THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

NEIL WILLIAM SULLIVAN (the "member")

- and -

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

Hearing Date:	October 18, 2018
Panel:	Richard J. Scott (Chair) Wendy Stewart Marston Grindey (Public Representative)
Counsel:	Rocky Kravetsky for the Law Society of Manitoba Saul Simmonds for the Member

DISPOSITION OF THE DISCIPLINE COMMITTEE

Background and Submissions

1. The panel reconvened on October 18, 2018 for the purpose of conducting a sentencing hearing, following the release of our Reasons for Decision on March 26, 2018. In that decision, the member was found guilty of "professional misconduct in failing to discharge his legal responsibilities in the circumstances with integrity, as well as, his failure to provide his clients with service that was competent." To fully understand the factual background and substantive issues then before the panel, it will be helpful to first review the March 26, 2018 Reasons for Decision.

2. Today, we were presented with a submission by counsel jointly recommending that:

"...the Discipline Committee Panel make an Order that:

1. Mr. Sullivan:

   a. Pay a fine to the Society of $10,000;
   b. Pay costs to the Society of $30,000;

2. Mr. Sullivan's Practising Certificate be cancelled and a new one issued subject to the condition that within three months of it becoming available Mr. Sullivan successfully complete a course of study in real estate law, practice and ethics to be developed and administered by the Education Department of The Law Society of Manitoba at Mr. Sullivan's expense."

3. At the conclusion of submissions, after adjourning to consider the arguments presented, we agreed to accept the joint recommendation and so advised counsel and the parties.

4. These are our reasons for doing so.

5. The starting point for us is the recent unanimous decision of the Supreme Court of Canada in *Anthony-Cook v. Her Majesty the Queen*, 2016 SCC 43, wherein the court dealt explicitly with circumstances in which a judge (and by analogy a tribunal such as here) can depart from a joint submission on sentence. As Moldaver J. writing for the court, explained, there are four alternatives to consider: the fitness test; the demonstrably unfit test; the public interest test; and an approach that treats the fitness and public interest tests as basically the same. He concluded that the public interest test is the proper legal test to be applied. At para. [32], "Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest." At para. [31], "It is more stringent than the other tests proposed and it best reflects the many benefits that joint submissions bring to the criminal justice system and the corresponding need for a high degree of certainty in them."

6. Moldaver J. quoted with approval, at para. [33], *R. v. Druken*, 2006 NLCA 67, 261 Nfld. & P.E.I.R. 271, at para. 29, that to be contrary to the public interest means the joint submission is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system." To further emphasize the point, Moldaver J. went on to note at para. [34], "Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold – and for good reason."

7. Finally for our purposes, we note that a discipline panel of this Law Society in *The Law Society of Manitoba v. Orlikow*, 2018 MBLS 1, applied the *Anthony-Cook* rationale in determining that the public interest test mandated "a very high bar to a rejection of a joint submission."

8. In support of the joint submission, counsel for the Law Society rightly emphasized a previous discipline decision, *The Law Society of Manitoba v. Nadeau*, 2013 MBLS 4, in which the panel conducted a compendium analysis of the approach to be taken and the principles to be applied in determining the appropriate level of punishment for professional misconduct. The panel noted:

> "In Lawyers & Ethics: Professional Responsibility and Discipline, Gavin MacKenzie ("MacKenzie"), Carswell 2012, Release 3, the author comments on the purposes of discipline proceedings, at p. 26-1:
>
> > 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 in which professional misconduct is either admitted or proven, the penalty shall be determined by reference to these purposes. ---"

9. Significantly for our purposes, in *Nadeau*, the panel used as a guideline the factors emphasized by the Law Society of British Columbia in the *Law Society of British Columbia v. Ogilvie* [1999] L.S.D.D. No. 45, [1999] LSBC 17, Discipline Case Digest 99/25, as follows:

> "In the *Law Society of British Columbia v. Ogilvy (sic)* [1999] L.S.D.D. No. 45, [1999] LSBC 17, Discipline Case Digest 99/25, a discipline panel of the Law Society of British Columbia laid down some of the appropriate factors which might be taken into account in disciplinary dispositions, at page 10: "(a) The nature and gravity of the conduct proven; (b) the age and experience of the respondent; (c) the previous character of the respondent, including details of prior disciplines; (d) the impact upon the victim; (e) the advantage gained or to be gained, by the respondent; (f) the number of times the offending conduct occurred; (g) whether the respondent had acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances; (h) the possibility of remediating or rehabilitating the respondent; (i) the impact on the respondent of criminal or other sanctions or penalties; (j) the impact of the proposed penalty on the respondent; (k) the need for specific and general deterrence; (l) the need to ensure the public's confidence in the integrity of the profession; and (m) the range of penalties imposed in similar cases."

We too agree with these criteria.

10. Taking each factor in turn, counsel for the Law Society emphasized how the proposed disposition, to a significant extent, well met these criteria looking at them in totality.

11. We concur with this submission as does counsel for the member, who stressed the concluding paragraph in the lengthy report of a registered psychotherapist who, after dealing extensively with the member, opined:

> "In conclusion, Mr. Sullivan is dealing with the aftermath of having been found guilty of professional misconduct in a mature and responsible way. Psychotherapy has proven helpful in providing perspective on his over-all life, personal characteristics and future hope. In describing Mr. Sullivan, I paraphrase Carl Rogers who conveyed that most people are inherently good and will move in a direction that would improve society or preserve the human race if given the chance. I believe that Mr. Sullivan is sincere about managing his professional conduct in such a way as to disallow problems from happening, and when they do, he makes every effort to correct them."

12. Counsel for the member noted as well the supporting letters of reference from clients, real estate agents and other lawyers, most of whom were generally aware of what had befallen the member. Counsel highlighted the psychotherapist's opinion that the member did not "suffer with concerning personality problems" and that he had a "sound work ethos." The member, he noted, has a clean record, other than the matters before us. The member, he stressed, understands the professional consequences of what he did, has better insight now, feels remorse and has taken responsibility for his actions.

13. Finally we heard from the member himself, who expressed regret for his behavior, had apologized to his clients and reviewed the significant steps he has taken to ensure that history does not repeat itself.

Disposition

14. The joint submission before us amply meets the standard mandated by the Supreme Court of Canada in *Anthony-Cook v. Her Majesty the Queen*, 2016 SCC 43.

15. In the result, we order that a penalty be imposed upon the member in accordance with the recommendation set forth in paragraph 2 hereof.

16. Our thanks to both counsel for your helpful submissions.

DATED this 14th day of November, 2018.

Richard J. Scott

Wendy Stewart

Marston Grindey