

Toronto, Ontario (formerly of Vancouver, B.C.)  
Called to the Bar: September 10, 1980

**Discipline hearing panel:** February 6-8, 1995 and December 12, 1997 (written reasons March 23, 1995 and January 26, 1999).  
Benjamin Trevino, Q.C., as a one-Bencher panel

Geoffery Gomery, for the Law Society  
David Gibbons, Q.C., for Mr. Trower and Mr. Trower on his own behalf

---

### **Summary**

Mr. Trower represented a client when his personal interest conflicted with that of the client and in circumstances when he ought to have withdrawn, although the hearing panel found he did make full disclosure and the client received independent legal advice at his recommendation. In the course of representing this client, Mr. Trower entered in a dispute with the client's former lawyer. Mr. Trower had purchased the former lawyer's practice and all his work in progress. The former lawyer claimed \$70,000 from the client for "unbilled fees," but Mr. Trower took the position that such unbilled fees represented work in progress and should belong to him, not the former lawyer. Mr. Trower asked the client to pay him the \$70,000 and did not ask the client to question the appropriateness of this amount, even after he learned that the client's former lawyer had earlier transferred to himself \$105,799.03 without rendering an account. This transfer ought to have included the \$70,000 claim for unbilled fees and Mr. Trower was no longer in a position to treat the \$70,000 claim as reasonable. The hearing panel did not find that Mr. Trower acted in bad faith, but his acting in a conflict of interest and overcharging constituted professional misconduct.

---

### **Facts**

In 1986 Mr. Trower purchased a law practice from Mr. C, a lawyer with whom he had earlier articulated.

Mr. C was facing discipline at the Law Society at the time and was disbarred in 1986; he was also facing financial difficulties and was petitioned into bankruptcy.

When Mr. Trower purchased the practice, it was agreed that Mr. C would be entitled to the purchase price and all accounts receivable and that Mr. Trower would be entitled to the practice and all work in progress.

One of Mr. C's clients was a cooperative housing association (P Association), which was the defendant in construction litigation initiated by contractors and subcontractors. Mr. C had represented P Association as counsel, and judgment in the case had been reserved.

While representing P Association in 1985, Mr. C had arranged for interest on money held in court to be paid out for his client's benefit. In August, 1985 he prepared an "interim account" for \$125,000 and backdated it to August 31, 1984. He then transferred \$105,799.03 to his general account. Mr. C did not deliver the bill to P Association and, in fact, the Association did not learn about it until after Mr. Trower became their counsel.

When he began representing P Association in May, 1986, Mr. Trower started to consolidate the litigation files, review the client's financial position and determine whether the amounts P Association had paid into court would be sufficient to meet the claims if necessary. In September, 1986, P Association's accountants provided Mr. Trower with some information showing the bills payable. These included a \$70,000 item that Mr. C had supplied to the accountants for "fees unbilled and due to date."

In November, 1986 Mr. Trower reported out to P Association his review of the client's financial exposure and potential liability. He addressed the \$70,000 of unbilled work and noted "That work is not detailed in the same way that I keep track of time and function as you will see from our account. However, I take the \$70,000 shown on the list prepared by Mr. C and apparently accepted by your accountant as a fair and accurate estimate of the value of that work ..." Mr. Trower included the \$70,000 in his own bill to P Association, on the understanding that he would not seek to collect it until the case was concluded.

Mr. Trower and Mr. C soon entered a dispute over which of them was entitled to the \$70,000. Mr. Trower's position was that this amount related to work in progress and that he was entitled to it as the purchaser of Mr. C's practice. Mr. C's position was that the file was a receivable and had been assigned to his wife back in November, 1984. He later advised that his other receivables had been assigned to R Bank.

Mr. Trower fully disclosed to P Association his dispute with Mr. C on November 29, 1986. The board of directors of P Association discussed the account and the fact that Mr. Trower was in a conflict of interest by reason of a potential claim by Mr. C or his wife. The board, however, decided that, if Mr. Trower thought he was entitled to the \$70,000, he would have a greater incentive to resolve P Association's litigation favourably.

By April, 1987 Mr. Trower had negotiated settlements of 20 of 22 subcontractor claims against P Association. One of the contractors was allegedly attempting to have others repudiate the settlements and join in the action against P Association. P Association sued the contractor for attempting to induce breach of contract and later sued for defamation on the basis of a statement made by the contractor about P Association. The contractor counter-claimed against Mr. Trower personally, putting him in a conflict of interest. Mr. Trower reported this conflict to the board of directors and, after discussing the matter with the Law Society Secretary, recommended the board obtain independent legal advice. The board followed that advice and an opinion from independent counsel stating that Mr.

Trower appeared to have done a competent and responsible job in representing P Association. Independent counsel recommended that it would be appropriate for the board to pass a number of resolutions ratifying Mr. Trower's actions and continued representation.

In July, 1987 Mr. Trower reported to P Association that, from his review of the Association's files, Mr. C had given no notice of his \$125,000 bill, or his payment of \$105,799.03 out of trust on that bill. Mr. Trower advised that this bill was not valid. He advised his client that, although Mr. C would have been entitled to bill for some of this time covered by his "dud bills," he did not, so this was work in progress. Mr. Trower said that he owned all work in progress on P Association's file, and he did not intend to bill any further for that work.

In August, on the advice of Mr. Trower, P Association sued Mr. C for breach of trust in relation to the \$105,799.03 withdrawal in August, 1985.

In accordance with his understanding with P Association, Mr. Trower restated on all his accounts to P Association the \$70,000 in dispute between himself and Mr. C. By the time of the lawsuit, P Association had paid Mr. Trower \$20,000 towards the \$70,000 account. As R Bank held a general assignment from Mr. C, it had an interest in P Association's action against Mr. C. Mr. Trower negotiated a settlement whereby P Association would pay the bank \$50,000 in exchange for the bank not joining the action as a defendant and relieving P Association of any claims that may have been made on Mr. C's accounts.

By October, 1998, P Association's action against Mr. C was adjourned generally, with a new trial date to be scheduled. As well, the construction litigation in which P Association was a defendant had settled, with the plaintiff receiving \$98,000 and P Association \$288,000. Mr. Trower presented his account to P Association, which included the \$50,000 outstanding balance of the \$70,000 in dispute between him and Mr. C.

P Association, with full knowledge of Mr. Trower's dispute with Mr. C over that amount, paid the account in full in October, 1988. In March, 1989 Mr. C counter-claimed against Mr. Trower in P Association's action against Mr. C.

Mr. C claimed that Mr. Trower was in a conflict of interest and should not continue to represent P Association. Mr. Trower again referred the board for independent legal advice. The board retained a different lawyer than that from whom they first took independent advice, and this new lawyer found that P Association's best interests would be served by continued representation by Mr. Trower, unless the board was dissatisfied with his services.

The court later found that Mr. Trower should withdraw because he would have to appear as a witness in the case. When new counsel was retained by P Association, he issued a third party notice against Mr. Trower alleging negligence and breach of fiduciary duty relating to a "double counting" of the \$70,000 account on the basis that it was already part of the \$105,799.03 that Mr. C had transferred to himself for fees.

After a 29-day trial, the judge gave judgment to P Association against Mr. C for the \$105,799.03, gave judgment to P Association against Mr. Trower for \$75,000 (the \$70,000 account and \$5,000 exemplary damages) and dismissed Mr. C's counter-claims against P Association and Mr. Trower. Mr. Trower filed a notice to appeal the decision, but was unable to pursue it for financial reasons.

The hearing panel, in considering this background, made additional findings:

- Mr. Trower was initially entitled to assume that Mr. C's allocation of unbilled time of \$70,000 was reasonable, given the number of liens and the amount of money involved and the fact that accountants for the client did not object to the bill.
- Mr. Trower had disclosed the account to his client openly and with candour. However, he became somewhat obsessive about the account because of Mr. C's manoeuvre of claiming a prior assignment to his wife.
- Once he discovered Mr. C had used a backdated and undelivered account to transfer \$105,799.03 to himself, Mr. Trower was no longer in a position to treat Mr. C's claim of \$70,000 of unbilled time as reasonable. By then he knew that the lien action had not taken 10 full days of trial but in fact 10 days of court appearance, of whatever duration. He knew the type of fraud and forgery of which Mr. C was capable. He was then in a conflict of interest. He had questioned, properly, every other account of Mr. C that was outstanding, but he never questioned the appropriateness of Mr. C's \$70,000 account to which Mr. Trower claimed he himself was entitled as work in progress.
- Mr. Trower failed to direct his mind or the client to the issue of whether Mr. C's account was legitimate.
- Mr. Trower recommended, and P Association accepted, independent legal advice on at least three occasions; however, the questions to be referred to independent counsel never included nor framed a question respecting the \$70,000 dispute between Mr. Trower and Mr. C. This was not a manipulation on Mr. Trower's part, but illustrated the insidious way in which a conflict can affect a lawyer's relationship with a client. While he had agreed to settle the matter in his client's best interests early in the retainer, Mr. Trower's dispute with Mr. C coloured his judgement and his advice.

The hearing panel noted that Mr. Trower's advice to P Association to purchase Mr. C's receivables from his bank for \$50,000 was given in good faith, was strategically sound and worked to the client's benefit as it removed the bank as a potential party to the litigation.

## **Decision**

The hearing panel found that Mr. Trower was guilty of professional misconduct in:

- representing P Association when his personal interest conflicted with that of his client; and
- asking P Association to pay a \$70,000 bill to him after learning that P Association's former lawyer had earlier transferred to himself \$105,000, which amount ought to have included the \$70,000, and after Mr. Trower was no longer in a position to treat the \$70,000 claim as reasonable.

The panel noted, however, that Mr. Trower made full disclosure to his client about all matters, including the \$70,000 bill and on three occasions recommended that his client receive independent legal advice with respect to whether he should continue to act, although he did not specifically make reference to the \$70,000 bill. The client received independent advice from two different lawyers and concluded it was in its best interests to have Mr. Trower continue the representation. The panel could not attribute any *male fides* to Mr. Trower. However, the panel found that Mr. Trower ought to have withdrawn in the circumstances.

### **Penalty**

In light of Mr. Trower's resignation and undertaking in another disciplinary matter (see *Discipline Digest*: April, 1999), the Discipline Committee had instructed Law Society counsel not to seek a penalty on this citation. The panel accordingly imposed no penalty.

*Discipline Case Digest — 1999: No. 14 April (Trower)*