2006 LSBC 20
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

William Frederick McGuire

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: April 24, 2006

Panel: Joost Blom, Q.C., Chair, William M. Trotter, Q.C., Donald A. Silversides, Q.C.

Counsel for the Law Society: Brian McKinley
Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] In our decision on facts and verdict on August 29, 2005 (2005 LSBC 43), we concluded that the Respondent was guilty of professional misconduct and breaches of Law Society Rules. We do not repeat the facts here because they are fully set out in the Decision on Facts and Verdict and the Agreed Statement of Facts (ASF) appended to it.

[2] We do repeat, for convenience, our findings on each count of the citation. The list of trust fund withdrawals under each count has been omitted but can be found in paras. 38-45 of our Decision on Facts and Verdict. For reasons explained in our earlier decision, no withdrawal appears under more than one count.

> [38] On count 1, we find that between July 2002 and September 2003 the Respondent withdrew client funds from his pooled trust account for his personal use when he was not entitled to do so, and without the clients' knowledge or consent, through the use of his " personal float" ledger account #302 (ASF paras. 10-13, 131). This finding applies to the following transactions: [25 withdrawals listed].
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> [39] On count 2, we find that the Respondent made withdrawals from trust of funds belonging to his client S.B. (trust ledger #2691.01) in November and December 2002 and January, 2003 to pay fees and disbursements for clients other than S.B., and for draws, and then replaced these funds belonging to his client S.B. with trust funds belonging to other clients (ASF paras. 119-129, 132). The basis on which disbursements and fees on other client file sub-ledgers, as well as personal draws by the Respondent on sub-ledger #302, were identified as coming from the S.B. funds is set out at pp. 7-10 of Ms. Keating's Audit Report (Exhibit 4). The identification of subsequent S.B. expenditures as having been covered by other clients' trust funds to [sic] is likewise set out there. The Respondent used S.B.'s funds for other clients' or the Respondent's own purposes, and other clients' funds for S.B.'s purposes. This finding applies to the following transactions: [12 withdrawals listed].

> [40] On count 3, we find that the Respondent made withdrawals from his pooled trust account on client files when insufficient funds were held in trust to the credit of the client (ASF para. 130). This finding applies to the following transactions: [36 withdrawals listed].
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> [41] On count 4, we find that the Respondent made withdrawals from his pooled trust account for fees before bills were prepared and delivered to the client and without written instructions from the client allowing such withdrawals. This finding applies to the following transactions: [10 withdrawals listed].
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> [42] On count 5, we find that the Respondent generated certain billings to clients that were misleading in that the billings were dated prior to the actual date the billings were produced. This finding applies to the bills presented to client J.V. dated 9 November, 2002 but actually produced some time after 18 December, 2002 (ASF para. 29); to client L.C.B. dated 4 October, 2002 but actually produced some time after 7 January, 2003 (ASF para. 63); and to client K.O.N. dated 15 November, 2002 but actually produced on 19 November, 2002 (ASF para. 88).
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> [43] On count 6, we find that the Respondent made withdrawals from his pooled trust account for fees before rendering the services to the client for which those fees were charged. This finding applies to the following transactions: [3 withdrawals listed].
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> [44] On count 7, we find that the Respondent failed to keep his books, records and accounts in compliance with the requirements of Part 3, Division 7, of the Law Society Rules from April 2002 to December 2003 (ASF para. 136, exhibit 3 to ASF).
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> [45] On count 8, we find that the Respondent failed to deposit cash trust funds received from his client M.M. in a trust account as soon as practicable.

[3] In our verdict we found that the conduct as itemized under counts 1, 2 and 3 was, as the Respondent admitted, professional misconduct. We added the following reasons in para. 46:

> By his conduct as described in relation to the first three counts the Respondent misappropriated his clients' trust funds. He made withdrawals for himself, unrelated to particular client files, when he himself had no, or not enough, funds on deposit to cover the withdrawals. He also misappropriated his clients' trust funds by making withdrawals for fees or disbursements on other files when the client in relation to whose file the withdrawal was made had no, or not enough, funds on deposit to cover the withdrawals. As the Respondent conceded in testimony, this was theft from his clients.

[4] The conduct under count 5 (backdating statements of account) was also admitted to be, and found by the Panel to be, professional misconduct.

Submissions on Penalty

[5] Mr. McKinley, for the Law Society, took the position that the only appropriate sanction for the Respondent's professional misconduct was disbarment. He cited a number of previous discipline cases, each of which involved the deliberate misappropriation of trust funds and in each of which the lawyer was disbarred. We refer in more detail to these authorities below. In counsel's submission, disbarment is the only effective means in this case to ensure the public is protected.

[6] Mr. Hinkson, for the Respondent, citing *Law Society of BC v. Ogilvie*, [1999] LSBC 17, Discipline Case Digest 99/25 (Decision on Penalty) at para. 18, also started from the proposition that

disbarment is reserved for " those instances of misconduct of which it can be said that prohibition from practice is the only means by which the public can be protected from further acts of misconduct." He submitted that this condition was not met, since imposing an appropriate practice condition relating to trust funds would be as effective as disbarment in ensuring the protection of the public. Such a condition had already been shown to be effective because the Respondent had been practising under such a condition since December 2003 as a result of a s. 39 order made by a panel of three Benchers at that time (see our Decision on Facts and Verdict at para. 3). Mr. Hinkson cited a number of discipline cases, which again we discuss further below, in which misappropriations or misuse of trust funds had been sanctioned with relatively mild penalties.

[7] Mr. Hinkson put before us 30 letters of reference from clients, professional colleagues and others, affirming the writers' confidence in the Respondent's integrity. Each of the writers of the letters had been given a copy of our Decision on Facts and Verdict. Those letters, counsel said, attest that the Respondent is a conscientious and dedicated lawyer who works hard and effectively for his clients. They also show that those who know the Respondent well are inclined to attribute the behaviour in question to a string of personal difficulties, and to his innate reluctance to share those difficulties with friends or to seek help in overcoming them. In counsel's submission, an appropriate penalty in this case would be a fine, together with restrictions on the use of the Respondent's trust account.

Analysis and Discussion

[8] We first consider the precedents that counsel for each side cited to us, starting with those relied on by the Law Society. The lawyer in *Ogilvie*, *supra,* had misappropriated some $7,000 from his trust accounts and covered up his actions by creating fraudulent statements of services rendered and disbursements. He was disbarred. Counsel for the Law Society pointed to a number of comparisons with this case. He said that the Respondent, like Mr. Ogilvie, had engaged in a pattern, rather than a single instance, of misappropriation and over a much longer period than in *Ogilvie*. As a factor in the present Respondent's favour, he noted that Mr. McGuire, unlike Mr. Ogilvie, had acknowledged his misappropriations and put them right. Counsel for the Respondent argued that *Ogilvie* had a number of critical differences from the present case. Mr. Ogilvie had not defended or appeared before the hearing on penalty. He had falsified accounts, not just taken too much. He had disappeared without accounting for a further $96,000. He had let his membership lapse and, given his declining health, there was no chance he would practise again anyway.

[9] The Law Society cited *Law Society of BC v. Guthrie*, [2003] LSBC 06, Discipline Case Digest 03/01, as the exception that proves the rule. The lawyer had discovered that $458.34 remained in a trust account for a file that had been closed eight months before when the client demanded return of the files. Ms. Guthrie drew up a bill in that amount for file retrieval services to the client, and transferred the funds to her general account. She did not send the bill to the client. She voluntarily reported her improper taking of the funds. The penalty, imposed by a single-Bencher panel, was a four-week suspension and costs. The panel added (para. 27) that " it should be clearly noted that it is only in the most extraordinary of circumstances that a misappropriation will not lead to a disbarment." Counsel for the Respondent noted that Ms. Guthrie's withdrawal for fees, like all but a handful of the Respondent's, reflected services that had been rendered to the client; the problem in both cases was that they had not been billed. We note, however, that the principal issue with most of the withdrawals in the present case is not the lack of a bill (though that was a factor in some of them), but the lack of funds in the relevant sub-ledger to cover the withdrawal.

[10] *Law Society of BC v. Peters*, [1999] LSBC 38, Discipline Case Digest 00/5, concerned a lawyer

who had misappropriated $7,000 on trust for a client by seven withdrawals over seven weeks. The lawyer had made notations on the cheques to divert suspicion and avoid detection. A single-Bencher panel ordered disbarment, and the penalty was upheld on Review by the Benchers. Mr. McKinley stressed the similarity to the present case in that there were a number of withdrawals because Ms. Peters needed funds and, as she herself had put it (Decision on Facts at p. 8), " she simply took the path of least resistance." Although there was evidence that Ms. Peters was well on the way to recovering from substance abuse problems that had contributed to her actions (Decision on Penalty at para. 9), the Benchers on Review said at para. 17, " The evidence is lacking in both quantity and quality to support an inference that Ms. Peters' struggles with her problems have been crowned with success or that they may be crowned with success in the future." Mr. McKinley suggested that the Respondent's situation was not dissimilar, in that there was no assurance that the Respondent would not in the future come under stresses like the ones that had led him to misappropriate funds, or that he would not respond to such stresses in a similar way. Mr. Hinkson, in turn, emphasized a number of distinguishing features of the *Peters* decision. The lawyer had deliberately taken all the trust funds belonging to a client and then set out to deceive those who might review the accounts. He argued that, whereas in *Peters* the Benchers found there was no evidence she might not do the same thing again, we should find that there was such evidence in the present case. It had been conceded in *Peters* that, when she misappropriated the funds, the lawyer was not suitable to practise law, but the same did not apply here. There was no suggestion that there was anything the matter with the Respondent's service to his clients.

[11] Counsel for the Law Society referred us to the English Court of Appeal's decision in *Bolton v. Law Society*, [1994] 2 All E.R. 486, for the proposition that it is no answer to an argument for a particular penalty that the lawyer who has committed serious misconduct is otherwise a good man. The penalty, according to the Court (at 492), should not necessarily be understood as punishment, especially where the lawyer has been punished already by criminal sanctions. Rather, the disciplinary penalty may be imposed for either or both of two non-punitive reasons. One is to minimize a risk that the lawyer will repeat the offence, by deterrence or by removing the lawyer temporarily (in the case of suspension) or indefinitely (in the case of disbarment) from practice. " The second purpose," according to the Court, " is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth." (*ibid.*) The Court added (at 493) that the severe effect of the penalty (in that case, suspension) on a lawyer's ability to carry on his livelihood " does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member."

[12] Mr. Hinkson argued that the proposition implicit in *Bolton*, that the circumstances of the member are immaterial if the reputation of the profession is seen to be at stake, had never been accepted as correct in disciplinary decisions by the Law Society of B.C.

[13] In *Law Society of BC v. Hammond*, 2004 LSBC 32, 15 counts of misconduct were found to be established, the most serious of which were two in respect of misappropriation of client funds and four for breaches of undertaking. The lawyer did not defend. A three-Bencher panel ordered he be disbarred. Law Society counsel referred to the panel's statement at para. 25, " A careful review of the authorities with respect to instances of misappropriation which did not lead to disbarment indicates that in each such case there were exceptional circumstances." Mr. McKinley relied especially on the following quotation at para. 23 of the panel's Decision on Penalty, from Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Carswell, 1993) at page 26-1:

> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances

> and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that possibility is remote. Any other result would undermine trust in the profession.

[14] The remaining two disbarment cases the Law Society relied upon were *Law Society of BC v. Kierans*, [1999] LSBC 13, Discipline Case Digest 00/4, and *Law Society of BC v. Donald*, penalty report dated December 7, 1993, Discipline Case Digest 94/4. Mr. Kierans had taken for his own use $5,500 held in trust for a beneficiary who had not yet been located. He had, as well, improperly charged executor's fees and legal fees that he had no right to charge. In upholding the hearing panel's order of disbarment, the Benchers on Review said at para. 51, " The hearing panel reviewed a range of authorities which indicate that disbarment is an appropriate penalty for misappropriation. There appear to be few exceptions to this generally accepted proposition." The Benchers referred to several cases in which such an exception had been made, each of which was very dissimilar to the case before them and the case before us. In *Donald*, the lawyer made five withdrawals totalling $15,400 from his client's trust account by forging his client's endorsement on the cheques. He replaced funds, but at one point between withdrawal and replacement, there was a $8,800 shortfall and the citation charged him with misappropriating that amount. Respondent's counsel noted, in relation to *Kierans*, that the lawyer's conduct had been overt, deliberate and deceitful, and that the Benchers concluded the only way to protect the public was through his disbarment. On *Donald,* he noted that the lawyer did not defend and, by the time disbarment was ordered, had ceased being a member of the Society.

[15] Turning to the cases relied on by the Respondent, the decision in *Law Society of BC v. Spraggs*, Discipline Case Digest 94/2, involved withdrawing a client's trust funds without first rendering a proper bill and knowing that the client objected to the withdrawal. A single-Bencher panel ordered a reprimand, a fine, and costs. This was put forward as a case where the lawyer, in effect, stole money, but Mr. McKinley distinguished the case from ours on the basis that, in *Spraggs*, the money taken was in the account; there was no dishonesty.

[16] In *Law Society of BC v. Andres-Auger*, Discipline Case Digest 94/11, the lawyer withdrew funds on a number of occasions, purportedly in respect of fees, but without delivering a bill. The three-Bencher panel, for this misappropriation and other misconduct, imposed a $1,750 fine and costs, referring to the member's unique personal circumstances and the length of time she had been out of practice. The panel concluded the misappropriation was the result, not of dishonesty, but of an unacceptable degree of inattention, even wilful neglect, by the lawyer of her trust obligations. Mr. Hinkson argued that *Andres-Auger* was factually close to the present case and it was unclear how the panel had concluded there was no dishonesty.

[17] A case that counsel argued was closest to the present one was *Law Society of BC v. Bridal*, [2002] LSBC 23, Discipline Case Digest 02/12, in which the penalty was a reprimand. The lawyer used his trust account for non-trust transactions and commingled personal funds in the account. The Law Society said that *Bridal* was not close to the present case because there was no misappropriation of funds from trust.

[18] *Law Society of BC v. Pierce*, Discipline Case Digest 96/7, involved, among other misconduct, the lawyer's withholding in trust $3,483.53 of the client's funds, even though he conceded that the money belonged to the client, and the client and the client's lawyer had demanded its return. The panel ordered a $10,000 fine and costs. In *Law Society of BC v. Purvin-Good*, 2004 LSBC 05, Discipline Case Digest 04/09, a fine was imposed for failing to remit certain funds collected as GST and PST. Counsel argued that was, as the panel there described it, a case of theft.

[19] Mr. Hinkson pointed to obvious similarities between the present case and *Law Society of BC v. Ashton*, Discipline Case Digest 93/3. The lawyer had withdrawn more money from trust than was held to the credit of a client, had failed to make good trust shortages promptly and had transferred funds out of trust into his general account without rendering a bill. The panel imposed a reprimand, a $1,000 fine and costs. The panel accepted that the misconduct arose from the member's inexperience in running a law practice as well as personal problems. Mr. Hinkson questioned how, given the clarity of the rules about trust funds, even a relatively new lawyer could be said to be honestly mistaken when removing from a trust account more money than was held to the credit of the client. If one removed that distinguishing finding, he suggested, the case was close to the present one.

[20] In *Law Society of BC v. Payne*, Discipline Case Digest 94/14, the lawyer was suspended for three months for failing to maintain sufficient funds in trust to meet his trust obligations and transferring money from his trust account to his general account before delivering an account to the client. The panel found he had not acted dishonestly, only with gross negligence, which again counsel suggested was an unpersuasive distinction from the present case.

[21] We conclude that the cases support the Law Society's position that disbarment is the remedy for deliberate misappropriation of trust funds except in highly unusual circumstances. The cases cited by the Respondent are all readily distinguishable. In *Bridal* and *Pierce* no trust funds were taken. In *Spraggs*, the gist of the wrong was taking funds out for fees when no bill had yet been delivered. In *Andres-Auger*, *Ashton* and *Payne* there was misappropriation, but the panel in each case found the lawyer was negligent, not dishonest, whereas in the present case the Respondent admits that he realized he was removing trust funds improperly.

[22] It is true that each of the disbarment cases the Law Society cited to us had some features different from the present one. The Respondent sought to distinguish them on the basis that in each of them, disbarment either merely ratified a cessation of practice that had already occurred, or, where the lawyer still wished to practise, the panel lacked convincing evidence that the lawyer's past acts of dishonesty might not recur. The Respondent's position was that in this case we do have such convincing evidence because we know that the Respondent can continue to practise with no risk to the public, as he has done since December 2003, subject to a condition restricting his sole access to his trust account. We assume such a restriction on the Respondent would be of indefinite duration. The Respondent did not suggest that the security offered by the restriction could appropriately be dispensed with after any particular period of time.

[23] We cannot accept the Respondent's argument, for two reasons. First, a restriction on a lawyer's use of his trust account is appropriately used, as it was in this case, as an interim measure pending a full examination of the lawyer's conduct. Once the misappropriation has been proved, however, we cannot see how such a restriction can properly be used as a permanent condition on a lawyer's ability to practise. To put it bluntly, a lawyer who, in light of his past conduct, cannot be completely trusted with sole control of his trust accounts should not be practising law.

[24] The second reason relates to the protection of the public. We accept that disbarment is a penalty that should only be imposed if there is no other penalty that will effectively protect the public. Protecting the public, however, is not just a matter of protecting the Respondent's clients in future. Even if the latter could properly be done by imposing restrictions on the Respondent's use of his trust account, we do not think that such a measure adequately protects the public in the larger sense. Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say

to its members, " Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards. A penalty in this case of a fine and a practice restriction is, in our view, wholly inadequate for the protection of the public in this larger sense.

[25] We do not go so far as, on one reading of it, *Bolton v. Law Society*, [1994] 2 All E.R. 486, did. We do not think that, in relation to penalty, maintaining public trust in the profession trumps all other considerations including the personal circumstances of the Respondent. There may be mitigating factors even for the deliberate taking of trust funds. For example, the lawyer's powers of judgment may have been thrown completely off-kilter by illness or by a sudden shock. He or she may have been under emotional pressures that nobody can be expected to resist. However, we think that the Respondent's circumstances in this case, while they certainly elicit compassion, cannot be described as mitigating factors analogous to these. Without in any way minimizing how difficult a time it was for him, the crisis he went through, on the evidence we have, was not such as to impair the Respondent's capacity for moral judgment. Nor did he act under the pressure of a sudden and overwhelming event. He engaged in a series of withdrawals of trust funds, known to be wrongful, extending over many months. Nor can one say for sure that he will never find himself under this kind of emotional and financial pressure again.

[26] The 30 letters of reference written on the Respondent's behalf are impressive. They affirm, and we fully accept, that the Respondent is a kind, generous, public-spirited man and a lawyer who gives good and dedicated service to his clients. Clients, close friends and lawyers who have dealt with him express their complete confidence in his fundamental integrity. As already mentioned, each of the writers of these letters had received a copy of our Decision on Facts and Verdict, so their comments were made with full knowledge of what the Respondent was found to have done. Those who discuss the reasons for his conduct attribute it to the stress he was under owing to the breakup of his marriage and other emotional strains, as well as his willingness to take on clients who could not pay him adequately. Some say that his self-reliant, stoic nature played a role because it held him back from asking his friends for help in dealing with his difficulties.

[27] Many of the factors listed in *Ogilvie*, *supra,* at para. 10, as relevant to penalty are, as his counsel stressed, favourable to the Respondent. His previous character, as confirmed by the letters of reference, was excellent. No client ended up losing money as a result of what he did. He gained no lasting advantage by what he did. He has acknowledged his misconduct and redressed the wrong. The impact on him of disbarment will be devastating, both financially and personally.

[28] All these, however, are not enough in our view to overcome the seriousness of what the Respondent did, the fact that he realized what he was doing, the fact that it was a course of conduct extending over many months, the need for specific and general deterrence, the need to protect the public's confidence in the integrity of the legal profession, and the range of penalties imposed in similar cases.

[29] The Respondent is a good man, but at a time of great difficulty in his life he allowed himself to do what a lawyer, regardless of what strains or pressures he is under, must never do. The standard he broke was not one of unattainable perfection, which humans are expected to fall short of from time to time. On the contrary, it is an absolute standard. When it is deliberately broken, as it was here, the seriousness of the misconduct is, except in very unusual circumstances, impossible to mitigate. No case was cited to us in which the deliberate, repeated recourse to trust funds to ease the lawyer's personal cash flow problems was sanctioned with anything less than disbarment.

[30] True, the Respondent regarded many of the takings as fees for work he had done, although the fees were not yet billed or the withdrawals not covered by funds deposited by the client. True, when he made the withdrawals, the Respondent seemingly intended to put things right when he could do so. True,

some of the withdrawals were put right, by delivery of a bill or by replenishment of the account, even before the Law Society became involved. True, in the end, no client has lost money. But none of that alters the fundamental fact that the Respondent broke, not once but many times over a long period of time, the clearest, most basic rule of professional conduct: you do not ever, under any circumstances, help yourself to trust money that belongs to your clients. One can say in the Respondent's favour that he did not compound his wrongdoing by, say, falsifying his trust records or failing to cooperate with the Law Society's investigation. But the fact that he could have done worse things does not lessen the seriousness of what he did do.

[31] For these reasons we conclude that the only appropriate penalty in this case is that the Respondent be disbarred.

Costs

[32] The Law Society presented a schedule of costs relating to the s. 39 referral to the Benchers on December 19, 2003, the Facts and Verdict hearing on August 29, 2005, and the present hearing. The total amount of costs claimed was $55,669.90.

[33] Although the Respondent raised substantial issues with respect to certain items of costs, we do not propose to deal with them. The Respondent, as his counsel told us, is the sole breadwinner for himself and a family of three others, lives in a rental home, and has no significant savings or assets. We think it wrong that, in addition to disbarment, he should face liability for costs on anything like the scale proposed. We award the Law Society costs against the Respondent in the amount of $10,000.

Decision

[34] This panel orders that the Respondent:

1. be disbarred, and
2. pay costs in the amount of $10,000.