Citation: The Law Society of Manitoba v Young, 2018 MBCA 126

Date: 20181128
Docket: AI17-30-08944

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Freda M. Steel
Madam Justice Diana M. Cameron

BETWEEN:

THE LAW SOCIETY OF MANITOBA	)	***G. M. Wood***
	)	*for the Appellant*
	)	
(Applicant) Respondent	)	***R. H. Kravetsky*** ✓
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard and*
JAMES GRAEME EARLE YOUNG	)	*Decision pronounced:*
	)	***November 19, 2018***
	)	
(Respondent) Appellant	)	*Written reasons:*
	)	***November 28, 2018***

On appeal from 2017 MBLS 9

CHARTIER CJM (for the Court):

[1] A panel of the discipline committee of the Law Society of Manitoba (the Panel) found the respondent guilty of numerous instances of professional misconduct. The Panel ordered that the respondent be disbarred. He now appeals. After hearing submissions from counsel, we dismissed the appeal with reasons to follow. These are those reasons.

[2] The respondent was facing 12 counts on two Citations. He contested four of the charges and admitted liability with respect to the other eight. Of the four contested charges, two were dismissed and he was found guilty on

the other two. In the end, he admitted or was found guilty of 10 charges, the specifics of which follow:

- three charges of misappropriation relating to three different clients involving seven instances of misappropriation of client trust funds totalling over $80,000, spanning a period of almost four years (Counts 1, 3 and 9);
- two charges of breaching trust conditions (Counts 2 and 5);
- one charge of misleading clients (Count 4);
- three charges of failing to comply with undertakings to the Law Society of Manitoba (Counts 7, 10 and 12); and
- one charge of providing false information to the Law Society of Manitoba (Count 11).

[3] The respondent was also ordered to pay $42,106.11 in costs to the Law Society of Manitoba (the Law Society).

[4] The respondent's notice of appeal raises 32 grounds of appeal. On the view that we hold of this matter, the issues can be reframed to the following three grounds of appeal:

1. Did the Panel err in receiving evidence with respect to two charges, which were ultimately dismissed, relating to the SD and SC misappropriation complaint (Counts 6 and 8)?

2. Are the Panel's liability findings with respect to the two charges to which he pled not guilty unreasonable (Counts 9 and 11)?

3. Is disbarment unreasonable in the circumstances?

[5] At the beginning of the hearing, we dealt with two motions that were before us. The Law Society had initially moved for a sealing order with respect to the appeal books and the transcripts of the proceedings, as well as for an order excluding members of the public or an order banning publication of any information that may compromise any solicitor-client privilege, but that motion was withdrawn.

[6] The second motion was made by the respondent who moved to introduce fresh evidence: a recently completed psychological report. The Law Society was opposed to the request. Fresh evidence principles are found in *Palmer v The Queen*, [1980] 1 SCR 759. Though it is a criminal case, it applies to non-criminal matters as well. In general, parties will not be allowed to present fresh evidence on appeal if, by due diligence, that evidence could have been presented in the first instance. The fundamental reason for the fresh evidence principles is that there is both a public and private interest in the finality of litigation. As this Court recently stated in *G (JD) v G (SL)*, 2017 MBCA 117 (at para 39):

> Absent a miscarriage of justice, which I have not been convinced occurred here, the principles of certainty and finality in litigation do not allow for a party to attempt to resurrect his or her case from an unfavourable ruling by proffering evidence that could have been readily available at trial through a motion for fresh evidence on an appeal.

[7] We agree with the Law Society that the fresh evidence motion is an attempt by the respondent, who was represented by experienced counsel, to bolster his case from an unfavourable ruling in which deliberate decisions were made not to adduce this type of evidence. In our view, with a modicum of due diligence, this evidence could easily have been adduced at the hearing before the Panel, especially considering that exactly this type of evidence was adduced at a previous hearing. As a result, the motion for fresh evidence was denied at the hearing.

[8] We now turn to the appeal proper.

[9] In reviewing the issues of liability and penalty, it is trite to say that this Court owes deference to the Panel's decision. The Panel's misconduct findings and its decision to disbar the respondent are to be reviewed on the standard of reasonableness, which involves asking, "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision" (*Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 47). See also *Doolan v Law Society of Manitoba*, 2016 MBCA 57 at paras 61-63.

[10] With respect to the first ground, the respondent claims that the Panel should not have heard any evidence on the SD and SC misappropriation complaint (Counts 6 and 8). He submits that there was no reason to proceed on this matter because SD and SC sought to withdraw their complaint; declined to cooperate with the Law Society; and later stated that they agreed with the respondent's position (that the payment they sent him was not a retainer, but a repayment of an old loan made to SC). He claims that

proceeding on this baseless complaint unduly influenced the Panel with respect to the other matters before it.

[11] The Panel was of the view that, given the particular circumstances in which the payments were made, more scrutiny was required. SD and SC had made a complaint to the Law Society claiming that the respondent had inappropriately diverted their retainer payment. Records showed that their payment was never placed in the respondent's law firm trust account, but rather into the respondent's personal bank account. The respondent's position was that their payment was not a retainer, but a repayment of an old loan made to SC.

[12] At the hearing, the Panel reviewed a series of emails between the complainants and the respondent that the Law Society argued constituted admissions by the respondent that the money paid by SD and SC was for legal work, not the repayment of an old loan. In the end, after considering the evidence tendered and the respondent's testimony, the Panel concluded that the Law Society did not meet its onus and dismissed Counts 6 and 8.

[13] We do not accede to this ground of appeal. In our view, the circumstances surrounding the SD and SC complaint warranted, at minimum, an explanation or further examination. Had the respondent been that concerned about being prejudiced by having these counts heard at the same time as the other 10, he could have moved for severance. Moreover, the respondent's claim that the Panel was unduly or improperly influenced because of hearing evidence on the complaint is without merit. The Panel's reasons show that it was careful not to let itself be influenced by any other credibility ruling involving the same witness when it stated (at para 88):

> We acknowledge that with respect to the other contested matter, we conclude that [the respondent] did not tell us the truth under oath. However, we are not persuaded that a witness who lies about some events must be found unreliable and not credible with respect to his testimony on unrelated matters.

[14] The second ground concerns whether the Panel's liability findings with respect to the two counts the respondent contested are reasonable (Counts 9 and 11). Count 9 alleges that the respondent misappropriated $2,500 of the $4,000 in cash that LY had given him as part of a retainer. LY claims that the respondent accepted her $4,000 retainer cash payment but that when his assistant returned with the retainer letter, it referenced only an amount of $1,500. The evidence shows that the respondent's own notes confirmed that LY was to provide him with a retainer of $4,000. It is not disputed that on the same day that LY said she provided the $4,000 cash retainer that the respondent deposited $2,300 in cash to an account in his name.

[15] Count 11 relates to the respondent's own response to the above-mentioned Count 9 (LY's complaint that he misappropriated $2,500). The allegation is that he provided false information to the Law Society when asked to respond to LY's complaint by providing correspondence that she only gave him $1,500 and not the $4,000 she claims.

[16] The Panel had to consider the evidence as a whole and determine, on a balance of probabilities, whether Counts 9 and 11 had been proven. After providing comprehensive reasons for its findings, it found the respondent guilty on both counts. The Panel reviewed at length the *viva voce* and the documentary evidence. Three persons testified. The Panel considered the

evidence of the respondent and one of his friends CC on one side, and LY on the other. Where it found it appropriate to do so, the Panel drew reasonable inferences from the evidence.

[17] Moreover, the Panel clearly understood the factual issues arising from the evidence, including that credibility was the critical issue. The Panel found LY to be credible and rejected the respondent's evidence, as well as the evidence of CC. Key to its decision was the Panel's conclusion that LY's evidence was consistent with the independent documentary evidence before it, namely smartphone and bank records. In reaching its conclusion, the Panel also considered certain inconsistencies in LY's evidence and explained why they did not undermine her credibility.

[18] As already mentioned, the respondent denied LY's claim that he had misappropriated the $2,500. He and his witness CC gave evidence that was completely inconsistent with LY's accusation. The Panel explained in detail why it found that both the respondent and CC were not credible. It concluded that, after attempting to persuade LY to withdraw her complaint, the respondent and CC had presented a false story to the Law Society. It compared their testimony with the independent documentary evidence and found numerous inconsistencies that damaged their credibility. These inconsistencies are described in detail in the Panel's reasons.

[19] Appellate intervention is unjustified on this ground either. We are all of the view that the Panel's professional misconduct finding on both Counts 9 and 11 is justified on the evidence. The Panel seized the substance of the critical issue, which was credibility. Its credibility findings are supported by a "line of analysis within the given reasons that could reasonably

lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Law Society of New Brunswick* at para 55).

[20] The third and final ground concerns whether the respondent's disbarment was unreasonable in the circumstances. The respondent admitted to two counts of misappropriating client trust funds and was found guilty on the third misappropriation involving LY's $2,500. These misappropriations of client trust funds totalled over $80,000 and spanned a period of almost four years. The respondent also admitted to three charges of failing to comply with undertakings to the Law Society; two charges of breaching trust conditions; and one charge of misleading clients. Finally, he was found guilty of providing false information to the Law Society.

[21] The Law Society submitted to the Panel that the appropriate penalty in the circumstances was disbarment. For his part, the respondent argued for a continuation of his existing suspension from practice for a further eight to nine months. It is necessary to place this suspension in its proper timeframe. For our purposes, two dates are important. The first date is April 24, 2014. While the respondent was being investigated by the Law Society for other charges of professional misconduct, he gave an undertaking to the Law Society on April 24, 2014 to practice under supervision; to cooperate with his supervisor; to document all communications; and to record his time on each client file. The second date is July 6, 2015. On that date, another panel of the discipline committee of the Law Society accepted a joint recommendation, after the respondent pled guilty to 19 charges of professional misconduct for events occurring over a two-year period (2012 to 2014), to suspend the respondent from practising law for eight months ending on March 8, 2016.

[22] With respect to the 10 professional misconduct charges that form part of this appeal, five were in regard to conduct that occurred before April 24, 2014 (Counts 1 to 5); four were with respect to conduct that occurred after he was placed under supervision on April 24, 2014, but before he was suspended on July 6, 2015 (Counts 7, 9-10 and 12—three breaches of undertaking to the Law Society and one count of misappropriation); and one was in relation to conduct that occurred while he was serving his suspension from practice (Count 11—giving false information to the Law Society).

[23] The respondent submits that the Panel's rejection that his admitted misappropriations were inadvertent is unreasonable and that circumstances allowed for consideration of a sanction less than disbarment. As earlier indicated, he admitted to two charges of misappropriation. The Panel did not accept the respondent's argument that the misappropriations were either "technical" (at para 118), the result of "mere oversight or carelessness" (at para 126) or "carelessness, incompetence or the consequence of an overworked lawyer functioning in a fog of depression" (at para 127). The respondent urged the Panel to find that these circumstances allowed for a suspension rather than disbarment.

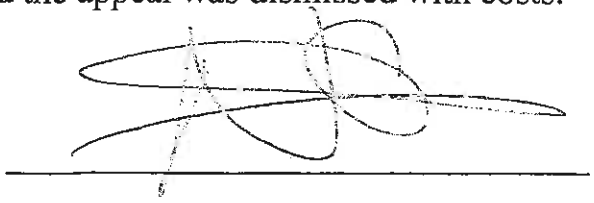
[24] The Panel recognised that some of the misappropriations involving the unauthorised use of trust funds to pay for work were not as severe as where a lawyer had done no work and misappropriated trust funds. However, the Panel also correctly recognised that other misappropriations were more severe, such as the misappropriation involving LY. In addition, the Panel explained why it rejected the respondent's claim that his actions were at the less serious end of the misconduct spectrum. It noted the deliberate nature of some of the misconduct; the seriousness of other conduct; his concerted

efforts to mislead the Law Society while he was suspended because of earlier charges; and that he was writing coherently to his clients and others when claiming he was in a fog of depression.

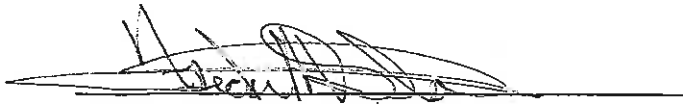
[25] As this Court has already stated, any unauthorised use of client trust funds by a lawyer amounts to misappropriation. Lawyers who misappropriate their client's money act without integrity. The Panel found that the respondent had repeatedly ignored his obligation to act with integrity and disbarred him. In our view, disbarment was most certainly a reasonable decision in the circumstances. We have no trouble concluding that the interpretation placed upon the respondent's actions by the Panel, and specifically its considered rejection of his explanation to mitigate the penalty, was reasonable.

[26] In the end, the Panel's decision to disbar is supported by a "line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Law Society of New Brunswick* at para 55) and falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). We see no basis to intervene.

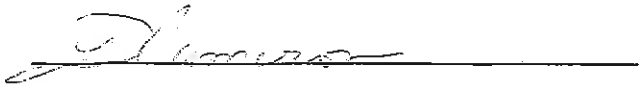
[27] In the result, the sealing order motion was withdrawn, the fresh evidence motion was denied and the appeal was dismissed with costs.



CJM



JA



JA