2006 LSBC 21
Report issued: May 25, 2006
Citation issued: August 24, 2005

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

Elmer Vernon Epp

Respondent

Decision of the Hearing Panel

Hearing date: May 15, 2006

Panel: Ralston S. Alexander, Q.C., Chair, Dirk Sigalet, Q.C., G. Glen Ridgway, Q.C.

Counsel for the Law Society: Brian McKinley, Maureen Boyd
Counsel for the Respondent: Jerome Ziskrout

Background

[1] In a decision dated January 24, 2006, the Panel decided that the Respondent's conduct concerning an undertaking given by him amounted to professional misconduct. The relevant facts are set in the context of an owner/contractor residential premises construction dispute. Briefly, the relevant facts are that the Respondent and Lawyer C negotiated a settlement. This settlement was outlined in Minutes of Settlement signed by the respective clients. The relevant paragraph of these Minutes said:

> 3(j) Upon installation of the siding and gutters, and receipt of proof of payment by the contractor of $5,516.92 to [company] and $2,235.77 to [company], Taylor, Epp and Dolder undertakes to forthwith forward $9,452.94 to S.P. Law Corporation " in trust" , for immediate release to the Contractor.

Receipt of the above required proof of the two payments is occasionally referred to by the parties and in this decision as the " triggering event."

[2] On May 31, 2004 Lawyer C delivered this required proof to the Respondent and requested the $9,452.94. In other words, the triggering event occurred. However, the Respondent declined to pay out on the basis that:

> (a) another term of the Minutes of Settlement somehow implied that proof of a warranty had to also be provided; and
>
> (b) the Minutes of Settlement were not binding on the Respondent because he had not signed them - they had only been signed by his client.

[3] In June of 2004, in response to written inquiries from the Respondent, the Law Society Practice Advisor told the Respondent that he was bound by the undertaking contained in the Minutes of Settlement. The Practice Advisor declined to comment on whether the triggering event had occurred.

[4] The Respondent continued to resist fulfillment of his undertaking on the basis that the lack of

delivery of the warranty meant that the triggering event had not occurred.

[5] On March 17, 2005, Law Society staff advised the Respondent that the Law Society did not agree that the delivery of the warranty was part of the triggering event. By March 25, 2005, the Law Society advised the Respondent by letter that the matter had been referred to the Discipline Committee.

[6] At the November 17, 2005 hearing the Respondent admitted that he was bound by the undertaking contained in the Minutes of Settlement paragraph 3(j), and that he breached his undertaking by failing to forward the funds forthwith upon receiving proof of payment as set out in that undertaking.

Analysis

[7] At the penalty phase of the hearing helpful submissions and materials were provided by both Counsel. Counsel for the Law Society fairly characterized the above facts as an overly technical approach to avoid an undertaking. He cited Chapter 11, Rule 7 of the *Professional Conduct Handbook*, which says, in part, that a lawyer must: " ...scrupulously honour any trust condition once accepted."

[8] Mr. McKinley provided the following authorities:

1. *Law Society of BC v. Price,* Discipline Case Digest 98/11.

2. *Law Society of BC v. Visram,* Discipline Case Digest 98/17.

3. *Law Society of BC v. Taschuk,* Discipline Case Digest 99/05.

4. *Law Society of BC v. Ghag,* Discipline Case Digest 99/29.

5. *Law Society of BC v. Morrison,* Discipline Case Digest 01/02.

6. *Law Society of BC v. Kruse,* Discipline Case Digest 02/09.

7. *Law Society of BC v. Heringa,* Discipline Case Digest 03/15; and *Law Society of British Columbia v. Heringa* 2004 BCC 97.

8. *Law Society of BC v. Hall,* Discipline Case Digest 05/03.

[9] The Respondent's behaviour and actions were not characterized by such exacerbating factors as flagrant disregard, cavalier attitude, aggravating circumstances or a shortfall of trust funds. The Panel accepts that the Respondent's factual situation is at the lower end of the undertaking misconducts presented by these cases and is most in keeping with the decisions in *Price*, *supra*, and *Hall*, *supra*.

[10] Respondent's counsel, Mr. Ziskrout, took no issue with Mr. McKinley's characterization of the circumstances of the case. Mr. Ziskrout introduced seven letters of reference, (Exhibit 3 in this proceeding). The letters of reference speak very highly of the Respondent, of his long and distinguished career in the law, and of the assistance that he has freely provided to junior lawyers throughout his practice life. Mr. Ziskrout observed that in his experience he had seen letters of reference as good as those provided for the Respondent but that he had never seen any better letters. We agree.

[11] The Respondent cooperated fully with the Law Society during its investigation of his conduct. When the Respondent's behaviour is considered within the context of this cooperation, and also in the more relevant context of these letters of reference, it is apparent that the Respondent's error in judgment is a

one-time occurrence and is certainly not a situation that is likely ever to occur again.

[12] The Law Society's publication of this judgment may cause humiliation for the Respondent in situations where colleagues in other parts of the Province are not familiar with the situation. The Panel also appreciates the publication may also cause an awkwardness with the public. One of the seven letters of reference is a letter from a non-lawyer. RCMP Superintendent A.M., (Ret'd) writes:

> I have read the decision of the Board [sic] and find his actions which resulted in this Hearing and decision to be totally out of character. Retrospect is always invaluable and there is no doubt, in my mind, you will never find Elmer Epp in this situation again and if he had an opportunity to look back through that looking glass I know his action would be different.

[13] It can be inferred that Superintendent M.'s letter fairly speaks for the public. It therefore shows that the public understands a one-time unfortunate error of a solicitor with an otherwise impeccable career. The public interest is served by the penalty, as pronounced below, being in keeping with penalties imposed in similar situations. The effect of this penalty, with respect to this Respondent, is it safeguards the fundamental nature of undertakings to the practice of law and preserves the requirement of all lawyers to make certain that serious and diligent efforts are made to meet all undertakings. Undertaking compliance is an essential ingredient in maintaining the public credibility and trust in lawyers.

Penalty

[14] Accordingly the Panel orders that the Respondent:

(a) be reprimanded;

(b) pay a $5,000 fine by June 15, 2006; and

(c) pay $5,000 in costs by June 15, 2006.

[15] Counsel for the Respondent has stated that the Respondent does not expect his colleagues in the Province to, in effect, bear the costs of these proceedings and therefore takes no issue with the proposed Bill of Costs from the Law Society. He noted that the Respondent did not need any time to pay. The Panel notes however, that if the Respondent encounters changed circumstances on or before June 15, 2006, he is at liberty to apply for time to pay.