

## **Fred Collins Marion Lowther**

Vancouver, B.C.

Called to the Bar: July 10, 1980

**Discipline hearing:** February 27, 2002

**Panel:** Robert W. Gourlay, QC, Chair, James D. Vilvang, QC and Anne K. Wallace

**Report issued:** March 11, 2002; indexed as [2002] LSBC 05

**Counsel:** Jessica S. Gossen, for the Law Society; Jerome D. Ziskrout, for Mr. Lowther

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### **Summary**

While acting for clients in a matrimonial litigation, Mr. Lowther misled the court registry as to the availability of opposing counsel to attend a proposed hearing on short notice. He further failed to endorse several draft orders, or alternatively outline his clients' position on these orders, by a particular date, thereby breaching a consent order. In another matrimonial case in which he acted for the plaintiff spouse, Mr. Lowther breached a consent order that required he pay \$20,000 to the defendant from funds held in his trust account. In spite of the consent order, Mr. Lowther did not release the funds to the defendant, but sought to negotiate a payment from the funds to cover maintenance arrears owed by the defendant to the plaintiff. Mr. Lowther subsequently obtained a garnishing order of \$5,111.78 to pay the arrears, which order he used to garnish the funds from his own trust account. He advised the defendant's counsel of the garnishing order and said that he intended to seek a court order that the balance of the funds be used to pay ongoing maintenance pending a final hearing.

The hearing panel found, and Mr. Lowther admitted, that his conduct in these matters amounted to professional misconduct. With respect to Mr. Lowther misleading the registry and breaching the consent order to endorse orders, the panel imposed a reprimand. With respect to his breach of the consent order to release \$20,000 to the defendant, the panel imposed a two-week suspension, which began on March 18, 2002. The panel further ordered that Mr. Lowther pay \$1,500 as costs.

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### **Facts**

#### **Clients K and L**

In 1998 Mr. Lowther represented Mrs. K and Mr. L, respondents in a matrimonial matter. At a pre-trial conference on December 17 a master ordered, by consent, that Mr. Lowther's clients should endorse an earlier order made on November 24 by another master (as well as four other unentered orders) or alternatively outline their position on those orders by December 31, 1998.

Mr. Lowther did not agree with the wording of the master's draft order of November 24, which he received from opposing counsel (H) for review. He did not endorse any of the orders or outline his clients' position with respect to them by December 31 as required by the consent order.

In correspondence that ensued between Mr. Lowther and H in January, 1999, Mr. Lowther sought to schedule a hearing before the master who made the November 24 order to seek clarification. He contacted H's office to see if February 3 would be acceptable for this hearing. When he did not hear back from H's office, Mr. Lowther booked February 3 before the master, indicating to the registry that opposing counsel was available.

H told Mr. Lowther in late January that setting the matter before the master was premature without first reviewing the clerk's notes in an effort to settle their disagreement over the draft order. When H learned that Mr. Lowther had set down the hearing, he called the registry to say he had not consented to the hearing.

Mr. Lowther acknowledged that he had insufficient information to assert that opposing counsel was available or to imply consent to the matter being set down on that date, and that he did not take necessary care to verify the accuracy of his statements.

### **Client M**

In 1999 Mr. Lowther represented Mrs. M, the plaintiff in a matrimonial action. On September 27, the day before trial, the parties came to an agreement with respect to a partial distribution of funds held in trust by Mr. Lowther. They entered into a consent order on September 28 that required, among other things, that \$20,000 would be released to Mr. M, and the balance of the claims and issues between the parties be adjourned pending a hearing under Rule 18A.

After both counsel had spoken to the consent order and had it entered, Mr. Lowther advised Mr. M's counsel that he intended to deduct or garnish from the \$20,000 maintenance arrears owed by Mr. M to Mrs. M.

Mr. M's lawyer objected to this course of action and demanded release of the funds under the consent order.

On October 12, 1999 Mr. Lowther obtained a garnishing order for \$5,113.78 for the maintenance arrears. He used the order to garnish that sum from the \$20,000 payable to Mr. M. On October 18, Mr. M's lawyer again demanded the funds for Mr. M. Mr. Lowther acknowledged the demand, but stated that he intended to prepare a court application for an order that the balance of the funds (after payment of the garnishment) be used to pay ongoing maintenance to Mrs. M pending final hearing of the issue.

Mr. M's lawyer complained to the Law Society on October 29, 1999.

Mr. Lowther and Mr. M's lawyer resolved matters between their clients on the basis that Mr. Lowther would release the non-garnished portion of the \$20,000 to Mr. M's lawyer

and Mr. M's lawyer would adjourn generally an application to set aside the garnishing order.

Mr. Lowther later apologized for his conduct.

## **Decision**

Mr. Lowther admitted, and the hearing panel found, that his conduct amounted to professional misconduct in:

- misleading the court registry on the availability of opposing counsel to attend a proposed hearing on short notice in a matrimonial case;
- breaching a consent order by failing to endorse several draft orders, or alternatively to outline his clients' position on the orders, by a particular date; and
- breaching a consent order by failing to release \$20,000 to the opposing party as required by the order.

## **Penalty**

Having heard submissions on the difficult personal circumstances faced by Mr. Lowther at the time of incidents, the panel expressed sympathy, but stated that the public has the right to expect that lawyers will conduct themselves properly at all times, regardless of the personal, family or financial stresses the lawyer may be under. In the panel's view, stressful personal circumstances are only mitigating factors to the extent that they may be an indication that the misconduct is unlikely to recur.

The hearing panel found that Mr. Lowther had no expectation of personal gain from any of his actions, but clearly went too far in his efforts for his clients. The panel also noted that Mr. Lowther had undergone a conduct review just two weeks prior to the first of these incidents. To his credit, Mr. Lowther had admitted his misconduct in a timely fashion and cooperated with the Law Society in the prosecution of this matter.

In relation to Mr. Lowther's conduct in misleading the court registry and in breaching a consent order to endorse earlier orders, the panel imposed a reprimand. The panel stated that Mr. Lowther had made an error in judgement in consenting to an order that required him to deal with the draft orders in a short time period, especially over the Christmas season, and he compounded the error by letting the time go by without discussing it with opposing counsel or seeking an extension from the court.

In relation to Mr. Lowther's breach of another consent order by failing to release funds as required, the panel regarded this breach more seriously. It was, in effect, a repetition of his earlier misconduct in breaching an order and merited a suspension.

The hearing panel accordingly ordered that Mr. Lowther:

1. be reprimanded;

2. be suspended for two consecutive weeks to commence before May 31, 2002 (*Mr. Lowther elected for the suspension to begin on March 18, 2002 as earlier reported to the profession*); and
3. pay \$1,500 towards costs of the discipline proceedings.

*Discipline Case Digest — 2002: No. 06 April (Lowther)*