2004 LSBC 04
Report issued: March 25, 2004
Citation issued: May 28, 2002

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Re: Lawyer 1

Respondent

Decision of the Hearing Panel

Hearing date: January 7, 2004

Panel: Ralston S. Alexander, Q.C., Chair, Allan McEachern, Life Bencher, Michael Falkins, Lay Bencher

Counsel for the Law Society: Jessica Gossen
Counsel for the Respondent: George F. Gregory

Background

[1] On the 28th day of May, 2002, a Citation was issued against the Respondent pursuant to the Legal Profession Act and Rule 4-15 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The Citation directed that this Hearing Panel enquire into whether the Respondent, had been guilty of professional misconduct, or other lesser offences contrary to Chapter 6, Ruling 1 of the Professional Conduct Handbook.

Chapter 6, Ruling 1 provides:

" A lawyer has a duty to give undivided loyalty to every client."

The particulars allege the Respondent failed to provide the beneficiaries of an estate a letter describing a claim against the estate, in failing to advise he beneficiaries of the intention of the executrix to purchase the estate's main asset, the family home, and in failing to advise the beneficiaries to obtain independent legal advice regarding such sale. The case for the Law Society was aimed at proving these particulars.

[2] At the commencement of the Hearing the Respondent acknowledged, through his counsel, proper service of the Citation.

Facts

[3] The parties submitted an Agreed Statement of Facts which was entered by consent as binding on the parties despite the fact that it was unsigned and undated; the parties also submitted a joint book of documents which will be more fully described as these reasons are expanded.

[4] The Agreed Statement of Facts, edited slightly, provided as follows:

1. The Respondent was called to the Bar in British Columbia on June 26, 1975.

2. The Respondent practiced in Nelson, B.C. from January 1, 1981 through to December 31,2001. In 1998 he practiced at the law firm of [law firm]. He became a non-practicing member effective January 1, 2002.

3. T.C. passed away on March 5, 1997, dividing his estate equally between (sic) his 11 children, one of whom (" F.C.") was a minor and whose 19th birthday was December 22, 1998.

4. In August of 1997, N. C., T.C.'s daughter and Executrix of the Estate, retained the Respondent to act on behalf of the Estate. An Order for probate was granted on May 6, 1997. On March 10, 1998, the Public Trustee brought an application under the *Wills Variation Act* (" WVA") on behalf of F.C., a minor beneficiary of the Estate. Counsel for the Public Trustee also contemplated an action on behalf of F.C. against the Estate for maintenance pursuant to the provisions of the *Family Relations Act* (" FRA ').

5. Six months had elapsed between the granting of the Order for Probate and the commencement of the WVA action. The beneficiaries had a potential limitation defence to this action.

6. The ten beneficiaries other than F.C. were named as defendants in the WVA action, as was the Estate. On April 28, 1998, the Respondent wrote to the beneficiaries suggesting that it would be economical for him to act for all of the beneficiaries in this action. He invited them to get independent legal advice. (Attachment 1) He included a draft Statement of Defence and requested that each recipient of the letter sign the consent to act at the bottom of the letter and return it to his office.

7. The beneficiaries agreed to the Respondent acting on their behalf in the WVA action. On June 3, 1998 after concluding that the conflict between at least two of the beneficiaries and the Executrix precluded him from acting for those beneficiaries, the Respondent again wrote to the other beneficiaries revisiting the issue of his representing them and asked them to confirm their agreement to his acting for them in writing. (Attachment 2)

8. The Respondent filed a Statement of Defence on behalf of those defendants in August of 1998. (Attachment 3) S.C. and E.C., two sons of T.C., were not represented by the Respondent in the WVA application, or at all.

9. On November 23, 1998, the Respondent received a confusing letter from the plaintiff's solicitor proposing settlement of all issues including the WVA action and any rights of F.C. under the FRA. (Attachment 4).

10. The Respondent wrote to the Executrix on November 25, 1998 (Attachment 5), providing her with a copy of the said letter and seeking her instructions. The Respondent copied all of the beneficiaries with his letter to the Executrix but did not include the said letter.

11. The Respondent suggested in his letter to the Executrix that she canvass the proposal for settlement with the other beneficiaries but he did not confirm the instructions of each of the beneficiaries himself.

12. The Respondent discussed the potential limitation defence to the WVA with the Executrix but not with the beneficiaries. Nor did the Respondent discuss a potential FRA claim by F.C. with the beneficiaries.

13. The Respondent believed that an action pursuant to the FRA on behalf of F.C. would be successful. He also believed that the Executrix had the sole discretion to settle the FRA claim.

14. A. St.A., one of the beneficiaries, requested a copy of the said letter from the Executrix, but not from

the Respondent. The Executrix refused to provide a copy of the letter to A. St.A.

15. The Executrix instructed the Respondent to settle the outstanding issues in the manner that was proposed by the claimant's lawyer in his November 23, 1998 letter.

16. On May 26, 1999 A. St.A. complained of the Respondent's conduct to the Law Society.

17. On May 26, 1999 the Law Society replied saying her complaint did not disclose a basis for an investigation.

18. On March 26, 2001, A. St.A. complained again to the Law Society (Attachment 6).

19. After the death of her father, the Executrix and her husband decided they wanted to purchase the Estate's main asset, the family home located in Ymir [B.C.].

20. The Estate obtained two appraisals of the property, one for $105,000 and the other for $107,000. The Executrix and her husband purchased the house on June 26, 1998 for the full amount of the higher appraisal, $107,000. No real estate commission was paid on this sale.

21. The Estate's gross value was $108,588.53.

22. The Respondent did not advise the beneficiaries directly himself of the Executrix's intention to purchase the home. The Executrix advised the Respondent that she had spoken to the other beneficiaries and that they were in agreement with her proposal. This information was not correct; she had not informed all of the beneficiaries of her intention. (emphasis added).

23. The Respondent did not advise the beneficiaries to obtain independent legal advice to ensure that their interests were protected in the sale of the family home.

24. On March 7, 2002, pursuant to Ru1e 4-13 of the *Law Society Rules,* the Discipline Committee resolved to recommend to the Chair of the Discipline Committee that there be a direction to issue a citation against the Respondent and the Chair so directed.

25. A copy of the citation dated May 28, 2002 and schedule (Attachment 7) was served on the Respondent by way of registered mail on May 28, 2002 (Attachment).

[5] The attachments described in the Agreed Statement of Facts do not add significantly to the narrative.

[6] We wish to comment on the WVA action. First, the plaintiff in that proceeding was a minor at all material times. Second, probate of the testator's last will may have been issued in error as the plaintiff's solicitor says he had filed a caveat in the appropriate registry before probate was issued. If this is so, the grant of probate may have been recalled. Third, the Respondent had the view that the WVA claim was not likely to succeed as the plaintiff had no special claim to a larger share of this small estate beyond that of his ten brothers and sisters. The Respondent's view was that the risk to the estate was the plaintiff's claim under the FRA based on the plaintiff's expectation of maintenance from his father at least during his minority.

[7] The letter described in para 9 of the Agreed Statement of Facts comprises four pages wherein a settlement of $40,000.00 in settlement of the WVA action was proposed. The letter dealt with a number of collateral issues, including the fact that a difficulty had been encountered in finding and serving the two beneficiaries for whom the Respondent no longer acted, the fact that the infant beneficiary would turn 19 years of age on December 22 nd, 1998 (a date which is but one month after the date of the subject correspondence), and the fact that as a consequence of that birthday, the Public Trustee would no longer represent the plaintiff in the action.

[8] The letter discussed DNA testing because an issue had arisen as to whether the infant beneficiary was the natural son of the deceased. The letter next described the basis upon which the infant's claim under the WVA action would be developed. It noted a dependent relationship that existed between the deceased and the infant beneficiary and the fact that the deceased had been encouraging the infant in a course of study and would have enjoyed the support of the deceased. The correspondence noted that the deceased had a larger moral and legal duty to the infant than was fulfilled in the Will, and observed that the Will was prepared and witnessed by a Notary Public, an adviser unqualified to speak to *Wills Variation Act* matters.

[9] The plaintiff's lawyer concluded this portion of his letter by describing the other beneficiaries as being self-sufficient adults who were not in need of support from the deceased and who were therefore not owed any significant moral duty. He ended his factual analysis by noting that had the deceased been more properly advised, and " carefully considered the circumstances and his duties" , he would have provided substantially more for the infant.

[10] The lawyer then outlined the settlement offer which is described in the Agreed Statement of Facts.

[11] The Respondent wrote to the Executrix of the estate and provided copies to all of the beneficiaries for whom he acted. His letter was written on November 25 th, 1998, two days after his receipt of the settlement proposal. In the letter to the Executrix, he described in general terms the nature of the offer to settle, and analyzed the financial ramifications of that proposal to each of the beneficiaries. He concluded that the settlement offer was at a dollar value that was likely higher than would be awarded by a court, but he noted that the court costs involved in conducting the court hearing, (often ordered payable from the Estate assets regardless of result) would likely offset the additional magnitude of the offer. He encouraged the beneficiaries to accept the offer and noted that he did not believe that a unanimous agreement among the beneficiaries was necessary, although in the absence of that unanimity, he recommended that the Executrix seek court approval. He requested that the Executrix canvas all of the beneficiaries to determine if they were in favour of or opposed to the settlement.

[12] Although not entirely clear from the Agreed Statement of Facts, it appears that all of the beneficiaries to the estate approved of the settlement of the infant beneficiary's claim on the basis set out in the claim letter.

Burden of Proof

[13] Counsel agreed that the burden of proof is upon the Law Society to prove the allegations described in the citation. That burden has been described as being somewhat less than the criminal standard, namely proof beyond a reasonable doubt. It is clear from the authorities that the burden is well past the balance of probabilities that would prevail in a civil case.

[14] The jurisprudence on this subject makes it abundantly clear that the standard of proof will vary according to the gravity of the consequences. Where a professional's reputation is at stake and the consequences of an adverse finding are significant or severe, the burden of proof to be met must be substantially higher than in those circumstances where no such adverse consequences are anticipated.

[15] Mr. Justice Taylor in J.C. v. The College of Physicians and Surgeons of British Columbia, 31 B.C.L.R. (2d) 383, spoke on the burden of proof as follows:

> " In the present case, the Disciplinary Committee considered the required standard at the outset of its report. It says the onus of proof proving the facts against the Doctor rest with the College. To discharge that burden a high standard of proof is called for going beyond the balance of probabilities and based on clear and convincing evidence. The case for the College must be

> proven by a fair and reasonable preponderance of credible evidence. This is essentially the view adopted by McLachlin J. as she then was in the decision of this court in Jory v. The College of Physicians and Surgeons."

Mr. Justice Taylor goes on to say

> While the cases provide no clear rule, the most helpful terms used in various judicial pronouncements on this subject seems to me to be the word " convincing" . To be convinced means more than merely persuaded. I think the test to be applied in the present case is whether on the evidence before us, the Committee could properly have been convinced that the patient had told the truth in making her accusations of sexual misconduct against the Doctor."

[16] The decision of Madam Justice McLachlin (as she then was) in Jory v College of Physicians and Surgeons of B.C., [1985] B.C.J. No. 320, Vancouver Registry A850601 is instructive on this subject.. She stated:

> The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt, but is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence.....The evidence must be sufficiently cogent as to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community:

[17] This is the burden of proof that has been adopted by this panel in this matter.

Discussion

[18] The first count of the Citation alleges a conflict of interest between the duty of loyalty owed to the Estate and the duty of loyalty owed to the individual beneficiaries for whom the Respondent acted. Two illustrations of this breach are cited in sub-paragraphs (a) and (b) of the first count which describes the Respondent's failure to provide the beneficiaries with the copy of the claimant's letter and the information contained therein. The second breach of loyalty is described as his failure to advise the beneficiaries of the Executrix's intention to purchase the main asset of the estate, the family home.

[19] With respect to the illustration in sub-paragraph (a), the failure to provide a copy of the claim letter, the Respondent argues that there can be no conflict between the interests of the beneficiaries and the interests of the estate as their interests are united in maximizing the return to the beneficiaries. The estate had no independent stake in the outcome of the administration of the estate, save to ensure that the maximum return was made to each of the beneficiaries in accordance with the terms of the Will. We agree, and find that no breach of the duty of loyalty is evidenced by the Respondent's failure to provide a copy of the claim letter to the beneficiaries for whom he acted. It is clear that he did not put the interest of any client ahead of the interest of any other client, which would be required in order to establish a breach of loyalty.

[20] It is easy to say with the benefit of hindsight that it would have been better if the Respondent had provided a copy of the claim letter to each of the beneficiaries even though he described its contents in the letter he did send to all the beneficiaries. However, since no beneficiary asked for a copy of the claim letter, we do not know what would have occurred had that request been made. It is probable that the Respondent would have provided a copy had any one or more of them requested it Even if it were negligence to fail to provide a copy, (a suggestion with which we do not agree), negligence without more does not establish a

breach of loyalty.

[21] While the merits of the settlement may be before us because of the enormous breadth of the citation, the course of the hearing was confined largely to the two illustrations alleged and it is unnecessary for us to say anything more than that the Respondent, as a matter of judgment, had concluded that the settlement was a propitious one for the estate. He therefore encouraged the beneficiaries to accept it and he should not be second-guessed for doing so having regard to the cost of defending the estate in these circumstances.

[22] The second " illustration" (Count 1 (b)) upon which the Respondent is cited for breach of loyalty is in respect of his failure to advise the individual beneficiaries of the fact that the Executrix was intending to purchase the family home from the estate.

[23] It is clear that the purchase of the home by the Executor was clearly to the advantage of the estate because the home was located in the small rural community of Ymir, and the chances of obtaining the appraised value in any sale were highly dubious.

[24] As stated at para 22 of the Agreed Statement of Facts, the Executrix advised the Respondent that " .she had spoken to the other beneficiaries and that they were in agreement with her proposal" . She or her husband paid the amount of the highest appraised value for the home. There is no evidence that any other beneficiary, or anyone else, was interested in purchasing this property.

[25] It was upon this factual basis that the Respondent concluded the land transfer. He believed that the beneficiaries had approved of the transfer to the Executrix because she told him that that was the fact. We think any lawyer in these circumstances would be justified in acting on the information he received. Again, even if this was an error, or even negligence, it was not a breach of any duty of loyalty: K.L.B. v. AG for BC, 2003 SCC 51 para 50.

[26] It would, of course have been better if the Respondent had confirmed the statement of the Executirix that all beneficiaries had agreed, but it is also worth noting that this estate could not easily bear the cost of such an investigation. As already mentioned, one of the beneficiaries (the plaintiff in the WVA action) was a few months short of his majority at the time of the transfer, and this beneficiary's consent would have likely required a court order. The Respondent was not acting for him.

[27] It must also be remembered that the question we have to decide is not whether the Executrix could validly purchase estate property. Having regard to the special considerations that govern the purchase by an executor of estate property, it may be that one or more of the beneficiaries could have sought to have the house sale transaction set aside. We express no opinion on that question. It is an entirely different question from what we are considering, namely whether the Respondent breached his duty of loyalty. We think he did not because of the information he had received.

[28] The Law Society contends in Count 2 to the Citation that the Respondent committed a breach of loyalty by failing to advise the other beneficiaries of the estate to obtain independent legal advice regarding the sale of the family home to the Executrix.

[29] It was argued by the Respondent that in the authorities cited in respect of similar circumstances, there is not found any reference to or discussion of a requirement for independent legal advice. He argues that the preponderance of authority on the subject suggests that independent valuation advice would be appropriate for the beneficiaries. He notes that independent legal advice will provide little assistance to the beneficiaries in their considerations as to the ethical propriety of the transaction.

[30] The Respondent refers the Panel to the Nova Scotia Barristers Society vs MacIsaac, [2001] L.S.D.D. No. 1, a case in which the Executor of the estate sold a significant estate asset to herself. This sale was at a

price which several of the Trustees of the estate felt was below fair market value. In that case, the Discipline Panel found that the lawyer had acted improperly because he continued to represent both parties to the transaction, when he was well aware that the parties were in dispute. In the view of the Panel, Mr. MacIsaac ought to have referred all of the clients to independent advisors when he became aware of the dispute (emphasis added). The Respondent argued that until such time as he became aware of a dispute, he was under no obligation to refer the parties to independent advice. In this instance also, the Respondent acknowledged that all parties would have been better served had he ensured that they had provided their consent to the sale.

[31] His error in this circumstance was that he ought to have assured himself that the individual beneficiaries had approved the sale of the family home to the Executrix.

[32] In the result of this analysis, there is no clear obligation on the member to refer the clients to independent legal advice and in the absence of such an obligation there can be no professional misconduct for its breach.

[33] As we have developed the view that the Respondent, in these narrow circumstances, was entitled to act on the information he received from the Executrix - and since the arrangement was so manifestly beneficial to the estate - he was not under a duty to advise the other beneficiaries to obtain independent, expensive legal advice. Even if he was obliged to communicate with each of them, his failure to do so would constitute negligence, not a breach of loyalty.

Conclusions

[34] In the result we have determined that the Law Society has failed to establish that the Respondent has committed any of the acts described in Section 38 (4) (b) of the *Legal Profession Act*, SBC 1998, c.9. The citation is accordingly dismissed.

Costs

[35] Having made the determination that no professional misconduct or conduct unbecoming has been made out by the Law Society, it follows that the Respondent should have his costs paid by the Law Society and we order accordingly. If the parties are unable to agree upon the appropriate amount to be paid to the Respondent in these circumstances, they are free to seek a further order from this panel on the matter.

[36] All of which is respectfully submitted this 25th day of March, 2004.