 sets out that process:

> **4-38** (1) Subject to Rule 4-38.1, the Executive Director must publish and circulate to the profession a summary of the circumstances and of any decision, reasons and action taken
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> (a) at the conclusion of the facts and verdict portion of a hearing on a citation,
>
> (a.1) at the conclusion of the penalty portion of a hearing on a citation,
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> (b) at the conclusion of a hearing before the Benchers under section 47 of the Act,
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> (c) at the conclusion of an appeal to the Court of Appeal under section 48 of the Act,
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> (d) when a respondent is suspended until the conclusion of a hearing of a citation under Rule 4-17(1),
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> (e) when a lawyer or former lawyer is suspended or disbarred under Rule 4-40, or
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> (f) when an admission is accepted under Rule 4-21 or 4-22.
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> (2) Subject to Rule 4-38.1, the Executive Director may publish and circulate to the profession a summary of any decision, reasons and action taken by the Benchers or a hearing panel not enumerated in subrule (1), other than a decision not to accept a conditional admission under Rule 4-21 or 4-22.
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> (3) When a publication is required under subrule (1), the Executive Director may also publish generally
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> (a) a summary of the circumstances of the decision, reasons and action taken,
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> (b) all or part of the report of the hearing panel, or
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> (c) in the case of a conditional admission that is accepted under Rule 4-21, all or part of an agreed statement of facts.
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> (4) When the Executive Director publishes a document under this Rule by means of the Society's website, the Executive Director must remove the publication from the part of the website for current

decisions and may relocate it to an archive part of the website when

(a) 6 months have elapsed from the decision of the hearing panel, and

(b) all aspects of the penalty imposed have been completed.

(5) This Rule must not be interpreted to permit the disclosure of any information subject to solicitor and client privilege or confidentiality.

[20] Publication almost always follows an adverse verdict.

[21] Publication must occur if the member is subject to a penalty involving suspension or disbarment. There is no other option.

[22] In the event that the penalty is less severe than suspension or disbarment, then the Benchers have determined that there could be an exception to the rule of publication identifying the member. However, Rule 38.1 provides that that exception was only to occur in particular and very limited circumstances.

[23] Rule 4-38.1(3) sets out those circumstances where the panel may make an exception to identifying the member.

[24] Rule 4-38.1(3) states:

4-38.1 (3) The panel may order that publication not identify the respondent if

(a) the panel has imposed a penalty that does not include a suspension or disbarment, and

(b) publication will cause grievous harm to the respondent or another identifiable individual that outweighs the interest of the public and the Society in full publication.

[25] In analyzing whether the member is entitled to an order that his name not be identified the correct analysis required to be undertaken by the Panel is the following:

(a) Firstly, the member must not be subject to a suspension or a disbarment. In other words, by necessary implication, the impugned behaviour must not be so serious as to have attracted penalties from the draconian end of the spectrum.

(b) Secondly, the Panel must analyze what harm the member says he or another identifiable individual may suffer if his name were to be published. The harm must be so severe as to be characterized as grievous harm.

(c) If the harm is found not to be grievous, that ends the matter.

(d) If the harm in publishing the name is found to be grievous, only then does the Panel move on to weigh that grievous harm in publishing the name against the public interest and the Law Society's interest. Only if the grievous harm outweighs those two interests should the Panel exercise its discretion to grant an order directing that the member's name not be disclosed.

[26] What is grievous harm and when can it occur? This Review Panel finds that grievous harm can only occur in rare and exceptional circumstances, taking it out of the ordinary, or beyond what one would reasonably expect in the circumstances. The focus is on the member's personal circumstances. In order to be grievous, the harm must be exceptional, unusual, onerous, and injurious to a member, and cause a member to experience catastrophic loss both personally and professionally. The harm must involve significantly more than damage to the member's reputation or embarrassment that would normally be

expected to flow from being found guilty of professional wrongdoing.

[27] The jurisprudence regarding identification of a member's name in discipline matters prior to the enactment of the present Rule in 2003, required that the effect on the member of identification must cause that member special or undue prejudice (see *Bell* No. 02/11, Oct. 2002) This Review Panel finds that the introduction of the word "grievous" in the 2003 amendment to the Rule was designed to convey that the harm that flows from identification must be significantly more serious in order to outweigh the obligations of the Law Society to be open and transparent.

[28] As an aside, the Review Panel notes that the Rule provides for the Panel to consider not identifying the member if grievous harm is caused to "another identifiable individual" where that identification outweighs the public's and the Society's right to know. The Benchers have never, to this Review Panel's knowledge, dealt squarely with that fact pattern and leaves it for another day.

[29] Moving on to an analysis of the subject case, the penalty imposed on this Respondent by the Panel, as a result of the conditional admission on verdict and penalty, was a fine. Therefore, he fell within the parameters of Rule 4-38.1(3)(a) since the penalty does not involve suspension or disbarment.

[30] The Respondent relied on the evidence before the Panel below, and did not apply to produce new evidence. The evidence below consisted of the Agreed Statement of Facts, the evidence of the Respondent and numerous documents and letters provided by the Respondent. These latter materials included a letter from the then Minister of Justice, news releases and newspaper articles about the Respondent's activities in relation to opposition to the closure of the Victoria Land Title Office, a letter from a partner at the law office which provided an office sharing space to the Respondent, and a letter from the Chief of an Indian Band for whom the Respondent provided pro bono legal work.

[31] The authors of these latter two letters were fully informed of the Respondent's bankruptcy and discipline situation.

[32] The Respondent before us alleged that publication identifying him would cause him grievous harm because:

(a) he is otherwise a good person;

(b) prior to this citation, he had an unblemished professional conduct record;

(c) the conduct which he admitted to be professional misconduct was not so serious of a nature as to attract the more severe penalties;

(d) the conduct for which he is being disciplined does not compel publication of his name; while it is not trivial in the scheme of things, it is not of the most serious nature;

(e) he works in a smaller community and identification of his name would render him notorious;

(f) his office sharing situation with an established law firm located in very comfortable premises, at a very nominal rent, and with some office support, would be in jeopardy if his name were published as the law firm from whom he rented might not renew his lease and/or allow him to stay on in his previous capacity;

(g) that same law firm might not offer him an associate position;

(h) his paying practice is small, and has been used to fund his pro bono work for good causes. Those good causes include the following:

i) he has worked to prevent closure of the Victoria Land Titles Office and preserve the historical records stored therein which is valuable in itself and critical for First Nations in making land claims against the government;

ii) he has performed much free legal work for First Nations bands;

iii) this work might end based on evidence provided from one band that it might not want to be associated with him if his name was published;

iv) he has worked for gay rights; and

v) he has worked to register the voting rights of the homeless and the poor.

(i) He has had some heart problems, albeit not presently causing him medical concerns.

[33] In reviewing the Record below the Review Panel accepts completely that this Respondent is one of a rare breed. He has devoted most of his professional career to worthy causes with minimal or no pay. He is valued in his community. He is valuable to the profession in that he sets an example with his selfless pro bono work. The larger public interest is served by his efforts.

[34] But after weighing all the evidence and applying the Rules and the law to the particulars of the Respondent, this Review Panel does not find that the Respondent has suffered, or will suffer grievous harm.

[35] Even if the Panel had found that he suffered grievous harm, we would not have found that this harm amounting to grievous harm outweighed the public interest and the interest of the Law Society in performance of its discipline duties, in publication of the Respondent's name.

[36] The panel considered the submissions of the Respondent, and finds as follows:

1. The Review Panel considers the conduct for which the Respondent is being disciplined to be serious. It involves the failure to remit clients'monies that are due to the government. Instead, the Respondent used that money for his own purposes over a twelve year period. Throughout, he knew he was doing wrong. The money he collected should rightfully have been public money. It is in the larger public interest that the public know this.

2. Regarding the evidence from the First Nations Band that it would not allow the Respondent to work with it in the future if his name were published, this Review Panel finds it to be counter intuitive that this author acknowledged the great assistance the Respondent had provided the Band for free yet suggested the Band would choose not to continue to engage him just because his name had been published in connection with his discipline offence.

[37] The Respondent's good works are vast and multifactoral and will draw support to him and provide him with ongoing opportunities to continue with these or other projects.

[38] In relation to individual members of the public and the profession, the Review Panel finds that the public interest and the Society's interest are served when individual members of the public and the profession who might have dealings with the Respondent know with whom they are dealing, including full knowledge of his professional circumstances including his discipline record.

[39] The jeopardy that the Respondent's very comfortable current office sharing arrangement may be terminated or that he might not be offered employment if his name were published are risks that this Respondent must bear. They are not of a grievous nature. His personal comfort and income security must not outweigh the general interest in people knowing with whom they are dealing.

[40] Finally, we note that any lawyer who is disciplined will suffer a loss of dignity and embarrassment. Undoubtedly the Respondent will, too. That's just not enough to meet the definition of "grievous harm" .

[41] This Review Panel agrees with the Panel below that the clear intention of Rule 4-38 and 4-38.1 is that the public should know who did what and that only in exceptional circumstances where full public disclosure will cause grievous harm to the member or another identifiable individual will that right be abrogated.

[42] A fair, large and liberal construction of Section 3 of the *Legal Profession Act* and Rule 4-38 and 4-38.1 instructs the Benchers that it is not individual lawyers'interests or lawyers'interests as a group that ought to serve as the focus of any inquiry regarding non-identification. It is a question of how lawyers fit in to the larger public society. The discipline activities of the Law Society of British Columbia and the results of its hearings, where adverse to members, are of large interest and instruction and even occasional notoriety. Nonetheless justice must be done and equally importantly, must be seen to be done. This can best occur only with publication of disciplined lawyers'names.

[43] The Respondent has cited *Mitchell v. British Columbia College of Teachers* [2005] B.C.J. No. 2692005, B.C.C.A. 76 ("Mitchell") in support of his position that there be anonymous publication. The Review Panel finds that this case is distinguishable both on its facts and in the differences between Rule 4-38.1 of the Law Society Rules and By-Law 6.S.03 of the College of Teachers By-Laws.

[44] In the *Mitchell* case both Madam Justice Humphries and the Court of Appeal made the following findings of fact:

> i) the sexual act complained of between the teacher and the student occurred ten years prior to the complaint;
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> ii) there was no civil or criminal action ensuing as a result of the teacher's actions and the sexual acts were found to be consensual;
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> iii) the teacher went on to have a successful ten year incident free career prior to the complaint;
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> iv) after the complaint the teacher readily admitted the wrongdoing and accepted her suspension;
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> v) the College's decision to cancel the teacher's certificate of qualification and terminate her membership and publish the decision was not until 2001, some sixteen years after the incident; and
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> vi) in the meantime the teacher was married and now had three children.

Madam Justice Humphries and the Court of Appeal found that these were mitigating factors in favour of a ban on publication. Here, the Respondent appropriated to himself client monies remitted for the purpose of satisfying PST/GST obligations to the government over a twelve year period. This misconduct involved the misuse of public funds which is something of public interest in the broad sense.

[45] The applicable Rules of the Law Society and the College of Teachers are different. The first part of By-Law 6.S.03 of the College By-Laws states:

> "If the Respondent requests that their name be withheld from publication, the Hearing Sub-Committee may order that the Respondent not be identified in a summary published in accordance with 6.S.01 . . ."

The first part of Rule 4-38.1 of the Law Society Rules states:

> "(1) Except as allowed under this Rule, a publication under Rule 4-38 must identify the Respondent

. . ."

The Law Society Rule starts with the proposition that publication is mandatory whereas the College's By-Law is clearly permissive which in this Review Panel's view creates a lower threshold for granting anonymous publication.

[46] There have been two recent cases where a Panel has ordered that the member's names not be published. As this Review Panel makes its decision, one of these decisions has been reversed on Review and a Review of the other case is pending. The case that was reversed on review, *Re Milne* (2004) LSBC 10, was reversed without full argument and by consent of the member involved. For this Review Panel, its precedential value is limited.

[47] The Review Panel finds that the Panel below, while perhaps not clearly reciting the analysis set out herein, applied the correct law to the facts before them to arrive at the correct decision. Accordingly the Review Panel dismisses the Respondent's application and orders that the decision of the Panel below be published, identifying the Respondent.