2013 LSBC 37
Report issued: December 20, 2013

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a referral to the Benchers under Rule 4-40 concerning

William Jacob Mastop

Decision of the Benchers

Hearing date: November 13, 2013
Benchers: Leon Getz, QC, Chair, Lynal Doerksen, Jan Lindsay, QC, Benjimen Meisner, Thelma O'Grady, Lee Ongman, David Renwick, QC, Kenneth Walker, QC

Counsel for the Law Society: Jaia Rai
Counsel for the Mr. Mastop: Richard Fernyhough

[1] On December 20, 2012 William J. Mastop pleaded guilty in the Supreme Court of British Columbia to one count on an Indictment that alleged that he:

> William Jacob Mastop, did knowingly, between the 1st day of August, 2004 and the 30th day of June, 2006, inclusive, at or near Vernon, in the Province of British Columbia, participate in or contribute to the activity of a criminal organization, for the purpose of enhancing the ability of the criminal organization to facilitate or commit an indictable offence, contrary to section 467.11(1) of the *Criminal Code*.

After several days of a sentencing hearing, Mr. Mastop was sentenced on April 4, 2013 to one year incarceration [*R. v. Mastop*, 2013 BCSC 738].

[2] As the offence for which Mr. Mastop was found guilty is an indictable offence, the matter was referred to the Benchers by the Discipline Committee pursuant to Law Society Rule 4-40(2). It was agreed by both parties at the outset of this hearing that the matter was properly before the Benchers under this rule.

[3] We note that, after being charged with the offence set out above, Mr. Mastop was released on a Recognizance of Bail on January 26, 2010 with one of the conditions being that he not engage in the practice of law. Mr. Mastop has not practised law since that date.

[4] The only issue before us is whether the Benchers should “summarily suspend or disbar” Mr. Mastop as per Rule 4-40(3). We reserved our decision at the conclusion of the hearing on this issue on November 13, 2013.

[5] On November 18, 2013 the British Columbia Court of Appeal allowed an appeal by the Crown against the sentence imposed on Mr. Mastop and increased it to two-and-one-half years of incarceration [*R. v. Mastop*, 2013 BCCA 494].

[6] In view of this we invited counsel to make any further written submissions they might consider appropriate, and both did so.

[7] We have considered those submissions. On reflection, however, we have come to the conclusion that the Court of Appeal decision to increase Mr. Mastop's sentence has no bearing on the decision we must make. In our opinion, it is the conviction and the conduct of the lawyer that is determinative of the appropriate disposition under our legislative framework, not the sentence of another tribunal.

CIRCUMSTANCES OF THE *CRIMINAL CODE* OFFENCE

[8] The facts upon which Mr. Mastop was convicted are found in the decision of the trial judge referred to above. Without going into exhaustive detail, the pertinent facts are these:

1. At all material times Mr. Mastop was a practising lawyer with the Law Society of British Columbia and practised in Vernon.

2. One of Mr. Mastop's clients, Peter Manolakos, was the acknowledged leader of a criminal organization known as "the Greeks". This organization was involved in the trafficking of illegal drugs such as cocaine and heroin.

3. Mr. Manolakos, along with four other members of the Greeks, was charged with the murder of three individuals.

4. During the course of the murder investigations, the police intercepted conversations between Mr. Mastop and members of the Greeks. Over 300 intercepted conversations were entered as evidence.

5. Through these intercepts it was learned that Mr. Mastop, while representing another client, had received from the Crown a document generally referred to as an "Information to Obtain" ("ITO").

6. An ITO is an affidavit sworn by a peace officer in order to obtain a search warrant. The information in the ITO can be of a sensitive nature as it may include information from a confidential source or an informer about the criminal activity of a suspect. In the criminal drug world the revelation of an informant's identity can have serious consequences to the informant including bodily harm or death.

7. Mr. Mastop gave the ITO to Mr. Manolakos. Mr. Manolakos was interested in the ITO for the purpose of trying to determine the informant's identity.

8. There was no evidence to suggest that, by providing the ITO to Mr. Manolakos, any harm was suffered by anyone. However, Mr. Mastop knew that, if the identity of an informer was revealed, the informer could face serious violent consequences.

9. On two occasions Mr. Mastop, himself an experienced marksman and a member of a Vernon gun club, took members of the Greeks to his gun club as guests. Mr. Mastop also had in his possession a rifle that belonged to one of the Greeks but had been given to him for repair.

10. There were numerous other incidents not specifically described that showed Mr. Mastop's willingness to aid the members of this criminal organization. (See para. 39 of the trial judge's decision.)

POSITION OF THE RESPONDENT

[9] Mr. Mastop asserts that Rule 4-40 is discretionary and does not require the Benchers to suspend or disbar him. Being convicted of an indictable offence only allows the Benchers to proceed in a summary fashion without the requirement for a full hearing.

[10] Mr. Mastop points out that the offence he pleaded guilty to is a relatively new provision of the *Criminal Code*, having been proclaimed in 2002, only two years from the start of the offence date, and but for this enactment, Mr. Mastop would not have been charged. The impugned conduct is not, in and of itself, criminal. In other words, the same conduct in aid of another person (or a non-criminal organization) would not have attracted a criminal charge.

[11] Further, the offence (a breach of s. 467.11) to which Mr. Mastop pleaded guilty is the least serious of the "trilogy" of enactments that relate to conduct "in aid of a criminal organization". The maximum penalty under s. 467.11 is five years. The maximum penalties under s. 467.12 and s. 467.13 are 14 years and life imprisonment respectively. Each section requires a higher level of moral blameworthiness and thus attracts a higher maximum penalty.

[12] Section 467.11 does not require the Crown to prove that there were any consequences as a result of the impugned conduct. The conduct may, in fact, have been of no benefit to the criminal organization at all.

[13] Further, Mr. Mastop notes that, as s. 467.11 is a relatively new provision, there was no guiding case law and the legislation was not held constitutionally sound until 2009 in *R. v. Beauchamp*, 2009 CanLII 37720, [2009] OJ No. 3006.

[14] Moreover, section 467.11 is not classified as an "Offence Against the Administration of Law and Justice", the title of Part IV of the *Criminal Code* wherein the offences of perjury (s.131), fabricating evidence (s. 137), obstruction of justice (s. 139), swearing false affidavits (s. 138) and public mischief (s. 140) are found. Section 467.11 is found in Part XIII of the *Criminal Code*, which is entitled "Attempts – Conspiracies – Accessories". Thus, Mr. Mastop asserts this Panel should not conclude that this is an offence that strikes at the heart of the administration of justice.

[15] Mr. Mastop agrees that "it was foreseeable that his conduct could have the effect of assisting the criminal organization, and this was what led to the guilty plea." He asserts, however, that his motivation was to "simply assist his clients" and not to assist the criminal organization to commit an indictable offence.

[16] Mr. Mastop says that he is no danger to the public he has learned his lesson and he will not commit this offence again. Indeed, the trial judge said as much (at para. 57). Mr. Mastop provided an impressive list of character references from family, friends, former clients and colleagues.

[17] Nonetheless, Mr. Mastop recognizes that, at the very least, a suspension is warranted in this case. In support of this he relies on the case of *Law Society of BC v. Ogilvie*, [1999] LSBC 17, [1999] LSDD No. 45, at para. 18 of the decision on penalty, where the panel held that "the ultimate penalty of disbarment is reserved for those instances of misconduct in which prohibition from practice is the only means by which the public can be protected from further acts of misconduct."

[18] Mr. Mastop also drew our attention to several cases where a lawyer has been convicted of a criminal offence and yet not disbarred. These cases are:

> *Law Society of BC v. Watt*, [2000] LSBC 19, [2001] LSDD No. 4;
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> *Law Society of Upper Canada v. Mills*, 2005 ONLSHP 0005, [2005] LSDD No. 9;

POSITION OF THE LAW SOCIETY

[19] The Law Society seeks Mr. Mastop's disbarment on the basis that his conduct is so serious that, despite any mitigating factors, disbarment is required in order to protect the public and the integrity of the legal profession.

[20] In this connection, the Law Society invokes the provisions of sections 3(b) and 14(2) of the *Legal Profession Act* that is the statutory basis of our responsibility for the governance of the legal profession:

> 3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
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> ...
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> (b) ensuring the independence, integrity, honour and competence of lawyers, …
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> 14(2) A member in good standing of the society is an officer of all courts of British Columbia.

[21] Further, as an officer of the court, a lawyer is "an officer assisting in the administration of justice" and a lawyer is "required to uphold the law; he is also under a duty not to subvert the law." Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Ltd., 1957 at pp. 12-13, 17).

[22] The Law Society urges the Benchers to be guided by the following principles:

> 1. The purpose of this proceeding is not to punish Mr. Mastop but to protect the public, maintain high professional standards and preserve public confidence in the legal profession. As was stated in *Law Society of BC v. Hammond*, 2004 LSBC 32 at para. 23:
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> > [23] We are mindful of the requirement imposed upon the Benchers of the Law Society by Section 3 of the *Legal Professional Act* [sic] which requires that the legal profession be governed in the best interests of the public. We note in Gavin MacKenzie's publication *Lawyers and Ethics: Professional Responsibility and Discipline*, (Carswell, 1993) under the general heading "Purposes of Discipline Proceedings", the following appears:
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> > > The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. In cases which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. If a lawyer has committed a criminal offence, it is for the criminal courts, not the legal profession, to inflict punishment. All sanctions necessarily have punitive effects, which are tolerable results of the protective and deterrent functions of the discipline process. The goals of the process are, nevertheless, non-punitive.
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> 2. The more serious the misconduct the more likely is disbarment. Continuing the quote from MacKenzie in *Hammond*, (supra), at para. 23:
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> > The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practice will be terminated regardless of extenuating circumstances and the probability of reoccurrence. If the lawyer misappropriates a substantial sum of client's money, that lawyer's right to practice

> will almost certainly be terminated, for the profession must protect the public against the possibility of a reoccurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

3. Conduct that undermines the public confidence in the integrity of the profession is of paramount importance in determining disciplinary action. See: *Law Society of BC v. Power*, 2009 LSBC 23; *Adams v. Law Society of Alberta*, 2000 ABCA 240; *Bolton v. Law Society*, [1994] 2 All ER 486 (CA).

4. Protection of the public means more than the risk that, if the lawyer is permitted to continue to practise law, he may commit a similar offence. This factor includes the principle of general deterrence, and the message the Benchers are sending to the profession and the public generally. The Law Society refers to *McGuire v. Law Society of BC*, 2007 BCCA 442, in which the Court of Appeal upheld the panel's decision to disbar and quoted the panel's decision at para. 8:

> [24] The second reason relates to the protection of the public. *We accept that disbarment is a penalty that should only be imposed if there is no other penalty that will effectively protect the public*. Protecting the public, however, is not just a matter of protecting [Mr. McGuire's] clients in future. … In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it."
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> [emphasis added by Court of Appeal]

5. Mitigating circumstances play a limited role in determining the appropriate sanction when the conduct is serious. As the Review Panel held in *Law Society of BC v. Hordal*, 2004 LSBC 36:

> [68] We note that this Respondent produced at the Hearing an unprecedented array of letters of support from his colleagues at the Bar in the community in which he practises. The support was characterized as coming from virtually every lawyer of significance in the community in which this member conducted his practice. It is also true that these letters of support were generated from members of the Bar who were fully apprised of the circumstances of the Respondent's misconduct. It is clear that this significant outpouring of support for the Respondent had a bearing upon the Hearing Panel as well it should have done.
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> [69] It is however improper to confuse popularity with probity. Most letters of support noted that this conduct was out of character for this Respondent. The apparent inconsistency of that observation appeared to be lost on many of the members providing letters of support. They were faced with two essentially identical and concurrent events of misconduct within twelve months of each other, and in those circumstances it must be difficult to suggest that this conduct is out of character. It is clear that this is a very popular member of the community Bar in which he practises. It is however also true that he has significantly impaired the reputation of the legal profession in that community by this conduct. That misconduct must be identified, criticized and penalized in an appropriate manner.

[23] The Law Society referred the Benchers to cases where lawyers have been disbarred for criminal conduct:

> *Law Society of BC v. Zoraik*, 2013 LSBC 13;
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> *Law Society of Upper Canada v. Li*, 2010 ONLSHP 6;
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> *Nova Scotia Barristers' Society v. Calder*, 2012 NSBS 2;
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> *Law Society of Manitoba v. MacIver*, [2003] LSDD No. 29;
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> *Law Society of Upper Canada v. Colmand*, [1998] LSDD No. 103; and
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> *Law Society of Upper Canada v. Wijesinka*, [1998] LSDD No. 89.

DISCUSSION

[24] Mr. Mastop correctly points out that s. 467.11 is the least serious of the three sections already referred to above. While this section does not require that the underlying conduct be criminal in-and-of itself, and there is no requirement that harm be done or proven to be done as a result of the conduct, this does not end the matter.

[25] As an example, murder is the most serious criminal offence for the taking the life of another. There are less serious criminal offences for causing the death of another (such as manslaughter, criminal negligence or impaired driving causing death) but, merely because they are less serious than murder, it does not follow that a lawyer could not be disbarred for committing something less than murder.

[26] We fail to see how the placement of s. 467.11 in one part of the *Criminal Code* or another matters in this case. It simply does not follow that, because s. 467.11 does not fall under Part IV of the *Criminal Code* and is not, therefore, an offence against the "Administration of Law and Justice", it should be considered less serious. That was certainly the view of the trial judge, who characterized Mr. Mastop's offence as "undermining the system of justice" (at para. 89). Any number of offences can "strike at the heart of justice" without being an offence against the administration of law and justice. For example, treason (s. 46) is not found under Part IV, but it is difficult to imagine an offence that does more to strike at the heart of law and justice. We hasten to add that we do not seek to equate Mr. Mastop's conduct with treason.

[27] Mr. Mastop asserted before us that he was simply assisting the Greeks, but without any intent to facilitate the commission by them of an indictable offence. He explained his guilty plea on the basis that "it was foreseeable that his conduct could have the effect of assisting the criminal organization" (Respondent's Submissions, para. 27); and that he "inadvertently" "crossed the line into prohibited conduct" (Respondent's Submissions para. 31).

[28] This is difficult to square with the trial judge's decision. At para. 11 the court held:

> Mr. Mastop's guilty plea is an acknowledgement of the essential elements of the offence. More specifically, it is an acknowledgment that between August 1, 2004, and June 30, 2006, he contributed to or assisted in the activities of the Greeks, knowing that they were a criminal organization, and that *his assistance had the purpose* of enhancing their ability to facilitate or commit an indictable offence or offences.
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> [emphasis added]

[29] And in the case of *R. v. Beauchamp*, (supra), the court held, at para. 95, for the crown to prove the

offence “that mere recklessness of the accused is not a sufficient mental element.”

[30] The proposition that s. 467.11 (and s.467.12 and s.467.13) are novel offences and therefore mitigate Mr. Mastop’s culpability or blameworthiness has no support in law. At some stage in history all offences are new. Even if there were such a principle, Mr. Mastop would not benefit much by it. It is difficult to imagine someone in a better position to know what the law is in this area than Mr. Mastop, a seasoned criminal lawyer.

[31] The Benchers are bound by the conviction and the facts as set out in the trial judge’s decision - Mr. Mastop was not guilty of a mere “lack of judgment and foresight.” He knew that the Greeks were a criminal organization, and he well knew what criminal activity they were involved in. These facts alone should have given him some pause about his relationship with the members of that criminal organization. There is nothing on the record to suggest that he ever questioned or sought advice on how he should provide services to the Greeks.

[32] Mr. Mastop’s characterization of his behaviour in the “ITO” and “gun club” incident cannot be accepted either. Although no harm was proven to have been caused by Mr. Mastop providing the ITO to Mr. Manolakos, we do not see that as a mitigating factor. On the contrary, in our view, it is simply the absence of an aggravating factor. Mr. Mastop had no way of knowing when he provided the ITO to the criminal organization that no harm would become of that information. He was present when Mr. Manolakos discussed the ITO with two others, and although he did not participate in the discussion, it was clear that Mr. Manalokas was trying to determine who the informants might be. It is difficult to give credence to the proposition that Mr. Mastop gave no thought to the possibility of harm to the informer if his identity were revealed. Put differently, we find it difficult to characterize Mr. Mastop’s conduct in this connection as anything but a deliberate attempt to assist a criminal organization in committing an indictable offence.

[33] We agree that, if Mr. Mastop were permitted to practise law, it is highly unlikely that he would commit such an offence again. We are also aware of his lack of a prior record, criminal or disciplinary, and the numerous letters of support put before the trial judge and before us.

[34] The question is: does any of this matter?

[35] Disbarment is not reserved solely for the worst case and the worst offender, as was held in *Adams v. Law Society of Alberta*, 2000 ABCA 240 (and followed in *Power*, (supra) at para. 11:

> It is therefore erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal sentences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment. Indeed, that proposition has been rejected in criminal cases for the same reasons it should be rejected here. It will always be possible to find someone whose circumstances and conduct are more egregious than the case under consideration. Disbarment is but one disciplinary option available from a range of sanctions and as such, it is not reserved for only the very worst conduct engaged in by the very worst lawyers.

[36] The public does not need protection from Mr. Mastop. However, the public needs protection from any lawyer who may think that crossing this line will not attract the ultimate regulatory penalty. We adopt the reasoning as previously set out above in the decision of *McGuire*, (supra); the profession has to say to its members: “Don’t even think about it.”

CONCLUSION

[37] Criminal defence lawyers have a difficult task when representing persons charged with criminal offences and especially so when defending persons who are members of a criminal organization. These persons are entitled to the same protection of the law and the rights as provided in the *Canadian Charter of Rights and Freedoms* as anyone else charged with an offence. Lawyers are bound to be diligent and vigorously defend their clients' rights and interests but they must do so within the law.

[38] All lawyers must be mindful of their relationships with their clients. Professional and social lines sometimes become blurred, and lawyers should be alert to the problems that may arise and the potential for disciplinary action as a result.

[39] We are simply not persuaded that a suspension even a lengthy suspension is appropriate in this case. Mr. Mastop used his particular privileged position in the justice system to provide assistance to a criminal organization contrary to the criminal law of this country. We think it is important to apply a sanction that will be effective in deterring other lawyers who will need to resist requests from clients for illegal assistance. In order to maintain public confidence in the legal profession, there should be no possibility of doubt that the Law Society takes such conduct with the utmost seriousness, and the profession needs to know that as well.

[40] We have reached the conclusion, accordingly, that Mr. Mastop should be disbarred, and we so order.