

Vancouver, B.C.

Called to the Bar: May 12, 1980

Voluntarily ceased membership: January 1, 1996

**Discipline hearing panel:** June 25, 1996, August 26, 1998 and January 19, 1999

Howard Berge, Chair, Richard Margetts and Mark McEwan (Mr. Justice McEwan of the B.C. Supreme Court as of August, 1996)

Todd Follett, for the Law Society

Mr. Gayman, on his own behalf, for hearing on findings of fact; he did not appear for the balance of the hearing, although notified

Hearing report indexed as [1999] LSBC 19

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### **Summary**

While acting as a trustee, Mr. Gayman on two occasions breached the terms of a trust agreement by improperly releasing a total of \$1 million of funds in trust. He had held the funds as trustee for the protection of purchasers of a company's scientific research tax credit and there were specific conditions over releasing the funds. Mr. Gayman made the first advance of funds at the request of a principal of the company without receiving the required documents. He knew that he was breaching the trust conditions, but he mistakenly believed the documents would be forthcoming. He later realized that the documentation would not be provided and learned from the company principal that the funds had been lost on the Vancouver Stock Exchange or through other investments. Mr. Gayman nevertheless made the second advance to the company principal in the hope that the trust could be restored and that Mr. Gayman could extricate himself from the situation. The tax credit was ultimately disallowed by Revenue Canada and the purchasers lost their right to any deductions and lost the back-up security of the funds held under the trust agreement. Mr. Gayman then failed to address the substantive issues that gave rise to a complaint to the Law Society in this matter and he failed to respond to correspondence from the Society. A majority of the panel found that Mr. Gayman was not acting in his capacity as a lawyer in this transaction. The panel found his breach of the trust conditions, resulting in the improper payment of \$1 million, constituted conduct unbecoming a member of the Society and that his conduct in failing to respond to Law Society communications constituted professional misconduct. The panel ordered that Mr. Gayman, then a former member, be disbarred.

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### **Facts**

*Majority decision by Mr. Margetts, concurred in by Mr. Berge:*

In December, 1984 Mr. Gayman began acting as the trustee of funds to be held under an arrangement between a company and a group of purchasers of a scientific research tax credit (SRTC) offered by the company.

The trust agreement, to which Mr. Gayman was a party, obliged him to hold approximately \$1 million as trustee on specific terms and conditions set out in the agreement. The essence of the agreement was that, if the purchasers of the tax credit were unable to obtain the tax advantages intended, the trustee would disburse funds to Revenue Canada. Alternatively, the trustee could disburse funds to the company in accordance with the requirements of the *Income Tax Act* on documented proof that the expenditures were permitted under the *Act* such that the purchasers would receive the tax benefit.

A principal of the company approached Mr. Gayman to request the release of funds held in trust. Contrary to the terms of the trust agreement and with full knowledge of his non-compliance, Mr. Gayman advanced a very substantial portion of the \$1 million to the company. He had the mistaken, but perhaps honestly held, belief that the necessary documents would be forthcoming. He did not receive the documentation and it did not appear that he would in fact receive it.

The company principal again approached Mr. Gayman and told him the advanced funds had been lost, either on the VSE or through other investments. The principal asked Mr. Gayman to disburse further funds. Mr. Gayman panicked and advanced the balance of the money held in trust to the company in the vain hope that the principal might be able to restore the trust.

Revenue Canada disallowed the SRTC and the purchasers could not deduct the funds they used to purchase the tax credit. They also lost the security of the funds held under the trust agreement, which was intended to protect them should they not receive the tax benefit. The principal of the company later fled the jurisdiction.

The purchasers commenced legal proceedings to recover their money. They alleged breach of the trust agreement and breach of fiduciary duty against Mr. Gayman, which he admitted.

After a complaint was made to the Law Society in this matter, Mr. Gayman failed to respond to the Society, which resulted in a separate discipline proceeding in 1995. He never addressed the substantive issues giving rise to the complaint and further failed to respond to Law Society correspondence of June 15, July 25, August 23 and September 18, 1995.

A majority of the discipline hearing panel determined that Mr. Gayman was not acting in his capacity as a lawyer in this transaction. The purchasers of the tax credit did not appear to understand Mr. Gayman to be a lawyer, he did not prepare the trust agreement and his account for services was rendered outside his professional practice. While Mr. Gayman

may have been required to make decisions that had legal considerations, he was not different from any other trustee in this respect, and any legal advice he gave would be to himself. Finally, the fact Mr. Gayman described himself as a “barrister and solicitor” on the trust document was not clear and convincing proof that he was acting as a lawyer.

*Dissent in part, by Mr. McEwan:*

Mr. McEwan said that he substantially agreed with the findings of the majority of the panel, but disagreed with the majority finding that Mr. Gayman had not acted in his capacity as a lawyer.

Mr. McEwan found a number of facts were persuasive evidence that Mr. Gayman was acting as a lawyer. First, he was approached to serve as trustee by an acquaintance solely because he was a lawyer. Second, he was described in the trust agreement as a “barrister and solicitor” and, if he had intended to treat the trusteeship as distinct from his status as a lawyer, it was incumbent on him to ensure that was clear. Third, he charged a fee for his services at a professional rate. Finally, he was required to make a number of legal judgements about the authenticity and adequacy of legal documents and this constituted legal advice.

## **Decision**

The hearing panel unanimously found that Mr. Gayman’s breach of the trust conditions, resulting in the improper payment of \$1 million, was so serious, contrary to the best interests of the public and harmful to the standing of the legal profession that it constituted conduct unbecoming a member of the Society.

His conduct in failing to respond to Law Society communications constituted professional misconduct.

## **Penalty**

The panel stated that, in making the first advance of funds held in trust, Mr. Gayman clearly breached the terms of the trust, although he mistakenly believed the terms could be fulfilled. The panel noted that this advance, while not excusable, was understandable. Also, Mr. Gayman had no personal interest in this transaction.

The second advance of funds, however, was particularly troubling to the panel. At the time of this advance, Mr. Gayman was well aware of the personal difficulties he would face surrounding the first advance and he, in effect, gambled with the purchasers’ funds in the hope that he might “save his own skin.”

Once a complaint was made to the Law Society, Mr. Gayman’s conduct was also significant. He failed to respond to the Society for more than two years (which had led to an earlier discipline hearing) and never provided a substantive response to the complaint.

While appreciating the emotional and financial stresses faced by Mr. Gayman in this matter, the panel found that his conduct demonstrated such a lack of responsibility that it was similar to other serious discipline cases.

The hearing panel ordered that Mr. Gayman be disbarred. The panel observed that, in the case of a former member, disbarment is a declaration that the former member is unsuitable to engage in the practice of law.

The panel further noted that it had no jurisdiction to order non-publication of the hearing as requested by Mr. Gayman, and that only the Benchers could make such an order. The panel did not favour a non-publication order since publishing the circumstances of the case would help encourage other lawyers in unfortunate circumstances to address their problems, rather than compound them.

*Discipline Case Digest — 1999: No. 15 June (Gayman)*