2014 LSBC 08
Report issued: February 24, 2014
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Martin Drew Johnson

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: October 17, 2013
Panel: **Majority decision**: Tony Wilson, Chair, Dan Goodleaf, Public representative **Concurring decision**: Dale G. Sanderson, QC, Lawyer

Counsel for the Law Society: Larry R. Jackie, QC
Counsel for the Respondent: Gregory P. DelBigio, QC

MAJORITY DECISION OF TONY WILSON AND DAN GOODLEAF

[1] We agree with the result in this matter expressed by panellist Dale G. Sanderson, QC, and that the Respondent, Martin Drew Johnson, has committed professional misconduct in respect of the circumstances described in Mr. Sanderson's reasons, namely, using the words "fuck you" to a witness who was a police officer in a corridor outside a courtroom at the Kelowna courthouse.

[2] To us, saying "fuck you" to a witness in anger, and meant as an insult to the recipient, clearly constitutes a marked departure from what the Law Society expects of its members as enunciated in the *Professional Conduct Handbook* in force at the time of the incident, as specified in paragraph [40] of Mr. Sanderson's reasons, and indeed in the *Code of Professional Conduct* now in force in British Columbia.

[3] However, having read the reasons of our learned colleague, we differ with how he framed the issue. The issue is not whether saying "fuck you" to a witness in a proceeding within a courthouse hallway is excusable in the particular circumstances of this case, namely, provocation by the witness (who happened to be a police officer). In our view, provocation is irrelevant to a determination of professional misconduct. Whether or not a lawyer could be pushed to a "breaking point" is irrelevant to a determination of professional misconduct. The fact that litigation can sometimes be hostile, aggressive and fierce is irrelevant to a determination of professional misconduct. The only issue for this Panel to determine is whether or not the Respondent's use of "fuck you" as an insulting interjection, spoken in anger to a witness in a courtroom hallway, constituted professional misconduct. That is the only issue.

[4] In addition to our differences as to how our learned colleague framed the issue, we also have a different interpretation of some of the facts and inferences upon which he based his reasons.

[5] It may be correct that Officer B overreacted in his dealings with the Respondent and that he may not have had reasonable grounds to make an arrest or to handcuff the Respondent and take him into custody. And, it may well be that Officer B did perceive the actions of the Respondent as constituting an act of

assault. But based on the evidence, we cannot say that the conduct of Officer B was both “extreme and unnecessary” given that the Officer and the Respondent were “nose to nose”. Nor can we agree that the Respondent was “paraded” down the hall, as stated in paragraph [41]. On the contrary, the Court Sheriff’s evidence was that he assisted Officer B in “escorting” Mr. Johnson down the hall.

[6] As for whether or not the words “fuck you” were spoken in anger, there is evidence from Crown Counsel that the Respondent became angry, and the demeanour of both the Respondent and Officer B were heated and volatile at the time they were “nose to nose” and moments later when the Respondent uttered the words “fuck you”. Accordingly, it is the view of the Majority that the words were spoken in anger, and not innocuously or harmlessly. Indeed, under the circumstances, it is clear the Respondent could not have used those words in these particular circumstances without the words being meant as an insult and spoken, no matter how loudly, in anger.

[7] Likewise, we do not see the facts of this case as an over-aggressive police officer provoking a lawyer into uttering a verbal insult, leading to a citation from the Law Society. Although Officer B might have taken more proactive steps to diffuse the situation, we believe the Respondent had a higher duty to avoid putting himself into the position where the police officer and Mr. Johnson were “nose to nose”, leading to the expletive being angrily uttered by him.

[8] Obviously, we recognize that the use of the word “fuck” in its various word combinations and permutations isn’t as taboo as it used to be. For good or for bad, it is not uncommon to hear the word in its various forms on television or in the movies. Despite the argument that it is still “profane”, we all know it is used in everyday conversation harmlessly and innocuously, although one probably would not use it with one’s mother or with small children in the room. It is used in humour, literature and music. It is used when one stubs one’s toe, falls down skiing, makes a mistake, or even as a form of self-deprecation. It is used by athletes in sports, and by disappointed or excitable fans. It has been used by presidents, prime ministers, Nobel laureates and Academy Award winners. Its use is not going away, and nor should it. Consequently, we wish to make it clear that our decision is not meant to deny the use of a word in the English language that people may hear or use all the time, or otherwise interfere with one’s freedom of speech. Rather, we wish to make it clear to members of the profession, that insults or profanity, if uttered in anger (whether using the f-word or not), directed to a witness, another lawyer, or member of the public in the circumstances and the place in which it was used by the Respondent, are not acceptable and can constitute professional misconduct.

[9] We also wish to make it abundantly clear that there should not be a defence of “provocation” as suggested by our learned colleague. Although the Majority agrees that the Respondent had committed professional misconduct by uttering those words in anger within a courthouse, we believe that the Respondent had an obligation to ignore any “provocation” by the witness, “rise above the fray”, and act with civility and integrity in a dignified and responsible way that lawyers are expected to act, notwithstanding the fact that acting as a lawyer and advocate can sometimes be hostile, aggressive and fierce.

[10] We do not accept that there are any circumstances in which a lawyer in a courthouse could say “fuck you” in anger to a witness, to another lawyer or to any member of the public. Such conduct might well lower the reputation of the legal profession in the eyes the public and, arguably, bring the administration of justice into disrepute.

[11] Excerpts from the *Professional Conduct Handbook* in operation at the time of the incident make it clear what the Law Society and the public expects of our profession; namely, that:

> ... it is a lawyer’s duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with

other lawyers and demonstrate personal integrity.

A lawyer should treat adverse witnesses, litigants, and counsel with fairness and courtesy, refraining from all offensive personalities.

All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

[emphasis added]

[12] Our new *Code of Professional Conduct* has similar obligations imposed on lawyers.

[13] We believe that public confidence in the administration of justice and in the legal profession may be eroded by conduct such as the Respondent's conduct in this case. We believe that a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, avoid even the appearance of impropriety, and uphold the standards and reputation of the legal profession. The Respondent's conduct failed to meet that standard.

[14] Accordingly, it does not matter if a lawyer is provoked, or whether the lawyer has reached a breaking point or if litigation is sometimes hostile, aggressive and fierce. Saying "fuck you" to a witness, another lawyer, or a member of the public in a courthouse in an angry, insulting, hostile or belligerent manner, as the Respondent did, is totally indefensible, is always a marked departure from the standard of conduct that the Law Society expects of lawyers and, therefore, always constitutes professional misconduct.

CONCURRING DECISION OF DALE G. SANDERSON, QC

Background

[15] The Respondent, Martin Drew Johnson, has been cited for professional misconduct pursuant to section 38 of the *Legal Profession Act*. He admits that he said the words "fuck you" to a police officer in a corridor outside a courtroom at the courthouse in Kelowna. His remark was overheard by Crown counsel, but no one else. His remark was made at the end of a quiet corridor. At issue is whether saying "fuck you" to a witness in a proceeding within a courthouse corridor, (whether that witness was a police officer or not) is excusable in the particular circumstances of this case, namely, provocation by the police officer.

[16] The citation alleges:

> On or about March 9, 2011, in the course of representing your client LP at the Kelowna Courthouse, you were involved in an altercation outside of the courtroom with B, a police officer who was also a potential witness, contrary to the Canons of Legal Ethics and Chapter 2, Rule 1 of the Professional Conduct Handbook.

Service of the citation has been admitted.

[17] For the reasons that follow, I conclude that the Respondent's conduct constitutes professional misconduct.

THE FACTS

[18] On March 9, 2011, Mr. Johnson was acting as defence counsel for an accused person before the Provincial Court in Kelowna. The accused had been charged with assaulting his estranged spouse. The

trial started at approximately 2:00 pm, and the complainant gave evidence and was cross-examined by Mr. Johnson. The court proceedings adjourned for the afternoon break after that cross-examination, and Mr. Johnson and Crown counsel spoke. They agreed that an appropriate disposition for the case would be that the accused post a Peace Bond.

[19] The Crown counsel indicated that he wanted to speak to the police officer, and Mr. Johnson and Crown counsel exited the courtroom. Mr. Johnson invited the police officer and Crown counsel to discuss the possible resolution. During the discussion, Mr. Johnson advised the police officer that his client would like to attend the matrimonial home and remove some of his personal possessions. Mr. Johnson was in possession of information that some of his client's personal possessions were at risk of being stolen.

[20] When Mr. Johnson asked Officer B if he would attend the premises with his client, Officer B refused to do so. Officer B said, "It's the RCMP that will have to do it and they are not going to." Mr. Johnson then said, "On the street, the police may have the power or authority, but in the court the judge has the power."

[21] Mr. Johnson describes Officer B's manner as offensive. Crown counsel described Officer B as at first being insistent until Mr. Johnson asked him to do something he did not want to do. Crown counsel testified that Officer B then raised his voice a bit and was unyielding. He said that the discussion became heated and volatile and that they were essentially inviting each other to "fuck off". Crown counsel testified that they were standing close to each other, less than an arm's length away.

[22] Crown counsel said that Officer B was a young officer and that an older officer might have defused the situation. He said Officer B was about 30 years old. Mr. Johnson was approximately 61 at the time. He had recently undergone hip replacement surgery. Mr. Johnson testified that he is five foot nine inches tall and weighs 179 pounds. He estimated Officer B to be about six feet tall and weighing between 200 to 220 pounds.

[23] Crown counsel intervened, stepping between the two and saying words to the effect of, "This is silly." He proposed that Mr. Johnson's client provide a list of items that he wanted to retrieve from the matrimonial home, which would be given to his estranged wife. She could then advise which chattels on the list could be removed, and those that were not agreed to would be determined later by the court.

[24] This proposal was acceptable to Officer B and Mr. Johnson. Crown counsel testified that he believed this was agreeable to everybody and that Mr. Johnson turned and started walking back down the hallway. Mr. Johnson testified that he did not start walking away but rather stayed facing Officer B who was standing with his back to the wall (or window) in the corridor. It is not necessary to determine which recollection of that event is correct as it is not material for our determination of this issue. What happened next is material.

[25] Crown counsel recalls that Officer B said something to Mr. Johnson. He cannot, however, recall what was said. Mr. Johnson testified that he asked Officer B, "Did you smell the marijuana in the house when you went there?" Mr. Johnson asked this because his client had instructed him that his client's wife had called his client and asked him to come by the house. His client had been told or learned that his daughter had been seeing a person known to be a drug user and that his client's property was being stolen from the former matrimonial home. When his client arrived at the former matrimonial home, he saw a police car but went into the house anyway because of his wife's request. When he went into the house Officer B was there, and he arrested him for breach of recognizance. Mr. Johnson was instructed that his client then took Officer B to the garage and asked if he could smell the marijuana.

[26] Mr. Johnson said his question to Officer B in the courthouse on March 9, 2011 was relevant because it had to do with the second charge against his client, namely breach of recognizance. Mr. Johnson testified that Officer B then said to him, "Don't for a minute think that I don't know who you are and what you are

about." Mr. Johnson testified that he was shocked and astonished by the remarks and he then said to Officer B "fuck you". Mr. Johnson testified that he immediately regretted what he was saying. He also testified that Officer B then approached him and they were nose to nose.

[27] Crown counsel testified that he recalled Mr. Johnson approaching Officer B. Crown counsel testified that there was only an inch or two between their faces and that Officer B said, "You don't scare me, you big shot lawyer." Crown counsel recalled that Officer B pointed out that Mr. Johnson's chest was touching his and Officer B then said, "That's assaulting a police officer."

[28] Mr. Johnson testified that he said to Officer B, "You are assaulting me." To which Officer B replied, "You haven't seen anything until you've seen an RCMP assaulted." Mr. Johnson and Crown counsel both testified that Officer B then moved into him very quickly, said that he was under arrest and very quickly grabbed Mr. Johnson's left arm and tried to spin him. Mr. Johnson was pushed or forced up against the window in the corridor and put his hands out to brace himself.

[29] Mr. Johnson had an artificial hip replacement surgery done the previous year and as a result was unable to spin around. It is apparent that a type of struggle ensued, that ended up with Mr. Johnson being pinned against the glass wall and placing his hand on the window to prevent himself from falling over. Officer B was substantially larger and younger than Mr. Johnson. Immediately a court sheriff's officer intervened to assist in the arrest. Mr. Johnson was placed in handcuffs and was taken down the hallway in front of all the people who were in the hallway. Crown counsel, who has been practising since 1974, said it was one of the most distressing things he had ever witnessed in his career.

[30] I found Crown counsel and Mr. Johnson were both honest and credible witnesses who were doing their best to recall the events. I found that Crown counsel was unable to recall certain events with clarity or certainty, and he candidly acknowledged that in his testimony. His recollection of what happened was less certain than Mr. Johnson's recollection. Where the evidence of Mr. Johnson and Crown counsel is different, I am unable to accept that Crown counsel's evidence is to be preferred because of his generally less certain recollection. The other independent observers were unable to add any evidence to assist in resolving these few differences. As the onus is on the Law Society to prove its case on a balance of probabilities, I conclude that, since I cannot say that the evidence of Crown counsel is to be preferred over the evidence of Mr. Johnson in the areas where their evidence is different, the Law Society has not proved those facts to the required standard.

[31] Based on all of the evidence I find as fact the following:

> (a) the Respondent asked Officer B to attend the former matrimonial home with his client while he picked up a few of his belongings;
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> (b) Officer B refused;
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> (c) Officer B's demeanour was unyielding, and his voice became raised, insistent and offending;
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> (d) both men became heated and volatile;
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> (e) Crown counsel intervened and suggested a solution that seemed workable to both sides;
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> (f) an older more experienced police officer would likely have defused the situation;
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> (g) after the Respondent asked Officer B if he could smell the marijuana in the house, Officer B said, "Don't for a minute think that I don't know who you are or what you are about";
>
> (h) the Respondent was shocked by this remark, and quickly said "fuck you" to Officer B. He immediately regretted saying this;

(i) at this point they came very close together, almost nose to nose. Their chests or stomachs were touching;

(j) Officer B said, “You don’t scare me, you big shot lawyer,” and he pointed out that their chests were touching. Officer B then said, “That’s assaulting a police officer”;

(k) the Respondent said, “You are assaulting me,” to which Officer B replied, “You haven’t seen anything until you’ve seen an RCMP assaulted”; and

(l) Officer B then spun the Respondent around, arrested him and handcuffed him with the assistance of one of the sheriff’s officers.

[32] Officer B sought to have charges laid against the Respondent for assault, and the Panel was told by counsel that the approving officer in Kelowna referred the matter to the Prince George Crown for determination if charges should be laid. Charges were ultimately not laid against the Respondent for assault or any other offence.

[33] Based on the evidence we heard, I conclude that the officer overreacted and did not have reasonable grounds to make an arrest, handcuff the Respondent and take him in to custody.

[34] The prosecutor who observed the whole incident testified that he did not think it would have been appropriate to lay assault charges against the Respondent.

[35] One of the two issues to be resolved is whether or not the Respondent physically assaulted or came into contact intentionally with Officer B. Counsel for the Law Society advised the Panel that he did not believe that the evidence could support an allegation of assault and that he was not making such an allegation.

[36] Crown counsel testified that the Respondent and Officer B were touching and that they were face to face or chest to chest, but he could not say who initiated the physical contact. The Respondent testified it was Officer B who initiated the physical contact and not him. It is important to note that Officer B did not testify. We were told that he was unable to testify because he is currently suffering from a medical condition that is unrelated to this incident.

[37] The burden is on the Law Society to prove on a balance of probabilities that the Respondent has committed professional misconduct. *Law Society of BC v. O’Neill*, 2013 LSBC 23.

[38] The Law Society has not met the burden in this case to prove that the physical contact or assault, if there was one, was initiated or caused by the Respondent. All that can be said is that there was physical contact and the Respondent testified that it was not initiated by him. I have no reason not to accept the evidence of the Respondent on this point, and I do so. Again, Officer B did not testify, which is unfortunate, given the circumstances of his arrest of the Respondent.

[39] That leaves the central issues of whether the use of discourteous and intemperate language to a witness in a courthouse constitutes professional misconduct and what effect the provocation in this case would have upon that determination. That is, does the use of rude and profane language in any circumstance constitute professional misconduct, or are there circumstances where provocation might excuse it.

[40] I am of the view that Officer B’s conduct was a serious aggravating factor that caused the Respondent to say what he did. Officer B declined what appears to be a reasonable request for assistance. I find that he did so in a confrontational and aggressive manner and tone. Once the matter had been resolved by a suggestion from Crown counsel, Officer B’s further remark, “Don’t for a minute think I don’t know who you

are and what you are about," could be taken as a veiled threat against the Respondent. He was communicating to the Respondent that he "knew who Mr. Johnson was," potentially implying some form of reprisal. He later said, "You haven't seen anything until you have seen an RCMP assaulted." Again, this may suggest a physical threat to the Respondent, given that Officer B had just accused him of assaulting an RCMP officer. The latter remark was, however, made after the Respondent's profanity.

[41] I find that, after the Respondent spoke the profane words to Officer B, Officer B over-reacted. He initiated a fairly serious and severe physical arrest with the assistance of others, and he caused the Respondent to be handcuffed and, according to the evidence of the Respondent, paraded down the hall to a private room. I conclude that the conduct of Officer B was both extreme and unnecessary.

[42] A lawyer must, at all times, act with professionalism, restraint and courtesy. The *Professional Conduct Handbook* in force in March 2009 stated:

> Preamble
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> These Canons of Legal Ethics are a general guide, and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned. …
>
> In these several capacities it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.
>
> Chapter 1 Rule 2(1) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
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> Chapter 1 Rule 3(4) A lawyer should treat adverse witnesses, litigants, and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public opportunity.
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> Chapter 1 Rule 4(1) A lawyer's conduct towards other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling.
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> Chapter 1 Rule 5(6) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

[43] Similar rules have been incorporated into the current *Code of Professional Conduct for British Columbia*. See rules 2.1-4(a); 2.2-1; 2.2-2; 7.2-1; and 7.2-4. What the Law Society, through the *Code of Professional Conduct*, seeks to achieve is a practice where lawyers are courteous, respectful and act in a dignified and professional way.

[44] It is apparent from the foregoing references to the *Professional Conduct Handbook* that a lawyer must act with restraint, dignity and courtesy in dealings with the public, witnesses and other lawyers.

[45] It is clear in this case that the inappropriate remarks of the Respondent were provoked by the conduct of Officer B. However, that does not necessarily make the conduct excusable.

[46] Lawyers often find themselves in highly confrontational and emotionally charged situations. Lawyers must always remember that they must conduct themselves in the manner that the Law Society expects of them. The test for professional misconduct is "whether the facts as made out disclose a marked departure from the conduct the Law Society expects of its members; if so it is professional misconduct." (*Law Society of BC v. O'Neill* (supra), and the cases cited therein.)

[47] I recognize that no-one is perfect and that every person has a breaking point. I also accept that the use of discourteous or profane language may be excusable in certain cases where the provocation is extreme. The general issue seems to be, could a reasonable member of the Law Society, acting with courtesy, fairness, integrity, honesty and dignity, be driven to the breaking point by the particular circumstances of provocation such that his inappropriate response would be excusable. I believe that there are circumstances when a reasonable lawyer could be driven to such a point. If that occurs, the particular conduct of the lawyer may be excusable. Each case will, however, depend on the degree of provocation and the nature of the lawyer's reaction.

[48] I conclude that, while the remarks of the Respondent are understandable, they are not excusable and constitute a marked departure from what the Law Society expects of its membership. I find that the Respondent's words constitute professional misconduct. I feel that a reasonable and proper response from the Respondent was to say nothing further. He should have bitten his lip and walked away.

[49] The public's confidence in their public institutions, such as the courts, and the integrity of the legal profession, are but a few of the underpinnings in safeguarding a free and democratic society. The use of profanity by the Respondent, a member of the legal profession and an officer of the court, towards a potential witness in a case within the confines of the courthouse and within the presence of others could have the effect of eroding public confidence in these bodies and constitutes behaviour that I believe must be rebuked.

[50] Counsel for the Respondent submitted that the life of a barrister is inherently one of conflict, that tempers will flare and exchanges will be made. Counsel further submits that aggravation, irritation or intimidation directed to a member of the legal profession is sufficient to excuse the remarks of the Respondent.

[51] Even if litigation can occasionally be hostile, aggressive and even fierce, that does not, in our view, excuse the conduct of the Respondent. If indeed the practice of litigation has become aggressive and fierce, then it becomes even more important that the Law Society, to the extent it can, control and limit the type of behaviour that constitutes a marked departure from the conduct it expects from its members.

[52] In my view, the conduct of Officer B was not so aggravating or severe to excuse the conduct of the Respondent. Accordingly, in these circumstances, I find the Respondent in breach of Section 38 of the *Legal Profession Act* in that he has committed professional misconduct.