2015 LSBC 34
Decision issued: July 9, 2015
Citation issued: September 26, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a section 47 review concerning

STANLEY CHANG WOON FOO

APPLICANT

DECISION OF THE BENCHERS ON REVIEW

Review date:	December 8, 2014
Benchers:	Nancy Merrill, Chair Satwinder Bains Lynal Doerksen Martin Finch, QC Dean Lawton A. Cameron Ward Tony Wilson
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Applicant:	Richard Gibbs, QC

SUMMARY

[1] This is a Review pursuant to s. 47 of the *Legal Profession Act* arising from the hearing panel's decision on Facts and Determination issued September 6, 2013 (the "F & D Decision") and the Disciplinary Action decision issued April 30, 2014 (the "DA Decision") with respect to Mr. Foo's conduct in the Quesnel courthouse.

[2] The event that gave rise to the complaint and citation can be summarized as follows. The Applicant, who normally represented parents of children who had

been apprehended by the Ministry of Children and Family Development, saw a Ministry social worker ("AM"), whom he had never met, in a hallway of the Quesnel courthouse and asked "Are you 'AM' … the social worker?" The social worker answered "maybe –who's asking?" The Applicant then said "I should shoot you … you take away too many kids."

[3] The evidence clearly established what the Applicant said to AM, and there is no dispute in terms of the words said.

[4] Was the hearing panel correct in determining that this comment, in the circumstances, constituted professional misconduct?

[5] The hearing panel found that the Applicant committed professional misconduct in respect of such comment and ordered a two-week suspension, plus costs.

[6] The Notice of Review sets forth a number of grounds for review that can be summarized as follows:

(a) Did the hearing panel err in finding the Applicant's conduct at the Quesnel courthouse whereby he stated to a social worker for the Ministry of Children and Family Development that he "should shoot" her because she "takes way too many kids" constitutes professional misconduct?

(b) Was the hearing panel correct in ordering a two-week suspension?

(c) Was the hearing panel correct in ordering costs under Rule 5-9, Schedule 4 (costs tariff)?

[7] In an Agreed Statement of Facts ("ASF") signed by the Applicant on April 4, 2013, he admitted the facts underlying the conduct and that the only issue in dispute was whether or not the admitted facts constituted professional misconduct.

[8] The Law Society submitted that the review should be dismissed on the basis that the hearing panel did not err as alleged by the Applicant or at all, and was correct in its determination of professional misconduct and correct in ordering the suspension and costs. In particular, it was the Law Society's submission that:

(a) the evidence clearly established what the Applicant said to the social worker and the evidence amply supports the hearing panel's finding as to the context in which his comments were made;

(b) the hearing panel made no error in the test for professional misconduct or its application of that test;

(c) the hearing panel correctly found that, even if the Applicant intended to make a joke, the context in which the joke was made met the marked departure test for professional misconduct;

(d) the hearing panel's failure to consider s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") was not in error in that, assuming the Applicant's comment is protected under s. 2(b) of the *Charter,* the balancing of the competing interests still warrants a finding of professional misconduct.

STANDARD OF REVIEW

[9] This Review is governed by s. 47 of the *Legal Profession Act* (the "*Act*"). Pursuant to s. 47(5) of the *Act,* the Benchers on Review may either confirm the decision under review or substitute any other decision the hearing panel could have made pursuant to s. 38(5) of the *Act.* The applicable standard of review is "correctness." The Review panel has the right to substitute its view for that of the hearing panel if the Review panel finds that it was incorrect.

[10] The review panel in *Law Society of BC v. Hordal,* 2004 LSBC 36 (at paragraph 18), held that the correctness standard as it relates to disciplinary action is informed by the reasonableness test. If a disciplinary action is "reasonable" or within the range of sanctions levied for similar misconduct, the correctness test will be satisfied. The panel in *Hordal* said:

> In considering questions regarding the correctness of the magnitude of a fine, or of the duration of a suspension, the Benchers must examine the impugned conduct and determine if the proposed penalty falls within a "range" of penalties that have been applied in similar situations in the past. This examination is often referred to as a "reasonableness" test, and in our view that characterization is sometimes wrongly contrasted with the correctness test. It is the view of the Benchers that to be correct, the proposed fine or suspension duration must be "reasonable" or within the range of appropriate penalties for similar delicts. In other words, the "correctness" test is informed by the "reasonableness" test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension duration in those circumstances.

[11] In terms of whether a review panel should modify the decision of the original hearing panel, the review panel in *Hordal* determined that

> … it would be improper for the Benchers to interfere with the fine quantum and/or suspension duration, as it was suggested that conduct by the Benchers would amount to "tinkering" with the determination of the Hearing Panel. Within certain parameters, we agree that it is inappropriate for the Benchers to "tinker" with determinations by a Hearing Panel.

[12] *Hordal* was considered by the review panel in *Law Society of BC* v. *Chiang*, 2014 LSBC *55*, where it held at paragraph 28 that the correctness standard is subject to two qualifications:

> (a) if factual matters are in dispute and the initial hearing panel made factual findings grounded in an assessment of credibility, the review panel should show deference to the hearing panel in respect to those factual findings; and
>
> (b) in reviewing a suspension order, the review panel should consider the hearing panel's decision to order the suspension, and the duration of that suspension, to be correct if it falls within an appropriate range.

DISCUSSION

[13] Counsel for the Applicant submitted that the comment to the social worker that he "should shoot" her because "she takes way too many kids" did not amount to professional misconduct for the following reasons:

> (a) It was not a threat because it was neither meant as a threat nor interpreted as a threat by the social worker. The Applicant was attempting to be funny, and even the social worker to whom the comment was directed did not actually believe the threat would be acted on but found it to be highly inappropriate;
>
> (b) The comment by the Applicant was in the nature of banter, which was a result of the social worker's relaxed demeanour and her "playful social gambit" when the Applicant addressed her in the hallway of the Quesnel courthouse. Specifically, when the Applicant asked, from 20 feet away, "Are you "AM" the social worker?" she responded "maybe, why?" This seemingly set the stage for a joking banter between the Applicant and the social worker when the "shooting" comment was made. It was Mr. Gibbs' position that the Applicant was trying to be funny, even though the joke fell remarkably flat, and was remarkably unfunny;

(c) The Applicant was a "socially awkward, bombastic lawyer, from a different cultural background," and the shooting comment was "nothing more than an awkward attempt to be funny";

(d) There was a six-month delay between the date of the incident and the date when the matter was eventually reported to the Law Society. The allegation was made that there were those in the Ministry of Children and Family Development who would prefer not to see the Applicant working in the Quesnel area anymore because he represented clients opposing the Ministry of Family and Child Services; and

(e) The hearing panel failed to mention or consider the Applicant's fundamental freedom under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, namely the freedom of opinion and expression, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[14] The hearing panel determined that the comment amounted to professional misconduct because it was a marked departure from the conduct the Law Society expects of lawyers. *Law Society of BC v. Martin*, 2005 LSBC 16, prescribes a test for marked departure as follows: "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[15] In *Re: Lawyer 12*, 2011 LSBC 35, the review panel (majority and minority decisions) determined that the test for marked departure also required the element of "culpable neglect" and that, if the alleged "marked departure" was the result of events beyond the lawyer's control or the result of an innocent mistake, it was likely not a marked departure.

[16] It is the Review Panel's decision that the hearing panel did not err on the issue of the comment being a threat and merely joke. Although "I should shoot you …. You take away too many kids" was not meant as a threat, in AM's interview with the Law Society, (admitted as evidence at the hearing on Fact and Determination) AM admitted taking Mr. Foo's comments as a threat, although she did not believe the Applicant would act on that threat. Said the panel:

> Even if the Respondent did not intend to intimidate or threaten AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he "should shoot" her and that she "takes away too many kids") would have in this emotionally charged situation where parents are in conflict with the

> Ministry and where others outside the courtroom would overhear his comments.

[17] We agree with the position of the Law Society, namely, that it is not necessary to prove that the words were intended to be threatening in order to prove professional misconduct.

[18] Mr. Foo's counsel submitted that the comment made by the Applicant to AM was not a comment that amounted to professional misconduct, but instead, was nothing more than "playful banter" by a "socially awkward, bombastic lawyer, from a different cultural background … attempting to be funny."

[19] Whether the Applicant was from a different cultural background, or was socially awkward, or was simply attempting to be funny, should not take away from or excuse the words themselves. "I should shoot you … You take away too many kids" cannot not be perceived as a joke or playful banter when said in a courthouse to a social worker who dealt in the emotionally charged environment of child apprehension, notwithstanding that there may have been nervous laughter at the time the comment was made. We agree that the hearing panel correctly applied the test for marked departure, even if the comment was meant as a joke.

[20] The six-month delay between the date of the incident and the date when the matter was eventually reported to the Law Society does not in any way mitigate the inappropriateness and severity of the "shoot the social worker" comment. AM made a complaint to the police within a week of the event, which means she found the comment to be serious enough to make the complaint. A complaint was subsequently made to the Law Society, which led to the citation. Nothing turns on the delay. The allegation that the Ministry of Children and Family would prefer not to see the Applicant working in the Quesnel area anymore because he represented opposing clients is mere speculation and is not substantiated by any evidence. Moreover, whether the Ministry would prefer not to see the Applicant in Quesnel anymore is not relevant to whether the comment itself, in the context that it was made, was a marked departure. We agree with the Law Society's position that the reason a complaint is made is not relevant to the assessment of whether the conduct complained of constitutes professional misconduct.

[21] It is suggested by counsel for the Applicant that AM's demeanour, or her comment to the Applicant ("who's asking?" when he called out her name), somehow gave the Applicant licence to "joke around" with AM. However, in humour, everything depends on context, circumstances and timing. In Mr. Foo's case, he lacked the common sense to appreciate that the context, circumstances and timing of his attempt at humour were profoundly wrong. The quip: "I should shoot you … You

take away too many children" spoken in a courthouse by a lawyer to a female social worker, whom that lawyer had never met, involved in the apprehension of children was more likely to be construed as a threat than a joke, and the comment can only be construed as a marked departure from that conduct the Law Society expects of lawyers.

[22] Accordingly, we agree with the submission of the Law Society. Where a male lawyer attempts to make a joke that involves violence to a woman unknown to him, who represented parties adverse in interest to parties the lawyer represented, in a courthouse, in front of a partisan audience, it is clearly a marked departure from the standard the Law Society expects of lawyers. Lawyers are free to joke, but are expected to exercise the etiquette, decorum and common sense to appreciate what is appropriate to the situation and setting. In short, this comment was not suitable for this situation and setting.

[23] Lawyers should not be joking about shooting social workers in courthouses for the same reason that aircraft passengers should not be joking about bombs in airplanes. In particular, lawyers cannot and should not make jokes in the workplace that target violence against other persons in the workplace, particularly women. Had the comment been made at a house party in circumstances where AM and the Applicant had a professional or personal relationship where they could joke around about any topic, a comment such as this would likely not have amounted to a marked departure because it would likely have been interpreted as a joke; albeit a poor one.

[24] Humour always depends on circumstances, timing and context. As there was no professional or personal relationship between them, because AM was involved in an emotionally charged environment of apprehending children and having to deal with the parents of those children in her position with the Ministry, and because the comment was made in a courthouse with other people around, the timing, context and circumstances for any joke of this kind could not have been worse. Accordingly, we find that the hearing panel did not err in its finding that the Applicant's comment amounted to professional misconduct.

[25] Counsel for the Applicant raised a *Charter* argument, namely that the hearing panel failed to mention or consider Mr. Foo's fundamental freedom under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, namely the freedom of opinion and expression, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The Applicant did not challenge the constitutionality of any code of conduct applicable to him.

[26] The Applicant has been called to the Bar in three different jurisdictions: Ontario, British Columbia and New York State. He has been a member of the British Columbia bar since 1995. At the hearing on Facts and Determination, the Applicant was represented by counsel. Surprisingly, neither his then counsel, nor the Applicant, raised s. 2(b) of the *Charter of Rights and Freedoms*. Accordingly, the hearing panel did not consider s. 2(b) of the *Charter* because the Applicant and his counsel neglected to raise it.

[27] Nevertheless, no objection having been raised on behalf of the Law Society, the Review Panel must address the issue raised by Mr. Foo's current counsel. The leading case on this issue is *Doré v. Barreau du Québec*, 2012 SCC 12, which determined the framework to be applied with respect to administrative tribunals tasked with the responsibility of disciplining lawyers when the right to freedom of expression is engaged.

[28] The test for professional misconduct when considering conduct that engages in *Charter* protected values is *Law Society BC v. Harding*, 2013 LSBC 25. The test is as follows:

> ... the test is whether the facts made out disclose a marked departure from the conduct the Law Society expects of its members, having properly balanced the relevant *Charter* value with the Law Society's public mandate and objectives; if so, it is professional misconduct.

Accordingly, a finding of professional misconduct must properly balance any freedom of expression right that the Applicant has against the Law Society's mandate to protect the public interest in the administration of justice.

[29] In *Doré*, the Supreme Court of Canada considered an appeal of a Québec lawyer who was disciplined by the Barreau du Québec for his conduct in writing a "personal" letter to a judge, which contained extremely critical remarks about the judge, after the judge criticized the lawyer in court and in the judge's written decision. The initial hearing panel found that the letter was "likely to offend and is rude and insulting" and that the statements made by the lawyer in the letter had "little expressive value." The panel determined that the letter was not private, because the lawyer had written the letter in his capacity as a lawyer.

[30] The lawyer appealed to the Supreme Court of Canada, and argued that the Code of Ethics, as they pertained to his criticism of the judge, violated his free speech rights protected by s. 2(b) of the *Charter*. In terms of administrative tribunals, the Supreme Court of Canada, at paras. 55 and 56, provided some guidelines for this issue:

(a) How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balance, the decision-maker should first consider the statutory objectives. …;

(b) Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

[31] In *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869, the Supreme Court of Canada held that the infringement of a *Charter* right was justified by the Law Society of Manitoba's objectives of protecting the administration of justice and the public. Said the court, "if an autonomous Law Society is to enforce a code of conduct among its members, as indeed is required by the public interest, a power to discipline its members is essential."

[32] We are persuaded by the Law Society's submission on this issue, namely, that a licence to practise law is a privilege, and not a right. Those who are licensed must accept that, in exchange for the privilege of membership in the Law Society, they must comply with the rules or limits the Law Society, as the regulator, may make about a licensee's conduct and behaviour.

[33] The question in this case is whether or not the hearing panel unreasonably impeded Mr. Foo's right to freedom of expression by finding that his conduct constituted professional misconduct and disciplining him for that conduct. Mr. Foo's comment that he "should shoot" AM because "she takes away too many kids" is a statement that is not protected under his right to freedom of expression under s. 2(b) of the *Charter*.

[34] In *R v. Khawaja*, 2012 SCC 69, the Court found "It makes little sense to exclude acts of violence from the ambit of s. 2(b), but to confer protection on threats of violence. ... Threats of violence, like violence, undermine the rule of law. … They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression. … Threats of violence fall outside the s. 2(b) guarantee of free expression."

[35] The Review Panel agrees with the position of the Law Society that the finding of professional misconduct is not a disproportionate response to the conduct and does not unreasonably limit Mr. Foo's right of to freedom of expression. This is because the comment involved a threat of violence that was, in and of itself, harmful,

notwithstanding Mr. Foo's intent that it was to be understood as a joke or banter. Additionally, his comment served no legitimate purpose in either advancing the interests of his client or the public interest in permitting lawyers to voice criticism of other participants in the justice system.

[36] The comment was made to a person whom the Applicant had never met and was not made within the context of representing a client or advancing a client's case in some manner or even as a result of provocation. We agree with the position of the Law Society that his comment "I should shoot you … You take away too many kids" was egregious because of the person to whom the comment was made, the place where it was made, the context of what was said and what was said had no legitimate legal purpose. The comment did not advance a client matter to resolution.

[37] We also agree that restricting freedom of expression by finding the Applicant guilty of professional misconduct does not impede a lawyer's duty to speak his or her mind. As per the Court's decision in *Doré*, lawyers can speak their mind and carry out their duties with "dignified constraint." If the Applicant really had an issue about the Ministry unnecessarily taking away too many children from their parents, he could have advanced that issue in a dignified manner, not by telling a social worker for the Ministry that he should "shoot her," even in jest.

[38] On the basis of *Hordal*, the Review Panel does not believe it should modify the two-week suspension ordered by the hearing panel, as that would amount to "tinkering," which *Hordal* disapproved.

[39] The Review Panel agrees with the Law Society's submission that costs are not ordered as punitive measures for professional conduct but ordered separately and independently from any sanction imposed and are not intended to address the conduct that is the subject of the citation but rather the costs resulting in the hearing of the matter. It is not appropriate to compare costs ordered against various respondents for similar misconduct because of a number of other variable factors that go into costs, including the role of the respondent lawyer in conserving or increasing the costs, admissions of fact, and timing of admissions. The fact that the Law Society did not seek costs in another case (*Harding*) is not relevant.

[40] Accordingly, the application is dismissed and the determination of the hearing panel that the Applicant's conduct amounted to professional misconduct is affirmed. The two-week suspension is hereby affirmed, and costs are as ordered by the hearing panel, including the six months that the panel allowed for payment.

[41] This Review Panel also makes an order that the Applicant pay the costs of this Review and the parties may make written submissions on quantum and time to pay within 30 days of this decision. Additionally, if the Applicant and the Law Society cannot agree between themselves as to when the suspension should start, the parties may also make submissions on that issue.