2014 LSBC 01
Report issued: January 16, 2014
Oral Reasons: October 21, 2013
Citation issued: December 20, 2012

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

RONALD WAYNE PERRICK

Respondent

Ruling on Application Concerning Abuse of Process

Hearing date: October 21, 2013
Panel: David M. Renwick, QC, Chair, John S. (WoodY) Hayes, Public representative, Bruce LeRose, QC, Lawyer

Counsel for the Law Society: Alison Kirby
Appearing on his own behalf: Ronald Perrick

[1] Pursuant to Rule 5-5 of the Law Society Rules, counsel for the Law Society was seeking:

(a) an order that the prior judicial decision of Madam Justice Allan dated May 1, 2009 (the "Allan Reasons") be admitted into evidence as prima facie proof of the matters before the Hearing Panel, except as it relates to allegation 5(c) of the citation; and

(b) an order that the Respondent be prohibited from re-litigating the matters before Madam Justice Allan based on the legal doctrine of abuse of process.

[2] There are 11 allegations in the citation broken into five categories, as follows:

(a) improper use of an expired power of attorney;

(b) backdating assignment of shares to a date prior to the death of the parents;

(c) failure to respond to communications from another lawyer;

(d) three allegations of failure to provide quality of service; and

(e) five allegations of breach of Law Society Rules.

[3] These matters arose and relate to the Respondent's conduct while acting for [number] British Columbia Ltd. (the "Company") respecting the sale of property on the south end of Seymour Street in Vancouver, BC, (the "Property") and the subsequent payment to the Respondent for fees and/or commission from monies paid into Ron Perrick Law Corporation (RPLC) trust account in 2006.

[4] The substance of many of the allegations in the citation were the subject of judicial comment in two judicial proceedings:

(a) a Rule 18A Application before Mr. Justice Rice, decided January 23, 2007 (the "First Action") between the Company and the Respondent and RPLC;

(b) a claim concerning fees before Madam Justice Allan, decided May 1, 2009 (the "Second Action") between the Company and the Respondent and RPLC.

[5] The Property was sold to C Corp. with a closing date of February 9, 2006. The sale proceeds were placed into RPLC's trust account, and a dispute arose over when the money was to be distributed and the amount of the fee.

[6] In the Reasons for Judgment in the First Action, Mr. Justice Rice made the following observations:

> [26] The handwritten schedule of March 2, 2006, which was sent another two times, was not a statement of account. It did not comply with the Act. It was not signed on behalf of Mr. Perrick or accompanied by a letter signed by or on behalf of Mr. Perrick that refers to the purported bill. ... It was at best a discussion document, and Mr. Perrick admits that he had not decided how to bill the plaintiff company when he presented the plaintiff company with it. …

[7] After a 22-day hearing, Madam Justice Allan made a number of determinations, including, inter alia, that:

> (a) there was no written retainer agreement setting out the terms of the Respondent's fee arrangement; and
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> (b) the Respondent prepared assignments backdated to October 21, 2004 in which the parents assigned all of their voting shares in the Company and M Ltd. to RW.

[8] The learned judge determined that the Respondent's misconduct precluded him from being paid a fee and found that:

> [144] Mr. Perrick removed a total of $926,916 from trust in four tranches without any authorization, before submitting a statement of account, and knowing that his fee was probably not going to be acceptable to the plaintiff. …
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> [145] At the time he removed his last fee payment of $185,000 from trust in April 2006, Mr. Perrick was aware that Mr. Ward had been retained by AW's siblings to dispute his fees. … That withdrawal contravened the Law Society Rule 3-57(5). …
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> [147] … He adamantly refused to render a fee account until June 15, 2006. That 34-page account, backdated to February 9, 2006, was clearly provided in response to the action commenced by the plaintiff a week earlier.

[9] Counsel for the Law Society has prepared a comprehensive Notice to Admit (NTA) to which the Respondent has prepared a Response. Of the 117 paragraphs in the NTA, only 27 paragraphs were not admitted.

[10] The Law Society is relying, inter alia, on the NTA, together with the Allan Reasons to establish the allegations in the citation, except allegation 5(c).

[11] The law is clear that the Allan Reasons may be admitted into evidence as prima facie proof of the allegation of misconduct as set out in the citation. In *British Columbia (Attorney General) v. Malik*, 2011 SCC 18, the Supreme Court of Canada determined that a judicial decision relating to a matter where the parties are the same, or were themselves participants in the prior proceeding in similar related issues, is admissible in a subsequent matter.

[12] In *Law Society of Upper Canada v. Marler*, 2010 ONSLAP 29, the Appeal Panel, when commenting on the admissibility of the judicial findings, held:

> [19] In our view, the Society was entitled to rely on judicial findings to make out its case, without

> presenting the underlying evidence in support. The appellant was a party to those proceedings, and actively participated in each. He testified. On certain key issues, he was disbelieved. The findings were made on the balance of probabilities. The law is now clear that this is the same standard imposed on the Society to prove professional misconduct and conduct unbecoming: [See *F.H. v. McDougall*, [2008] S.C.J. No. 54].

[13] In our view, the Hearing Panel is entitled, at a minimum, to treat the findings of fact made against the Respondent in the Allan Reasons as prima facie truth of those facts.

[14] Once the judicial decision is admitted into evidence, it is then up to the Panel to assess the weight to be given to the Judge's findings and conclusions, having regard to the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity of the prejudiced party to contest it.

[15] Notwithstanding the evidence is admissible, the Respondent will have an opportunity to lead fresh or compelling evidence to contradict or lessen the weight given to it by the Hearing Panel. However, the Respondent is not entitled to re-litigate.

[16] We accept the Law Society's position that the facts and conclusions in the Allan Reasons should be introduced into evidence as prima facie evidence of the Respondent's misconduct because:

> (a) the Respondent was a party to the prior litigation and was given the opportunity to fully contest the allegations in the 22-day trial;
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> (b) the issues in the trial were the same or very similar to those underlying the allegations set out in the citation;
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> (c) both deal with trust activity and accounting of trust funds on one client matter;
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> (d) both deal with the terms of a retainer and whether a legal bill was rendered; and
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> (e) both deal with whether, during the course of the retainer, the Respondent committed any misconduct.

[17] At the end of the submissions, the Respondent agreed that the decision of Madam Justice Allan could be admitted into evidence as prima facie proof of the matters before the Hearing Panel; however, he wanted an opportunity to call evidence on the basis that the decision of Madam Justice Allan was no longer valid.

[18] The doctrine of abuse of process by re-litigation is discretionary.

[19] In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, the Supreme Court of Canada applied the doctrine of abuse of process to prohibit re-litigation on the grounds that it would be detrimental to the adjudicative process. The Court held:

> 50 … A proper focus on the process, rather than on the interests of the party, will reveal why relitigation should not be permitted in such a case.
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> 51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources … Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[20] Further, in *Toronto (City) v. C.U.P.E., Local 79*, the Supreme Court of Canada felt that re-litigation should be avoided as it causes serious detrimental effects to the system, unless the circumstances dictate that re-litigation is in fact necessary to “enhance the credibility and the effectiveness of the adjudicative process as a whole” (paragraph 52). The Court provided some examples where re-litigation would enhance, rather than impeach, the integrity of the judicial system:

> (a) when the first proceeding is tainted by fraud or dishonesty;
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> (b) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or
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> (c) when fairness dictates that the original result should not be binding in the new context.

[21] The rationale for such a policy is noted by Binnie, J. in *British Columbia (Attorney General) v. Malik*, (supra), where he stated:

> 40 In a number of decisions our Court has emphasized a public interest in the avoidance of “[d]uplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings.” (*Danyluk v. Ainsworth Technologies Inc.*, [2001] SCR 460 at para 18)

[22] In *Law Society of Upper Canada v. Coady*, 2009 ONLSHP 0051, where the hearing panel relied on the reasons for judgment in making its finding of misconduct, noted:

> [11] … Much of the evidence introduced by the Society is the record of proceedings in the Ontario Court … Clear and unequivocal findings of fact are found in many of these documents. Given that these findings have been made by judges of the Superior Court of Justice after full and exhaustive consideration of the evidence before them, and given that their findings and conclusions have for the most part been upheld by the Divisional Court or the Court of Appeal for Ontario, we consider them in this proceeding to be compelling evidence of Coady’s conduct. In our view, in the absence of new or compelling evidence that was not considered by the judges in those judicial proceedings, we should not make different findings from those made by the justices of the Superior Court, confirmed on appeal. To do so would be to permit a collateral attack against those findings and would result in an abuse of process.

[23] We adopt the comments made by the hearing panel in Coady.

[24] The trial before Madam Justice Allan revolved around the Respondent’s conduct in a real estate transaction. She was left to determine whether he was entitled to a fee on the basis of quantum meruit or, alternatively, to determine whether the fee charged was reasonable and fair in all of the circumstances. She decided that the Respondent’s misconduct prevented him from a fee based on quantum meruit, and held that he was not entitled to any fee. Portions of her decision form the evidentiary basis for most of the allegations in the citation.

[25] The Respondent originally proposed to call 18 witnesses. Most of these individuals participated in the litigation before Madam Justice Allan, either as counsel or as witnesses, except for two Law Society staff. The Law Society contends that to allow any of these witnesses to testify would effectively result in re-litigating of the matter.

[26] The Respondent referred to a number of cases, including *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600, and *Harbuz v. Capital Construction Supplies Ltd.*, 2013 BCSC 1624. These cases stand for the proposition that, before the issue of estoppel can be raised, the decision in question must be a final decision.

[27] The Respondent contends that a decision will only be final after an appeal has been heard. He refers to the comments made by Arbour, J., who in *Toronto (City) v. CUP.E. Local 79*, (supra), at paragraph 46, states:

> 46 … A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties *only when all available reviews have been exhausted or abandoned*.
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> [emphasis added]

[28] The Respondent referred to the comments made by Binnie, J. in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, where, at paragraph 24, quoting from Middleton, JA in the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 DLR 420 at p. 422, he noted:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

[29] The Respondent takes the position that the judgment of Madam Justice Allan no longer remains because, after the judgment, he filed a Notice of Appeal, and prior to the hearing of the Appeal, the matter was settled between the parties. He contends that, as there was no appeal heard, there was no final determination. He contends that the settlement between the parties effectively erased the judgment of Madam Justice Allan.

[30] This suggestion has no merit. Clearly, the Respondent, by settling the issues in dispute in the Notice of Appeal with the parties, resulted in abandonment of the appeal. Quoting Madam Justice Arbour in *Toronto (City) v. C.U.P.E.* (supra), we note:

> 46. A decision is final and binding on the parties only when all available reviews have been exhausted or *abandoned*.
>
> [emphasis added]

DECISION

[31] We are satisfied that the Reasons for Judgment of Madam Justice Allan dated May 1, 2009 can be admitted into evidence and can serve as prima facie proof of the matters before us, except in relation to allegation 5(c) of the citation.

[32] Secondly, we are satisfied that to allow the calling of witnesses as suggested by the Respondent amounts to re-litigation of the matters before Madam Justice Allan, and would result in an abuse of process. The Respondent has not shown that any new or compelling evidence, not previously available, would come from these witnesses.

[33] Furthermore, we are satisfied that the decision of Madam Justice Allan is a final decision, and remains intact, as the Respondent’s appeal was abandoned, presumably because of a settlement between the parties.

[34] As a result of the foregoing, the panel orders that:

(a) the decision of Madam Justice Allan dated May 1, 2009 may be admitted into evidence as prima facie proof of the matters before the Hearing Panel, except as it relates to allegation 5(c) of the citation; and

(b) the Respondent is prohibited from re-litigating the matters before Madam Justice Allan.