

2006 LSBC 10

Report issued: March 15, 2006

Oral Reasons: March 8, 2006

Citation issued: December 1, 2005

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

James Douglas Hall

Respondent

**Decision of the Hearing Panel
on Facts and Verdict**

Hearing date: March 7 and 8, 2006

Panel: Anna Fung, Q.C., Chair, Ralston S. Alexander, Q.C., William M. Everett, Q.C.

Counsel for the Law Society: Brian McKinley

No-one Appearing on behalf of the Respondent

Background

[1] We are dealing with a citation authorized against James D. Hall, issued on December 1, 2005, which includes an amended Schedule which sets out:

1. You failed to comply with recommendations of the Practice Standards Committee. The recommendations were set out in a letter to you from Practice Standards Counsel dated March 17, 2005 and were adopted by the Practice Standards Committee on May 5, 2005. Specifically, you failed to:

- (a) Enter into a Practice Supervision Agreement with a practice supervisor and practice supervision agreement, to be approved by the Practice Standards Committee.
- (b) Update your corporate records files within 60 days, including annual filings, and updating the corporate minute books.
- (c) Document your files by:
 - (i) Using memos to file and short reporting letters to clients to track the file and keep clients informed on each new event and item.
 - (ii) Providing clients with opinion letters at all critical times in the file to keep them informed.
 - (iii) Arranging for each client to get an initial and a final reporting letter.
 - (iv) Using retainer/interim reporting letters and ensuring that checklists are in all your files.
 - (v) Ensuring that when client services or work for a quasi-client is limited in scope that you document in writing the limitations of your obligations.

(vi) Taking and filing notes of telephone conversations, with clients and others, and memos to file.

(d) Organize your open and closed files by:

(i) Separating your closed from open files so that you can focus on the ones that need your attention and avoid ones that do not.

(ii) Completing a reporting letter promptly after completing the services in question and then - and only then - close the file.

(e) Develop and maintain the following:

(i) A reminder system for routine BF's, work in progress and limitation dates. The reasons for the BF should be noted as well. All time limited matters, including limitation dates, should be noted at three or four dates ahead of the ultimate so that you can have lots of opportunity to get the work done.

(ii) Establish a conflicts checking system.

(iii) Use a file opening sheet or checklist for each file to record client and file information and keep it centralized.

(iv) Use checklists and interview forms to take down background details and initial interviews for ongoing notes.

(f) Seek practical help through Interlock or a private counsellor or psychologist to address your procrastination issues, including failure to communicate, delay and inactivity. Provide the Practice Standards Committee with a letter advising that you have gone for assistance.

2. You failed to maintain your books, records and accounts in accordance with Division 7 of Part 3 of the Law Society Rules.

3. You caused a Form 47 trust report to be delivered to the Law Society on April 4, 2005. That trust report contained the forged signature of David Toynbee, C.G.A. You caused that report to be delivered either knowing or being willfully blind to the fact that the person who signed the form was not a Certified General Accountant named David Toynbee.

4. You signed the Lawyer's Declarations contained in Part A and Part C of the Form 47 trust report and caused that report to be delivered to the Law Society on April 4, 2005, either knowing or being willfully blind to the false and misleading information contained in it. The false or misleading information was that the accountant had reviewed your books and records and formed the opinion that you had, during the reporting period:

(a) kept and maintained such books, records and accounts in connection with the law practice as are required by Part 3, Divisions 7 and 8 of the Law Society Rules;

(b) prepared a monthly trust reconciliation for each month ending in the reporting period in accordance with Part 3, Divisions 7 and 8 of the Law Society Rules;

(c) maintained an adequate system for recording all financial transactions of the law practice in compliance with Part 3, Divisions 7 and 8 of the Law Society Rules;

and that the accountant had reviewed the monthly trust reconciliations for the months subsequent to the reporting period and ending immediately prior to the completion of his field work, and that nothing came to his attention that would indicate any contravention of Part 3, Divisions 7 and 8 of the Law Society Rules.

5. While suspended from practice by the Law Society, you continued to engage in the practice of law when you:

(a) acted as counsel for your clients [corporation] *et al.* in a litigation matter;

(b) continued to act as counsel for your client P.J.Q. on the estate of T.F.H.

6. You provided an undertaking to the Law Society effective May 18, 2005 to cease practice in the areas of wills and estates. You breached that undertaking when you continued to act as counsel for your client P.J.Q. on the estate of T.F.H. after May 18, 2005.

7. You failed to provide your client P.J.Q. with a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, in that you failed to keep your client reasonably informed, and failed to do the work in hand in a prompt manner so that its value to the client was not diminished or lost, contrary to Chapter 3, Ruling 3 of the *Professional Conduct Handbook*.

8. You misled your client P.J.Q. about the status of his matter.

9. You attempted to mislead another member of the Law Society, Mr. Reilly, Q.C., and his assistant when you advised his assistant that you had filed an application for probate on the estate of T.F.H. when you had not done so.

10. You provided an undertaking to the Law Society on January 23, 2004 to "respond to correspondence from the Law Society Professional Conduct Department within 14 days of receipt of such correspondence." You breached that undertaking when you failed to respond at all to a letter from the Law Society Professional Conduct Department dated November 7, 2005, and received by you on November 8, 2005 regarding a complaint by Mr. Reilly, Q.C.

11. You provided an undertaking to the Law Society on January 23, 2004 to "respond to correspondence from the Law Society Professional Conduct Department within 14 days of receipt of such correspondence." You breached that undertaking when you failed to respond at all to a letter from the Law Society Professional Conduct Department dated October 18, 2005, and received by you October 19, 2005 regarding a complaint by your client B.D.

[2] Following receipt of the evidence, we are satisfied that service of the citation and the amended Schedule was proven upon the Respondent.

[3] The Panel convened at 9:30 a.m. on March 7, 2006, to consider the matters described in the citation. The Respondent was not present despite having been involved in a telephone discussion the night before with counsel for the Law Society. Mr. McKinley took the opportunity of a brief adjournment to call the Respondent again. He did not receive a response from the Respondent but left a message confirming that the Panel was meeting to consider the citation.

[4] Following a 30 minute delay the Panel proceeded, in the absence of the Respondent, to consider the matters set out in the citation, as that is permitted by Section 42 of the *Legal Profession Act*.

[5] With respect to the standard of proof required in these matters, the Panel instructed itself that the Law Society bears the burden of proving the allegations that are set out in the amended citation throughout this

proceeding. The standard to be proved is a standard higher than the balance of probabilities but lower than the criminal law standard of beyond a reasonable doubt.

[6] In that regard, we reviewed the decision of Madam Justice McLachlin in *Jory v. The College of Physicians and Surgeons of British Columbia* [1985] B.C.J. No. 320, a decision of the British Columbia Supreme Court. In that decision, Madam Justice McLachlin said:

"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 it 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." [authorities omitted]

[7] This Panel adopts the above interpretation of the burden of proof upon the Law Society and instructs itself as follows.

[8] The onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct, and the standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

[9] With respect to the determination of whether the conduct alleged amounts to professional misconduct, we note that it is well established that it is for the Benchers to determine behaviour that amounts to professional misconduct. We also note, in a recent decision of the Benchers in a matter involving Mr. Martin, [2005 LSBC 16] that the Panel in that case found an appropriate test to be applied as follows:

"The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[10] With respect to the citation, we will recite each count in order and deal with them seriatim.

Count 1

1. You failed to comply with recommendations of the Practice Standards Committee. The recommendations were set out in a letter to you from Practice Standards Counsel dated March 17, 2005 and were adopted by the Practice Standards Committee on May 5, 2005. Specifically, you failed to:

- (a) Enter into a Practice Supervision Agreement with a practice supervisor and practice supervision agreement, to be approved by the Practice Standards Committee.
- (b) Update your corporate records files within 60 days, including annual filings, and updating the corporate minute books.
- (c) Document your files by:
 - (i) Using memos to file and short reporting letters to clients to track the file and keep clients informed on each new event and item.
 - (ii) Providing clients with opinion letters at all critical times in the file to keep them informed.

- (iii) Arranging for each client to get an initial and a final reporting letter.
 - (iv) Using retainer/interim reporting letters and ensuring that checklists are in all your files.
 - (v) Ensuring that when client services or work for a quasi-client is limited in scope that you document in writing the limitations of your obligations.
 - (vi) Taking and filing notes of telephone conversations, with clients and others, and memos to file.
- (d) Organize your open and closed files by:
- (i) Separating your closed from open files so that you can focus on the ones that need your attention and avoid ones that do not.
 - (ii) Completing a reporting letter promptly after completing the services in question and then - and only then - close the file.
- (e) Develop and maintain the following:
- (i) A reminder system for routine BF's, work in progress and limitation dates. The reasons for the BF should be noted as well. All time limited matters, including limitation dates, should be noted at three or four dates ahead of the ultimate so that you can have lots of opportunity to get the work done.
 - (ii) Establish a conflicts checking system.
 - (iii) Use a file opening sheet or checklist for each file to record client and file information and keep it centralized.
 - (iv) Use checklists and interview forms to take down background details and initial interviews for ongoing notes.
- (f) Seek practical help through Interlock or a private counsellor or psychologist to address your procrastination issues, including failure to communicate, delay and inactivity. Provide the Practice Standards Committee with a letter advising that you have gone for assistance.

[11] The Panel heard evidence from Kensi Gounden, a Law Society employee, that two practice reviews were conducted by him. There are nine recommendations in the first practice review as at March 17, 2005. All of those practice conditions were accepted by the Committee. The report of Mr. Gounden's second practice review, which took place on June 8, 2005, clearly establishes to the satisfaction of this Panel a failure to comply with six of the recommendations of the original nine, which six recommendations are as set out in the citation. Mr. Gounden also testified that of the 50 or so practice reviews that he had done to the date of his giving evidence at this hearing, the Respondent's office was the worst that he had ever seen. In the result, we find that Count 1 of the citation has been proven to the satisfaction of this Panel, and we find that the Respondent professionally misconducted himself in respect of that Count.

Count 2

You failed to maintain your books, records and accounts in accordance with Division 7 of Part 3 of the Law Society Rules.

[12] We have the benefit of evidence from Karen Keating, a chartered accountant. Ms. Keating is an auditor with the Law Society, doing forensic audits. Based on evidence provided, we found Ms. Keating to be qualified to give opinion evidence as an expert witness on matters regarding compliance with Law Society accounting rules. We received in evidence Ms. Keating's interim audit report dated October 20, 2005, regarding the results of her investigation of the books and records of the Respondent. Her investigation resulted from audit orders made pursuant to Law Society Rules 3-79 and 4-43. Ms. Keating's investigation was in respect of work she had undertaken to August 12, 2005. Her report disclosed that the Respondent's books, records and accounts were significantly deficient and not in compliance with Law Society Part 3, Division 7 Rules, as particularized on pages 4 and 5 of her report.

[13] Ms. Keating described three critical characteristics of the Respondent's record-keeping which prevented her from being able to conduct a proper audit. These three characteristics are:

1. No trust account reconciliations existed.
2. A commingling of trust and general funds was going on.
3. There were significant numbers of errors disclosed throughout the records.

[14] Ms. Keating noted that the Respondent's books and records were in a terrible state and that those books and records would have been in that terrible state at April 4, 2005, the date upon which the Respondent signed and submitted his Form 47 report. In the result, we find that Count 2 of the citation has been proven to the satisfaction of this Panel, and we find that the Respondent professionally misconducted himself in respect of that Count.

Count 3

You caused a Form 47 trust report to be delivered to the Law Society on April 4, 2005. That trust report contained the forged signature of David Toynbee, C.G.A. You caused that report to be delivered either knowing or being willfully blind to the fact that the person who signed the form was not a Certified General Accountant named David Toynbee.

[15] We had the evidence of Wiley Ho, who was, at all material times, an employee of the Law Society, charged with responsibility for monitoring the filing of Form 47 reports. Ms. Ho described a series of communications that she had had with the Respondent leading ultimately, under threat of suspension, to a filing by him by facsimile transmission of a Form 47 on April 4, 2005. Part B of that Form 47 was purportedly completed and signed by one David Toynbee, C.G.A., showing an address at 2374 Renfrew Road, Shawnigan Lake, British Columbia.

[16] Following this filing, a routine check of Mr. Toynbee's qualifications as a C.G.A. disclosed that he was not in public practice and was therefore disqualified from signing a Form 47 declaration. Ms. Ho contacted the Respondent on April 5, 2005, to advise him of Mr. Toynbee's disqualification. The Respondent expressed surprise at that disclosure.

[17] We also had evidence from Kasandra Bonn. Ms. Bonn is the Manager of Professional Conduct at the Society of Certified General Accountants. Ms. Bonn testified that she had contacted Mr. Toynbee, the only C.G.A. bearing that name on the records of the Certified General Accountants Society, to inquire as to whether Mr. Toynbee had signed the Form 47 for the Respondent.

[18] We had the benefit of evidence from Mr. Toynbee before this Panel that he was not aware of the particular Form 47 for the Respondent, that he had not signed it, and that he only knew of the Respondent

by reason of an earlier attendance by him, that is by Mr. Toynbee, at a business law course where the Respondent was the instructor. He specifically confirmed that the signature on the Form 47 was not his signature.

[19] Ms. Bonn reported further that she had two conversations with the Respondent, the first on April 20, 2005, and the second a day later, on April 21, 2005, as a result of the fact that Mr. Toynbee had denied any involvement with the preparation of the Respondent's Form 47. Ms. Bonn testified that during the first conversation that she had with the Respondent, he advised her that:

1. He had delivered his books and records to the Renfrew Road address at Shawnigan Lake.
2. Mr. Toynbee sent him an invoice for the work, and that he would provide a copy of that invoice to Ms. Bonn.
3. Mr. Toynbee, who had been a student of the Respondent at the business law course, was not the same Mr. Toynbee that had signed the Form 47.

[20] In the second conversation with Ms. Bonn, the one day later, when asked why he had not provided a copy of the invoice for the service provided, the Respondent reported to Ms. Bonn that he did not get an invoice from Mr. Toynbee and that he had paid a retainer, "unfortunately in cash". He also said in that second conversation with Ms. Bonn that Mr. Toynbee had come to his office to collect the books and records rather than that the books and records had been delivered to the Shawnigan Lake address. When Ms. Bonn indicated to the Respondent that his story was very different in the second call from what he had said the day before, she inquired: "Why has it changed?" He replied: "Yesterday I was shocked, and now I have had a chance to think about it."

[21] This Panel finds that there would have been no reason for the Respondent to be shocked at the revelations from Ms. Bonn, since he had received the same information from Ms. Ho two weeks earlier with respect to the disqualification of Mr. Toynbee.

[22] On the basis of all of the evidence presented to this Panel, we find that the Form 47 report filed by the Respondent on April 4, 2005, contained the forged signature of David Toynbee, C.G.A., and that the Respondent provided that report to the Law Society knowing that the signature on the Form 47 was not that of a C.G.A. named David Toynbee. In the result, we find that Count 3 of the citation has been proven to the satisfaction of this Panel and that the Respondent has professionally misconducted himself in respect of that Count.

Count 4

You signed the Lawyer's Declarations contained in Part A and Part C of the Form 47 trust report and caused that report to be delivered to the Law Society on April 4, 2005, either knowing or being willfully blind to the false and misleading information contained in it. The false or misleading information was that the accountant had reviewed your books and records and formed the opinion that you had, during the reporting period:

- (a) kept and maintained such books, records and accounts in connection with the law practice as are required by Part 3, Divisions 7 and 8 of the Law Society Rules;
- (b) prepared a monthly trust reconciliation for each month ending in the reporting period in accordance with Part 3, Divisions 7 and 8 of the Law Society Rules;
- (c) maintained an adequate system for recording all financial transactions of the law practice in

compliance with Part 3, Divisions 7 and 8 of the Law Society Rules;

and that the accountant had reviewed the monthly trust reconciliations for the months subsequent to the reporting period and ending immediately prior to the completion of his field work, and that nothing came to his attention that would indicate any contravention of Part 3, Divisions 7 and 8 of the Law Society Rules.

[23] As a result of the facts described herein in respect of Counts 2 and 3, and as confirmed by the evidence of Mr. Gounden that the Respondent had told him that he had some accounting background and experience, and that he had performed his own rough trust banking reconciliations, we find that the Respondent provided the Form 47 to the Law Society knowing that it contained false and misleading information, as particularized in the Count. In the result, we find that Count 4 of the citation has been proven to the satisfaction of this Panel and that the Respondent has professionally misconducted himself in respect of that Count.

Count 5

While suspended from practice by the Law Society, you continued to engage in the practice of law when you:

- (a) acted as counsel for your clients [corporation] *et al.* in a litigation matter;
- (b) continued to act as counsel for your client P.J.Q. on the estate of T.F.H.

[24] This Panel heard evidence from Wiley Ho and David McCartney that the Respondent was suspended on September 6, 2005, by letter from the Law Society dated September 7, 2005, which letter was personally served on the Respondent on September 8, 2005. When served with a Notice of Suspension, the Respondent said to Mr. McCartney that he was turning everything over to Mr. Ogilvie. That reference was a reference to a custodian being appointed by the Law Society to look after the Respondent's practice.

[25] We have evidence from Mr. Gowe, a Vancouver lawyer, that he commenced a Supreme Court action on September 13, 2005. Mr. Gowe testified that he received an Appearance and a Statement of Defence in addition to communications regarding settlement proposals from the Respondent during the period of time from September 28, 2005 to and including January 16, 2006.

[26] The Panel heard evidence from P.J.Q., the executor of the estate of T.F.H., that P.J.Q. had discussions with the Respondent in October, 2005, when the Respondent provided information to P.J.Q. that he, the Respondent, had spoken to the Court about the progress of the probate application and that there were processing problems and personnel problems in the Court Registry and the probate would be issued in the next week.

[27] We also heard evidence from C.P., legal assistant to Vincent Reilly, Q.C., a Victoria lawyer, with respect to Ms. P.'s communication with the Respondent where the Respondent was providing Ms. P. with information as to why the probate application was delayed. This evidence was corroborated by a statement in the Respondent's affidavit, sworn on December 1, 2005, and filed in the Supreme Court on December 9, 2005, in the T.F.H. estate matter where the Respondent deposes that:

"I acted as solicitor for P.J.Q. . . . from November 4, 2003 to November 9, 2005."

[28] As a result of this evidence, we find that the Respondent was continuing to engage in the practice of law while his entitlement to do so had been suspended. In the result, we find that Count 5 of the citation has been proven and that the Respondent has professionally misconducted himself in respect of that Count.

Count 6

You provided an undertaking to the Law Society effective May 18, 2005 to cease practice in the areas of wills and estates. You breached that undertaking when you continued to act as counsel for your client P.J.Q. on the estate of T.F.H. after May 18, 2005.

[29] Kensi Gounden testified that, on May 23, 2005, the Respondent signed and delivered to him an undertaking to cease practice in the areas of wills and estates. On the basis of the evidence found on Count 5 of the amended citation, we find that the Respondent acted in breach of this undertaking in respect of the T.F.H. estate matter. In the result, we find that Count 6 of the citation has been proven to the satisfaction of this Panel and that the Respondent professionally misconducted himself in respect of that Count.

Count 7

You failed to provide your client P.J.Q. with a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, in that you failed to keep your client reasonably informed, and failed to do the work in hand in a prompt manner so that its value to the client was not diminished or lost, contrary to Chapter 3, Ruling 3 of the *Professional Conduct Handbook*.

[30] The Panel heard evidence from P.J.Q. that he retained the Respondent on November 4, 2003, to conclude the application for probate in the T.F.H. estate matter, which we were advised involved but two assets and five bequests. We have evidence from both Mr. Reilly and his assistant, Ms. P., that this was a simple estate that should have been probated within, at most, a five month period. P.J.Q. testified that the estate will be concluded in mid March of 2006, a period of approximately 29 months from the date of the initial instructions. No explanation for the delay has been provided. P.J.Q. also testified that the Respondent did not respond to requests for information in a timely manner or at all. In the result, we find that Count 7 of the citation has been proven to the satisfaction of this Panel and that the Respondent professionally misconducted himself in respect of that Count.

[31] We have dealt with counts 8 and 9 together.

Count 8

You misled your client P.J.Q. about the status of his matter.

Count 9

You attempted to mislead another member of the Law Society, Mr. Reilly, Q.C., and his assistant when you advised his assistant that you had filed an application for probate on the estate of T.F.H. when you had not done so.

[32] We have heard evidence from Ms. P. that no application for probate was made in the T.F.H. estate matter in the two year period prior to October 13, 2005, by the Respondent, or at all. We have evidence from P.J.Q., from Mr. Reilly, and from Ms. P., corroborated by the account rendered by the Respondent to P.J.Q. on January 7, 2004, that from time to time, from and after January 7, 2004 until October 2005, the Respondent reported on the progress and delays that were being experienced at the Court Registry with respect to the processing of the application for the grant of probate in the T.F.H. estate, which application, of course, had not been made. In the result, we find that Counts 8 and 9 of the citation have been proven to

the satisfaction of this Panel and that the Respondent has professionally misconducted himself in respect of those two Counts.

[33] We have dealt with Counts 10 and 11 together. They provide as follows:

Count 10

You provided an undertaking to the Law Society on January 23, 2004 to "respond to correspondence from the Law Society Professional Conduct Department within 14 days of receipt of such correspondence." You breached that undertaking when you failed to respond at all to a letter from the Law Society Professional Conduct Department dated November 7, 2005, and received by you on November 8, 2005 regarding a complaint by Mr. Reilly, Q.C.

Count 11

You provided an undertaking to the Law Society on January 23, 2004 to "respond to correspondence from the Law Society Professional Conduct Department within 14 days of receipt of such correspondence." You breached that undertaking when you failed to respond at all to a letter from the Law Society Professional Conduct Department dated October 18, 2005, and received by you October 19, 2005 regarding a complaint by your client B.D.

[34] We have in evidence a letter of undertaking from the Respondent dated January 23, 2004, where the Respondent undertook to respond to correspondence from the Law Society Professional Conduct Department within 14 days of receipt of such correspondence. We have the evidence of Mr. Caldwell that on November 7, 2005, he sent a letter of complaint from V.P. Reilly, Q.C. to the Respondent and requested that the Respondent respond to the allegations contained therein. We have further evidence from Mr. Caldwell that on October 18, 2005, he sent a letter of complaint from Mr. D. to the Respondent and that Mr. Caldwell requested that the Respondent respond to the allegations contained therein.

[35] Mr. Caldwell testified that to date the Law Society has not received a response from the Respondent to the two letters of complaint. In the result, we find that Counts 10 and 11 of the citation have been proven to the satisfaction of the Panel and that the Respondent has professionally misconducted himself in respect of those two Counts.

[36] We note finally that the Respondent has resigned his membership in the Law Society by letter dated November 24, 2005 and that the Respondent has undertaken to not reapply for membership in this or any other Canadian Law Society.