

Admission of misconduct and undertaking not to apply for reinstatement for 10 years

Misappropriations, conflicts, breaches of undertaking and false representations

MICHAEL CUSTANCE

Gibsons, B.C.

Called to the Bar: August 31, 1990

Ceased membership: January 1, 2000

While acting for clients in various transactions and other matters in 1998 and 1999, Mr. Custance misappropriated trust funds, in some instances taking funds for his own personal use and in other instances transferring funds to clients or other parties who were not entitled to receive them. On a number of matters, he acted in circumstances that could give rise to divided loyalties between clients or in which he had a personal interest, without the informed consent of clients and without recommending that they obtain independent legal advice.

Mr. Custance made false representations to induce loans, breached undertakings respecting use of trust funds and other professional commitments, breached a court order respecting the use of funds, failed to follow client instructions, failed to protect client interests, allowed shortages in his trust account and failed to report them, failed to pay practice debts, misled creditors and breached various Law Society accounting rules.
[Details below]

Based on two complaints received in the late fall of 1999, the Discipline Committee on November 10 ordered an audit of Mr. Custance's books, records and accounts. Following an interim audit report, the Chair of the Discipline Committee directed a citation against Mr. Custance on November 29. That same day a hearing was held to determine whether to suspend Mr. Custance; the panel made a number of orders respecting Mr. Custance's practice, including that he provide by noon on November 30 an undertaking not to remove any funds from trust. On December 3, 1999 Mr. Custance gave an undertaking not to practise law until relieved of that undertaking by the Law Society.

Mr. Custance did not pay his 2000 practice fees and accordingly ceased membership in the Law Society on January 1, 2000. Discipline citations were issued against him in February, 2000 and March, 2001.

On October 4, 2001 the Discipline Committee accepted an admission of professional misconduct from Mr. Custance (then a former member) on his undertaking:

1. not to apply for reinstatement for 10 years;
2. not to apply for membership in another law society without first advising the Law

Society in writing;

3. not to permit his name to appear on the letterhead of any law firm in B.C. without the written consent of the Law Society; and
4. to obtain the Law Society's written consent before working for any law firm in B.C.

Client R: Loan transactions

- In August, 1999 R entered into a transaction to borrow \$175,000 from M. Mr. Custance gave his undertaking to M's lawyer to pay \$225,000 on a specified date or to return the loan proceeds if he could not comply. Mr. Custance did not repay the loan or return the funds, in breach of his undertaking. He instead misappropriated the funds by disbursing them to himself, to client R and to a third party.
- In September, 1999 Mr. Custance induced a \$150,000 loan for client R by falsely representing to the lender's lawyer that he held \$200,000 in trust for R, of which \$150,000 would be available to repay the loan. Although he knew he would not have funds to repay the loan, Mr. Custance distributed \$163,200 to various parties, using up the loan proceeds and creating a \$13,200 shortage in his trust account. To cover up the shortage, he paid \$13,200 of personal funds into trust and failed to report the trust shortage to the Law Society.
- In October, 1999 a financial institution provided \$32,281 to Mr. Custance in trust for client R, on Mr. Custance's undertaking not to release or use the funds without the consent of the institution's lawyer. Mr. Custance misappropriated the funds by transferring \$10,261 to his own personal account and \$22,020 to his client, in breach of his undertaking and without the knowledge or consent of the lawyer for the financial institution.
- In November, 1999 P Ltd. agreed to provide a \$312,000 loan to R and R's company. While acting for R, Mr. Custance wrote to P Ltd., undertaking to repay the loan by a particular date and falsely confirming that he held \$550,000 in trust for R, which could be released to repay the loan when due. Mr. Custance did not in fact hold any money for R, nor did he have any other means to repay the loan. After receiving \$246,320, Mr. Custance breached trust conditions requiring him to hold the funds until he had provided certain security documentation. Mr. Custance instead misappropriated this money by transferring it to his own company and then disbursing \$100,000 to himself and the balance to R and to third parties.

Client GCV Ltd.: Real estate development project

Mr. Custance represented a client (GCV Ltd.) with respect to a real estate development project, including property sales and investments. In a number of transactions he also

represented other parties:

- In the fall of 1998 Mr. Custance received into trust mortgage proceeds from the original first mortgagee on the GCV Ltd. property. Mr. Custance misappropriated \$9,248 of these funds by transferring them to his law firm without the consent of GCV Ltd. and without rendering accounts.
- In the fall of 1998 Mr. Custance misappropriated funds in trust for GCV Ltd. by transferring \$8,000 to his law firm, \$10,000 to his personal account and \$40,000 to another law firm respecting a business venture. He did so without the consent of the client and without rendering accounts.
- In May, 1999 a mortgagee client (P) wished to roll over a \$50,000 mortgage investment when the mortgage came due. He arranged to roll over his investment to GCV Ltd., secured by a second mortgage on a development lot and by an assignment of specific debt owed to GCV Ltd. by the municipality. Mr. Custance acted for both P as mortgagee and for GCV Ltd. as mortgagor in the transaction, in circumstances that might give rise to divided loyalties and without their informed consent.

After receiving \$50,000 in proceeds from the first mortgage investment, Mr. Custance failed to secure the second mortgage or the assignment of specific debt on the new lot as he had been instructed. Instead he misappropriated the investment funds by paying \$18,000 to his own firm without rendering an account, \$30,000 to GCV Ltd., \$500 to P and \$1,500 to a mortgage company. In September, 1999 Mr. Custance also received a total of \$67,500 from the municipality, which was subject to the assignment to P. Mr. Custance misappropriated these funds, paying \$4,000 to his law firm, \$5,000 towards a personal debt and \$58,500 to GCV Ltd. He paid none of these funds to client P.

- In August, 1999 Mr. Custance represented GCV Ltd. on the sale of a lot to H and R. He received \$115,205.61 in trust from the purchasers' lawyer on his undertaking to apply the funds to pay off three existing mortgages on title, discharge an assignment of rents and to advance the balance to GCV Ltd. at various stages of house construction. Mr. Custance paid off the second and third mortgages, but used funds from another transaction for this purpose. He further breached his undertaking by failing to discharge the first mortgage or the assignment of rents and by failing to retain funds to advance as construction progressed. Mr. Custance subsequently told the purchasers' lawyer that all three mortgages had been paid off, but that he was awaiting receipt of discharges on two of them and on the assignment of rents. He knew this statement was untrue.
- In August, 1999 Mr. Custance and a business associate (S) agreed to loan GCV Ltd. \$60,000 as interim financing pending completion of the sale of a lot. Mr. Custance and S agreed to borrow that amount from a bank, lend it to GCV Ltd. and repay the bank loan once the sale completed. Mr. Custance acted for both

GCV Ltd. and S without their informed consent to do so and also acted when he had a direct financial interest in the transaction. He falsely represented to S that he held sufficient funds to repay the bank loan when this was untrue.

In the sale of the above property by GCV Ltd, Mr. Custance received in trust the sale proceeds and undertook to the purchasers' lawyer to discharge three mortgages and an assignment of rents from title and to pay outstanding property taxes. Mr. Custance breached his undertakings by failing to make any of the discharges and failing to pay the taxes. He misappropriated \$67,000 of the sale proceeds to his own personal use and \$77,451.43 to pay out a mortgage on an unrelated lot.

- In September, 1999 Mr. Custance represented both GCV Ltd. as mortgagor and F as mortgagee in a construction loan transaction in circumstances that could give rise to divided loyalties, without the informed consent of these clients and without recommending independent legal advice. Mr. Custance failed to register a second mortgage as security for F as instructed but rather registered it as a fourth charge against title. He then misappropriated the mortgage proceeds by disbursing them to discharge two mortgages unrelated to F's investment.
- In September, 1999 Mr. Custance represented C Corporation, a company that agreed to loan GCV Ltd. \$135,000 to be secured by a mortgage against specific lots in the development complex. Mr. Custance undertook to pay outstanding taxes, utilities and building trade debts and to discharge three mortgages such that C Corporation would hold a third mortgage on these properties. In breach of his undertaking, he failed to pay out one of the mortgages and certain expenses.
- In April, 1999 Mr. Custance acted in a matter in which he had a financial interest by arranging for client G to lend GCV Ltd. \$32,000 and personally signing a promissory note as security for the loan, contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook* and without disclosing that \$12,000 of the loan would be transferred to him personally.
- In June, 1999 Mr. Custance disbursed \$14,192.09 from trust on behalf of GCV Ltd. though he did not hold any funds in trust for the client, resulting in a trust shortage that was not rectified for four months.
- While acting for GCV Ltd. in a mortgage transaction in January, 1999, Mr. Custance undertook to pay another lawyer \$52,000 but did not have sufficient funds to make the payment. He deposited \$10,000 of personal funds to his trust account to pay out the funds, improperly co-mingling funds. He later transferred \$1,518.27 to himself personally without the client's consent and without rendering an account.
- In November, 1998 Mr. Custance assisted in raising \$75,000 on the security of a third mortgage on the GCV Ltd. development. The mortgage was to be held by a

company with a number of investors, including Mr. Custance who was to invest \$20,000 personally. In a later meeting with another of the investors, RC, Mr. Custance falsely stated that he held the mortgage when in fact he had already transferred the mortgage to another company. He told RC that he would prepare mortgage documentation for him, but did not do so. Mr. Custance deposited RC's funds to the credit of GCV Ltd. Mr. C did not obtain the informed consent of either GCV Ltd. or RC to act for both parties, and he failed to advise RC to obtain independent legal advice.

- In November, 1998 Mr. Custance prepared a third mortgage from GCV Ltd. to himself, although he had no instructions or consent from the client

Client T.O. Ltd.: Real estate development project

Mr. Custance represented T.O. Ltd., a company controlled by the same principal as GCV Ltd., in various aspects of a land development project:

- Client DR loaned \$25,000 to T.O. Ltd., to be secured by a mortgage over three lots in the development. Mr. Custance represented both parties in circumstances that could give rise to divided loyalties, without their informed consent, without advising DR to obtain independent legal advice or stating that he was not acting for her. He failed to protect her interests by having her effect mortgage discharges and then failing to register new mortgages against other property as security.
- After receiving funds from S and K as purchasers of a T.O. Ltd. property, Mr. Custance breached his undertaking to the purchasers' lawyer to discharge one of the mortgages on the property.

Estate clients

- In 1997 Mr. Custance misappropriated \$1,342.08 that he held as a tax holdback for an estate. He failed to distribute this money to the estate beneficiary, but instead billed for legal services in that exact amount and transferred the money without the knowledge or consent of the client.
- On another estate in 1996, Mr. Custance prepared an account that included \$4,106 for legal fees although he had not performed the services described in the account. Mr. Custance also misappropriated \$25,000 from the estate by transferring the money from a separate interest-bearing account to his pooled trust account in order to cover a trust shortage unrelated to the estate. He later deposited \$25,000 back into the estate account when his associate discovered the shortage and asked him to do so.

Client K Ltd.

In 1998, Mr. Custance represented both parties in two mortgage loan transactions without their informed consent and without recommending independent legal advice. Mr.

Custance further had a personal interest in the transactions because he held an interest in the mortgagor (K Ltd.):

- H loaned \$96,000 to K Ltd. The loan was to be secured by a second mortgage over two lots owned by K Ltd. Mr. Custance did not register the mortgage for 3½ months after the advance of the loan. In the interim, without the knowledge of H, Mr. Custance obtained another mortgage loan, and that mortgage received priority on title.
- When Mr. Custance obtained the other mortgage loan of \$97,750, he agreed to register the mortgage against both lots owned by K Ltd. Mr. Custance in fact failed to register the mortgage against one of the lots. The mortgagee was not separately represented and Mr. Custance did not recommend that he obtain independent legal advice.

Creditors

From 1998 to 1999, Mr. Custance failed to pay a practice debt of \$35,366.32, contrary to Chapter 2, Rule 2 of the *Professional Conduct Handbook* and he falsely represented to his creditor that he would obtain a bank loan to pay the debt, that the bank had approved the loan and also that he had no other security charges against his accounts receivable, when he knew these statements were untrue.

In 1998 Mr. Custance also failed to pay a \$415 account for a medical-legal report on a personal injury file.

Other clients and lawyers

- While representing Mrs. M in a matrimonial matter in 1999, Mr. Custance drafted a separation agreement and devised a child support arrangement under which her ex-husband could defraud Revenue Canada.
- Mr. Custance represented P in a divorce proceeding for which he was to receive \$700 as legal fees. On sale of the matrimonial home in July, 1999, Mr. Custance transferred \$700 directly to his general account, without rendering an account and without the consent of his client, thereby misappropriating the retainer.
- While representing the plaintiff H in a litigation matter between 1997 and 1999, Mr. Custance improperly deposited trust funds to his general account. He also failed to account to the client for retainer funds of \$4,047.95.
- While representing Mr. and Mrs. C as the vendors of a property in the summer of 1999, Mr. Custance received \$5,000 in trust on their behalf as the proceeds of a holdback. He misappropriated this money by depositing it to his general account, without having provided legal services or rendering an account. He later repaid \$3,219.10, but did not account for the balance although he billed \$570 for services.

- While acting for Mr. and Mrs. H in the subdivision and sale of their property, Mr. Custance deducted \$1,667.49 for fees from the sale proceeds. He subsequently rendered a second account for the same work and did not refund the overpayment.
- In breach of an undertaking, Mr. Custance disbursed the proceeds of a mortgage payout to his mortgagee client (C) without having first obtained and filed a mortgage discharge.
- Mr. Custance breached his undertaking to another law firm to pay \$150,000 in trust to the credit of their client.

Books, records and accounts

Mr. Custance failed to comply with the Law Society accounting rules. In particular, he failed to prepare monthly trust reconciliations, contrary to Rule 3-65; to eliminate trust shortages, contrary to Rule 3-66; to report trust shortages to the Law Society executive director, contrary to Rule 3-66; to accurately record deposits to and payment from trust, contrary to Rule 3-63; to maintain books, records and accounts, contrary to Rules 3-59 through 3-62; to deliver funds when due, contrary to Rule 3-67; or to report all trust accounts held by him.

* * *

A number of claims have been filed with the Law Society's Special Compensation Fund respecting the actions of Mr. Custance. The Special Compensation Fund, funded by all practising lawyers in B.C., is available to provide compensation on a discretionary basis to people who suffer loss when a lawyer dishonestly takes or transfers money or other property. The lawyer must have received the money or other property in his or her capacity as a lawyer. Claims that have been awaiting the outcome of discipline proceedings will be considered by the Special Compensation Committee in the coming months.

Admissions to the Discipline Committee

When a citation has been directed against a lawyer, the lawyer may tender a conditional admission of a discipline violation to the Discipline Committee under Law Society Rule 4-21.

If the admission is accepted by the Discipline Committee, the Committee will rescind any outstanding citation, direct that the admission be endorsed on the lawyer's professional conduct record and advise the complainant of the disposition.

Rule 4-38 provides for publication of summaries of these cases.

Discipline Digest — 2001: No. 2 October (Custance)