ICase Name:

Connor v. Law Society of British Columbia

Re: Patricia Colleen Connor and the Law Society of British Columbia
IN THE MATTER OF the Judicial Review Procedure Act
Between
Patricia Colleen Connor, petitioner, and
The Law Society of British Columbia, respondent

[1980] B.C.J. No. 1394

[1980] 4 W.W.R. 638

Vancouver Registry No. A791137

British Columbia Supreme Court
Vancouver, British Columbia

Murray J.

Heard: November 23, 29, 1979.
Judgment: filed January 3, 1980.

(23 paras.)

Counsel:

John Laxton and James Hogan, for the petitioner.
B.A. Dyer, for the respondent.

1 **MURRAY J.**:-- The petitioner applies under the provisions of the Judicial Review Procedure Act, S.B.C. 1976, c. 25, to quash the verdict of the Hearing Committee of the Law Society of British Columbia by which verdict it was held unanimously that the petitioner had been guilty of professional misconduct and conduct unbecoming a member of the Law Society and by which verdict it was recommended that the petitioner be disbarred.

2 Three grounds are advanced on the part of the petitioner as to why the verdict should be quashed. Those grounds are as follows:

> That on two of the six days on which the Hearing Committee sat to hear evidence a quorum was lacking.
> That the Hearing Committee failed to entertain submissions by the petitioner after making its findings of fact and prior to rendering its verdict.
> There was a likelihood of bias on the part of one of the members of the Hearing Committee.

3 I turn now to a consideration of each of the foregoing grounds in the order set out above.

LACK OF QUORUM

4 The facts are that the Hearing Committee sat a total of six days to hear evidence. On two of those six days one member of the Committee was not present but counsel for the petitioner stated "I am consenting to the proceedings carrying on. Insofar as my consent is valid at all, we are giving it to you." The member of the Committee who was absent on the two days in question read the transcript of the proceedings covering those two days prior to participating in the unanimous decision of the Committee.

5 The legislation bearing on this branch of the case is contained in subsections (1) and (2) of Section 43 of the Legal Professions Act, R.S.B.C. 1960, Chapter 214, which reads as follows:

> (1) The Benchers shall appoint from among their numbers a Discipline Committee composed of a Chairman, Vice-Chairman, and all other Benchers.
>
> (2) Three members of the Discipline Committee constitutes a quorum."

6 The Rules of the Law Society bearing on this branch of the case are contained in Chapter 7, Articles 4.1 and 4.2. They read as follows:

> "4.1 The Discipline Committee shall consist of a Chairman and a Vice-Chairman and all other Benchers. A quorum shall not be less than three."
>
> "4.2 A quorum of the Discipline Committee to be known as the Hearing Committee shall sit as required for the purpose of hearing citations,..."

7 By virtue of the provisions of Section 37(2) of the Interpretation Act, S.B.C. 1974, Chapter 42 the above rules have the force of statute.

8 In British Columbia Government Employees Union and Sealey v. The Public Service Commission et al (1979) 10 B.C.L.R. 87, Bouck J. said at pages 91 and 92:

> " I will first of all deal with the application to quash. At the hearing before me I was told by counsel that only two members were on the commission at all relevant times. The third member was appointed on 5th December 1978. While it was a two-member commission it could not legally function because the legislature specifically provided in s. 3 of the Public Service Act that 'the commission shall consist of not less than 3 members.'
>
> It would seem to follow that anything done under the authority of the commission when it was composed of only two persons is a nullity..."

9 That reasoning, in my view, applies to the facts of the case before me.

10 Bouck J. also dealt with the question of waiver at pages 92 and 93 as follows:

> " An affidavit of the chairman was filed on behalf of the respondents. In it he stated that at the hearing of August 16th, 1978 he offered an adjournment when counsel for the petitioners complained of the attendance of only two commissioners. The applicants elected to proceed. On this basis the respondents argue that the petitioners have waived the right to complain because the commission was then made up of only two members. I disagree.
>
> Because of the explicit language of the statute requiring no less than three members to conduct such a hearing, the commission could not acquire Jurisdiction on the basis of a waiver whether two or only one member sat to hear the appeal. The legislature decided the minimum number of commissioners was three. It was a condition inserted for the benefit of the public in the broad sense and all those who might be affected by the commission's decisions. It was not merely a protective device which only interested the parties themselves. Therefore neither of them could waive their rights to a hearing before a commission consisting of less than three: Craies on

Statute Law, 7th Ed., pp.269-71."

11 On the hearing before me counsel for the respondent quite properly conceded that the Legal Professions Act and the Rules of the Law Society constitute "public interest" legislation. This concession is borne out by the wording of Chapter 7, Article 1.1 of the Rules of the Law Society which provides:

> "1.1 It is the intention that discipline procedures should be a model of simplicity, fairness and expediency, designed to provide maximum protection to both the public and the bar." (My underlining.)

12 While I cannot agree that the authors of the Rules achieved their intention of making them a "model of simplicity", they clearly set out that the Rules are designed in the public interest. It is accordingly clear that the right to a full quorum at all relevant times could not be waived by the petitioner. Later in these reasons I will deal with the results which flow from the lack of quorum.

FAILURE TO ENTERTAIN SUBMISSIONS AS TO VERDICT

13 On this branch of the case the facts are that after the Hearing Committee had heard all of the evidence in the case it adjourned the proceedings until April 4th, 1979 at which time it handed down a written document containing not only its findings of fact but also its verdict that the petitioner had been guilty of professional misconduct and conduct unbecoming a member of the Law Society. In combining the findings of fact and the verdict the Hearing Committee violated the provisions of Chapter 7, Article 5.11 of the Rules of the Law Society in that it did not permit the parties to make submissions as to verdict. The relevant part of the Rules reads as follows:

> "5.11 If the Hearing Committee is unanimous in its finding of fact it shall entertain submissions by counsel for the Law Society and the Respondent or his counsel as to verdict..."

14 The failure of the Hearing Committee to respect the principle audi alteram partem resulted in a breach of natural justice. The effect of that breach I will deal with later in these reasons for judgment.

BIAS

15 The facts relating to the question of bias arise from the affidavit of James W. Hogan, who acted for the petitioner at the hearing before the Hearing Committee. He deposed that after the hearing he had a conversation with one of the members of the Hearing Committee during which conversation the member asked him "what the fuss was about and why we intended to dispute the recommendation" and then went on to say "he could not understand our position because he thought this was the most clear-cut case of disbarment (he) had ever seen and (he) had thought so from the outset of the case." (My underlining.)

16 The foregoing affidavit was not contradicted and while there were other allegations of bias advanced by the petitioner I do not find it necessary to deal with them as I consider that the foregoing remarks in themselves are sufficient to disqualify the member who made them. In this connection I need only refer to what was said by Dubin J.A. in the case of Re W.D. Latimer Co. Ltd. et al (1974) 52 D.L.R. (3d) 161 at page 173:

> "Evidence of prejudgment, however, is a ground for disqualification, unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry."

17 The statute in the case at bar does not specifically permit the type of prejudgment that took place in the case at bar. In view of the fact that the above member of the Hearing Committee held a rigid view of the guilt of the accused from the very outset of the hearing he should have promptly disqualified himself from sitting at all.

THE REMEDY

18 I have concluded that all three grounds of attack made by the petitioner on the proceedings of the Hearing Committee are valid but it is urged upon me by counsel for the respondent that I should refuse the relief in the nature of certiorari which is requested by the petitioner on the ground that such relief is discretionary in nature and the petitioner should be left to her remedy by way of appeal under the provisions of Section 62 of the Legal Professions Act which reads as follows:

> If it is alleged that the Benchers have erred in refusing to call an applicant to the Bar or to admit an applicant as a solicitor, or that the Discipline Committee or the Benchers have erred in the disciplinary action taken against a person, or that the Benchers have erred in a determination

> respecting the competence of a member to practise, an appeal lies to the Court of Appeal, and the Court of Appeal may make such order as to it seems just in the premises, either reversing, confirming, or varying the refusal or disciplinary action or determination respecting competency to practise, or referring the matter for further inquiry by the Benchers."

19 For the purposes of this argument I will assume dubitante that Section 62 provides the petitioner with a right of appeal from the verdict of the Hearing Committee (as distinguished from the Disciplinary Committee). For the purposes also of this argument I do not find it necessary to decide whether or not the three grounds of error on which the petitioner has succeeded go to lack of jurisdiction, loss of jurisdiction or excess of jurisdiction, or whether the decision of the Hearing Committee was void or voidable. Those difficult problems are raised in the different approaches taken by the Judicial Committee of the Privy Council in Calvin v. Carr (1979) 2 W.L.R. 755 and by the Supreme Court of Canada in Harelkin v. University of Regina (1979) 3 W.W.R. 676.

20 In the Harelkin case certiorari was refused in the exercise of the discretion which the Court possessed because it was held that the right of appeal to the Senate Committee constituted an adequate alternative remedy. In this connection Beetz J. said at page 697:

> "In order to evaluate whether the appellant's right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs several factors should have been taken into consideration, among which the procedure on the appeal, the composition of the senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs."

21 Assuming that I have a discretion in the case at bar I would exercise that discretion in favour of the petitioner as I am satisfied that the remedy under the Judicial Review Procedure Act is the better and more adequate remedy than the appeal which may (or may not) exist under Section 62 of the Legal Professions Act. The mere fact that I have a doubt about the application to this case of Section 62 is one factor which impels me to exercise my discretion in the manner I have indicated. I also exercise my discretion in favour of the petitioner as I consider the remedy asked for by the petitioner is more expeditious and less costly. No lengthy appeal books were required to support this application and the matter came before me much earlier than it could have come on in the Court of Appeal.

22 In the result therefore the verdict of the Hearing Committee will be quashed and a new hearing is ordered to be held before a committee constituted of different members of the Benchers from those who sat during the proceedings questioned before me.

23 The petitioner will have her costs of these proceedings.

MURRAY J.

qp/s/qlpha