

2004 LSBC 14

Report issued: May 7, 2004

Oral Reasons: May 6, 2004

Citation issued: November 14, 2002

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

HOWARD MARCEL SMITH

Respondent

Decision of the Hearing Panel

Hearing date: May 6, 2004

Panel: G. Glen Ridgway, Q.C., Single Bencher Panel

Counsel for the Law Society: Todd Follett

Counsel for the Respondent: Jerome Ziskrout

Background

[1] On November 14, 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 inquire into the Respondent's conduct as follows:

1. You participated in a scheme designed to mislead Canada Customs and Revenue Agency (C.C.R.A.). You prepared an Irrevocable Assignment of Debt relating to funds that you held in trust for D.O. subject to your undertaking to protect D.O.'s former counsel's account, which Assignment was to be executed by your client, D.O. in favour of "G.F.". At the time that you prepared the Assignment, you believed G. F. was a fictitious person and you understood the Assignment to be for the purpose of misleading C.C.R.A. as to any interest D.O. may have had in and to the trust funds.

[2] The Respondent acknowledge proper service of the citation and waived the requirements of Rule 4-15 of the Law Society Rules.

[3] Pursuant to Rule 5-2(2), the Respondent agreed to a Panel consisting of a single Bencher.

[4] The citation comes before this Panel as a conditional admission of a disciplinary violation and consent to specific disciplinary action pursuant to Rule 4-22. The Respondent admitted that he professionally misconducted himself and consented to the following disciplinary action:

1. to pay a fine in the amount of \$4,000;
2. to pay costs of the proceedings in the amount of \$1,000.

[5] An Agreed Statement of Facts was filed as Exhibit 2 in these proceedings. It provides as follows:

- (a) Mr. Smith was called to the Bar in British Columbia on May 10, 1978
- (b) Mr. Smith is a full time practitioner at Howard Smith & Co. in New Westminister, B.C. and has been since 1981.
- (c) On October 3, 2002, pursuant to Rule 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 Mr. Smith and the Chair so directed.
- (d) A copy of the citation dated November 14, 2002, and schedule is attached and was served on Mr. Smith by way of couriered mail on November 14, 2002.
- (e) Mr. Smith was retained by D.O. to act on her behalf in relation to a personal injury litigation matter. On October 5, 2000, Mr. Smith entered into a Contingency Fee Agreement with Ms. O.
- (f) Mr. Smith assumed conduct of Ms. O's file from Mr. Thomas Braidwood and Mr. Smith gave an undertaking to protect Mr. Braidwood's account in the amount of \$25,000.00.
- (g) The amount of \$25,000.00 was paid by Mr. Smith to Mr. Braidwood with a trust cheque #T 05229, dated January 31, 2001.
- (h) In December 2000 Ms. O's I.C.B.C. claim was settled and an amount was paid into Mr. Smith's trust account.
- (i) At the I.C.B.C. mediation a "Notice to Pay" was produced which stated that Ms. O owed Canada Customs and Revenue Agency ("CCRA") arrear tax payments.
- (j) On December 8, 2000, Ms. O executed an Irrevocable Assignment of \$25,000.00 in favour of G.F.
- (k) Mr. Smith intended to hold the \$25,000.00 in trust subject to the terms of the Irrevocable Assignment. The purpose of the Irrevocable Assignment was to preserve the funds against a possible demand for payment from CCRA.
- (l) On December 13, 2000, Mr. Smith received a letter from G.F. demanding payment of the \$25,000.00 pursuant to the Irrevocable Assignment.
- (m) Mr. Smith, in a letter to Mr. F. dated December 13, 2000, refused to make this payment as demanded.
- (n) Ms. O retained Mr. Arbour with regard to an account rendered on December 7, 2000 by Mr. Smith. Mr. Arbour lodged a complaint on Ms. O's behalf in a letter to the Law Society dated October 25, 2001. This letter referred to irregularities regarding the trust accounts of Howard Smith & Co. regarding Ms. O.
- (o) Mr. Arbour, in a letter to Mr. Smith dated October 19, 2001, demanded an accounting of the \$25,000.00, which had been placed in trust.
- (p) Mr. Smith states that he at all times believed that "G.F." was an alias for D.O., and that the Irrevocable Assignment in favour of this G.F. was for the benefit of D.O., as set out in a letter to the Law Society dated November 7, 2001.

(q) Ms. O stated that although she initially intended the \$25,000.00 to be paid to Mr. Braidwood's account, she later had a change of mind and viewed the setting up of the trust as a means of ensuring that CCRA would not be able to demand it.

(r) In a letter to the Law Society dated February 19, 2002, Mr. Smith admitted that he had not properly applied his mind to the matter when he agreed with Ms. O to place the \$25,000.00 in trust, and subsequently having her sign the Irrevocable Assignment in favour of G.F. Furthermore, Mr. Smith admits that he failed to "reflect upon the appropriateness of this plan" and did not realize that the arrangement agreed upon with Ms. O was not for a legitimate and proper secret trust. He now realizes that the agreement was not proper.

(s) Mr. Smith admits that his participation in a scheme designed to mislead CCRA as to any interest his client, D.O., had in relation to trust funds held by him constitutes professional misconduct.

[6] After considering the circumstances as set out in the Agreed Statement of Facts, and having heard the submissions of counsel, the Panel finds that the Respondent professionally misconduct himself.

[7] The Panel further finds that the penalty proposed by the Respondent and recommended by the Discipline Committee to be appropriate in all of the circumstance.

[8] It is accordingly ordered that the Respondent pay a fine of \$4,000 and costs of the hearing in the amount of \$1,000.

[9] The Executive Director is instructed to record the finding of professional misconduct on the Respondent's Professional Conduct Record.

[10] Publication of this finding is to be made to the profession in the normal course.