

## Re: Lawyer 2

**Discipline hearing:** January 8, 2004

Panel: John Hunter, QC, Chair, Gordon Turriff, QC, Art Vertlieb, QC

**Report issued:** April 30, 2004, indexed as 2004 LSBC 09

**Bencher review:** December 15, 2004

**Majority:** James Vilvang, QC, Darrell O'Byrne, QC, Margaret Ostrowski, QC and Gregory Rideout

**Dissent/Minority:** Ralston Alexander, QC, Chair, Patricia Schmit, QC and Anne Wallace, QC

**Report issued:** April 8, 2005, indexed as 2005 LSBC 13

Counsel: Todd Follett, for the Law Society, and Kevin Woodall, for the respondent

## Summary

While acting as a trustee, the respondent lawyer failed to pass accounts for nearly 10 years, contrary to the *Trustee Act*. The hearing panel found that the respondent gained no benefit from his failure to pass accounts, the beneficiary suffered no financial detriment and no dishonesty was involved in the delay. The panel concluded the respondent was not guilty of professional misconduct because he was acting as a trustee, not as a lawyer, and that his conduct did not justify a finding of conduct unbecoming a member of the Law Society. The panel, however, found that the respondent had breached the *Trustee Act* and ordered that he take a remedial program under the supervision of the Practice Standards Committee. On review of the panel decision, the Benchers found that the hearing panel lacked jurisdiction to order the respondent to take a remedial program in the absence of a finding of professional misconduct, conduct unbecoming, incompetence or breach of the *Legal Profession Act* or Law Society Rules. A majority of the Benchers concluded that the hearing panel had correctly applied the test for conduct unbecoming and, given there was no such finding, they dismissed the citation. A minority of the Benchers concluded that the panel had not applied the test correctly and, in the circumstances of the case, those Benchers would have found the respondent guilty of conduct unbecoming.

## Facts

In January 1988, the respondent became trustee of a trust under the will of the late LM for the benefit of LM's daughter, AM. Although required by s. 99 of the *Trustee Act* to pass the estate accounts within two years of the grant of probate, the respondent did not do so until after AM had filed a petition in November 1997. The petition followed an earlier notice issued by AM in 1996 pursuant to the *Trustee Act* that required the respondent to pass his accounts annually within one month of the anniversary of the grant of probate.

A BC Supreme Court master heard the respondent's application for passing of his accounts and approval of his fees in August and November 1998. The master concluded the respondent had not been acting as a solicitor in his dealings with the trust, but as a trustee. The master recommended that the respondent's fees be set at \$12,777.47 instead of the \$17,057.62 requested and that this amount be set off against the costs

of the beneficiaries' counsel in conducting the accounting. A BC Supreme Court judge confirmed the master's recommendations and ordered that the respondent pay special costs.

The respondent relied on his office staff to prepare his accounts and to obtain approval from AM, but admitted he did not supervise his staff adequately.

The respondent gained no benefit from his failure to pass accounts, the beneficiary suffered no financial detriment and no dishonesty was involved in the delay.

## Verdict

The hearing panel found that the respondent had breached the *Trustee Act* by failing to pass accounts. His actions did not amount to professional misconduct because he was acting as a trustee and not as a barrister or solicitor.

The panel also noted that, while breach of a statute can constitute conduct unbecoming, not every breach of the technical requirements of a statute by a member acting outside his capacity as a lawyer will result in such a finding. It will generally be necessary for the conduct to be "dishonourable or disgraceful or otherwise reflect adversely on the integrity of the respondent or the profession or the administration of justice to amount to conduct unbecoming."

## Penalty

The panel concluded that it had made an "adverse determination" in accordance with section 38(5) of the *Legal Profession Act*; the panel accordingly ordered, under s. 38(5)(f)(i) of the *Act*, that the respondent complete a remedial program relating to compliance with statutory time limitations and staff supervision, to the satisfaction of the Practice Standards Committee.

The panel made no order as to costs.

### **Bencher review**

Pursuant to s. 47 of the *Legal Profession Act*, the Discipline Committee applied to the Benchers for a review of the panel decision on verdict and penalty.

### **Majority decision**

On review, Law Society counsel asked the Benchers to consider four issues:

- what is the proper test for determining conduct unbecoming a member of the Law Society;
- whether the evidence against the respondent amounted to conduct unbecoming;
- whether the hearing panel was correct when it concluded that a breach of the *Trustee Act* is an adverse finding within s. 38(5) of the *Legal Profession Act*;
- the imposition of a penalty under s. 38(5)(f)(i) of the *Legal Profession Act* despite a dismissal of the counts in the citation.

A majority of the Benchers concluded that the hearing panel had correctly applied the test for conduct unbecoming (as conduct that is dishonourable or disgraceful or otherwise reflects adversely on the integrity

of the respondent or the profession or the administration of justice) and had properly concluded that the respondent's conduct did not amount to conduct unbecoming.

The majority concluded, however, that the hearing panel had no authority to impose a penalty under s. 38(5)(f)(i) of the *Legal Profession Act* because it had not made a finding pursuant to s. 38(4) that the respondent was guilty of professional misconduct, conduct unbecoming, a breach of the *Act* or Rules or incompetence.

As a result, the majority overturned the verdict of the panel, dismissed the citation and ordered that each party bear its own costs.

### **Minority decision**

The minority of the Benchers on the review agreed that the hearing panel had exceeded its jurisdiction by ordering the respondent to take a remedial program without first making a finding under s. 38(4) of the *Legal Profession Act*.

The minority Benchers, however, also concluded that the hearing panel had misdirected itself by finding that a member's conduct must be dishonourable or disgraceful before it will amount to conduct unbecoming a member of the Society. They were of the view that it is sufficient for a finding of conduct unbecoming that the conduct be "worthy of censure."

The minority pointed to the fact that the judge who confirmed the master's order for special costs against the respondent had characterized the respondent's conduct as "reprehensible." The minority concluded that some aspects of the respondent's conduct were in fact worthy of censure and that the hearing panel should have found the respondent guilty of conduct unbecoming.

*\* Law Society Rule 4-38(1)(a) requires publication to the profession of summaries of citation dismissals, as well as citations resulting in disciplinary action. Rule 4-38(2)(c) provides that citation dismissals must be published anonymously unless the respondent lawyer consents in writing to being identified*