2007 LSBC 19
Report issued: April 11, 2007
Citations issued: April 12, 2006 and June 13, 2006

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

**Rodney John Strandberg**

Respondent

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

Hearing date: January 22, 23 and 24, 2007

Panel: Bruce LeRose, Q.C., Chair, Gerald Lecovin, Q.C., Gavin Hume, Q.C.

Counsel for the Law Society: Gerald Cuttler
Counsel for the Respondent: Jerome Ziskrout

# Background

[1] On April 12, 2006 a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee. The citation, as amended, directed that this Panel inquire into the Respondent's conduct as follows:

1. You failed to provide your client E.H. 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, failed to answer reasonable requests from your client for information, 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, Rule 3 of the *Professional Conduct Handbook*.

2. You attempted to mislead the Law Society, E.H. and Glen Nicholson in responding to the complaints of your client E.H. and his subsequent lawyer, Glen Nicholson, by:

(a) representing to the Law Society, in a letter dated March 8, 2004, that you had asked E.H. to provide a report from a mechanic to use in a Rule 18A application, but E.H. had not done so, and as a consequence you had not been able to prepare the required material when you knew this to be untrue;

(b) representing to the Law Society, in a letter dated June 8, 2004, that you had asked E.H. to provide a mechanic's report twice by phone and once by letter, and that the mechanic's report was essential for you to proceed but that E.H. had not provided it, and that as a consequence you had not been able to advance E.H.'s case, when you knew this to be untrue;

(c) forging two letters purportedly addressed to E.H. and dated July 30, 2002 and March 1, 2004 respectively, inserting these forged letters in the file for your client, E.H. (the " E.H. file" ) and providing the E.H. file containing these forged letters to the Law Society under cover of your letter to the Law Society dated July 1, 2004, when you knew the E.H. file contained these forged letters;

(d) representing to the Law Society in your letter dated July 1, 2004 that you sent it the " original" E.H. file, and that the " only exceptions" were two memos to file which were copied because the reverse of them related to other clients, when you knew this to be untrue;

(e) representing to the Law Society in your letter dated September 20, 2004 that you asked E.H. for a mechanic's report but never received it and that there was little progress on the file because you were waiting for evidence from E.H., when you knew this to be untrue;

(f) representing to the Law Society in your letter dated October 4, 2004 that you had instructed a member of his staff to forward the E.H. file to the Law Society when you knew this to be untrue;

(g) representing to the Law Society and to Mr. Glen Nicholson, in your letters dated March 7, 2005, that on December 10, 2004 and January 6, 2005 you responded to correspondence from Mr. Nicholson dated December 3 and 15, 2004 and January 5 and 11, 2005, when you knew this to be untrue;

(h) forging two letters purportedly addressed incorrectly to Mr. Glen Nicholson and dated December 10, 2004 and January 6, 2005, sending them to the Law Society and to Mr. Glen Nicholson in your letters dated March 7, 2005 and representing that such forged letters had been sent to Mr. Nicholson's incorrect address, when you knew this to be untrue;

(i) representing to the Law Society in your letter dated April 25, 2005 that you had numerous discussions with E.H. concerning a mechanic's report, when you knew this to be untrue.

3. You were bound by an undertaking to the Law Society in your letter dated February 1, 2001 to not practise in the areas of " wills, estates or conveyancing" . You breached that undertaking by practising in the area of conveyancing when you acted for your client Ms. B. in accepting sale proceeds from another lawyer on your undertaking to pay off and discharge a mortgage and a judgment registered against title and to pay any outstanding property taxes. You further breached your undertaking to the Law Society when you paid out the mortgage on behalf of your client.

4. In representing Mr. B. as duty counsel, you misled another lawyer, Mr. Rivard, who was acting for the provincial Crown, when you advised him that the federal Crown would be taking a specific position with respect to sentence on a related matter, when you knew that you had not yet been advised by the federal Crown as to their position.

5. You failed to provide your client T.F. 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, failed to answer reasonable requests from your client for information, failed to prepare documents and perform other legal tasks accurately, 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, Rule 3 of the *Professional Conduct Handbook*.

[2] On June 13, 2006 a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society pursuant to the direction of the Chair of the Discipline Committee. The citation, as amended, directed that this Panel inquire into the Respondent's conduct as follows:

1. You failed to provide your client L.A. 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, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*.

2. You attempted to mislead the Law Society and L.A. by representing, in your letter to the Law Society dated May 1, 2005, that you had written to L.A. on April 5, 2005 and had conducted a judgment search prior to that date when you knew this was untrue.

3. You forged a letter purportedly dated " 5 April, 2005" addressed to L.A. and enclosed it in your letter to the Law Society dated May 1, 2005, with the intention of misleading the Law Society and L.A. to believe that you had written this letter before you learned that L.A. complained to the Law Society, when you knew this was untrue.

4. You attempted to mislead the Law Society by representing, in your letter to the Law Society dated November 30, 2005, that you had conducted a judgment search prior to the time you learned of L.A.'s complaint to the Law Society and that you had returned L.A.'s documents to her when you knew this was untrue.

5. You failed to provide your client A.W. 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, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*.

6. You attempted to mislead the Law Society and A.W. in letters you wrote to the Law Society and A.W. dated January 31, 2006 in which you stated that the faxes from or on behalf of A.W. received in your offices were " misfiled" when you knew this was untrue.

## Discussion

[3] With the exception of counts 3 and 4 on the citation dated April 12, 2006, as amended, the Respondent has agreed that the conduct constitutes professional misconduct.

[4] The two counts in issue are:

3. You were bound by an undertaking to the Law Society in your letter dated February 1, 2001 to not practise in the areas of " wills, estates or conveyancing" . You breached that undertaking by practising in the area of conveyancing when you acted for your client Ms. B. in accepting sale proceeds from another lawyer on your undertaking to pay off and discharge a mortgage and a judgment registered against title and to pay any outstanding property taxes. You further breached your

undertaking to the Law Society when you paid out the mortgage on behalf of your client.

4. In representing Mr. B. as duty counsel, you misled another lawyer, Mr. Rivard, who was acting for the provincial Crown, when you advised him that the federal Crown would be taking a specific position with respect to sentence on a related matter, when you knew that you had not yet been advised by the federal Crown as to their position.

**Breach of Undertaking to the Law Society**

[5] The agreed facts are as follows:

(a) On October 13, 2002, the Law Society conducted a Practice Review of the Respondent's practice as ordered by the Practice Standards Committee.

(b) During the Practice Review, the Respondent agreed never to take another file in areas of Wills and Estates and Real Estate. The Respondent's agreement was confirmed in a letter from the Law Society to him dated December 8, 2000.

(c) On February 1, 2001, the Respondent sent a fax to the Law Society in response to the Law Society's Practice Review and Report dated December 8, 2000. The Respondent stated, *inter alia:*

> I have no difficulty in undertaking not to practise in Wills, Estates or Conveyancing.

(d) On March 1, 2001, the Practice Standards Committee of the Law Society met to consider, *inter alia*, the Respondent. The Committee agreed to accept the Respondent's undertaking not to practise in the areas of Wills, Estates and Conveyancing.

(e) On May 9, 2003, the Respondent wrote to the Law Society. He confirmed that he had " undertaken to the Law Society not to practise in the area of conveyancing." He then sought clarification regarding his undertaking. He stated:

> I would hope that I could continue to certify my Land Title documents as an officer except in the context of real estate conveyancing files.

(f) Following consideration by the Practice Standards Committee, the Respondent was advised he should not be acting on any type of matter affecting an interest in real estate where he is or should be providing legal advice pertaining to the transaction. It is a simple matter to have those clients referred to a local solicitor who would carry out those particular functions for the client.

(g) Following further communications with the Respondent and considerations by the Practice Standards Committee, the Law Society wrote to the Respondent on July 17, 2003. It stated, *inter alia*:

> the Committee confirms your undertaking as February 1, 2001 to not practise in the areas of Wills and Estates and real estate does not include:
>
> i. advising clients on service rights agreements; and

ii. giving your family client advise (sic) on their rights relating to real property and witnessing their signatures on Land Title documents provided that you are [not] involved in any other aspect of any real property transaction, including, clearing title.

(h) In or about November and December 2003, the Respondent acted for client B.B. in respect of arranging for the execution of a separation agreement and the conveyance of a property (the " Property" ) owned by B.B. and her estranged husband to a third party.

(i) On November 14, 2003, the Respondent received a letter from the lawyer for the purchaser of the Property, which enclosed various documents for execution by B.B. The letter stated that the vendors' net sale proceeds would be forwarded to the Respondent on his " undertaking to pay to N. Credit Union the amount required to pay off in full and discharge the mortgage registered against the title to the property under No. PL38507 and to pay to Bank of Montreal the amount required to pay off in full and discharge the judgment registered against the title to the property under No. BV115288, and on the trust condition that they will provide you with the registerable discharges of that mortgage and judgment and on your further undertaking to, immediately upon receipt of the form of discharges, file the same for registration in New Westminster Land Title Office and provide us with registration particulars as soon as they are available; **and on your further undertaking to pay the outstanding Property Taxes and any penalties, arrears and interest, and provide this office with a receipt for payment of the same in due course** .

(j) On November 26, 2003, the Respondent witnessed the execution of B.B. in respect of a freehold transfer document concerning the property.

(k) On December 22, 2003, the Respondent witnessed the execution of B.B. on a freehold transfer document to transfer the property from B.B. to the purchaser.

(l) On November 30, 2003, the Respondent witnessed the signature of B.B. in respect of a Direction to pay addressed to the purchaser's lawyer and the Vendor's Statement of Adjustments.

(m) On December 23, 2003, the Respondent wrote to the purchaser's lawyer enclosing copies of executed documents relating to the transfer of the property from B.B. to the purchaser. The letter stated, *inter alia*:

Upon receipt of the settlement funds I will discharge the mortgage registered under No. PL385007 and additionally discharge judgment registered under No. BV115288 and pay any outstanding property taxes.

(n) On December 23, 2003, the Respondent requested a payout statement from the N. Credit Union.

(o) On December 24, 2003, the purchaser's lawyer sent his trust cheque payable to the Respondent in trust the amount of $99, 950.92, being the balance due on closing. The funds were sent to the Respondent on his undertaking to pay off in full and discharge the mortgage and judgment registered against the property and to pay all outstanding property taxes, penalties, arrears and interest and provide a receipt of payment.

(p) The letter also notified the Respondent of the Law Society Rule requiring notification to the Law Society if the Respondent failed to provide proof of filing of all discharges as pending applications within

60 days after the closing of the transaction.

(q) Although the transaction closed on December 24, 2003, the Respondent did not provide the purchaser's lawyer with proof of filing of all discharges as pending applications within 60 days thereafter.

[6] The Respondent acknowledges that he acted for his client in a conveyancing matter, but says he was not practising law when he did so. He points to the definition of " practice of law" in the *Legal Profession Act* which says;

...but does not include

any of those acts if not performed for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,

[7] The Respondent says that while he charged his client fees for negotiating a separation agreement with her husband, he did not charge her fees for the conveyance. Although his statement of account (Agreed Statement of Facts, paragraph 131) indicates that he did, he points out that this bill was created by his secretary from a template in his office. The secretarial notation at the bottom of the document bears this out. When first approached by the Law Society, his client confirmed that he never charged her for the conveyance. Accordingly, we find that he did not. The Law Society points out it is practising law if a person does so in the hopes of a " gain or reward" . It points out further that the Respondent was aware that his client could not pay him for the services he performed for her in negotiating the separation agreement except from the proceeds of the sale of her property.

[8] In her statement of evidence, taken by agreement, the Respondent's client states that she did not have money to pay the Respondent before selling her home, but she mentioned she would have money once the house was sold. The Law Society argues that in doing the conveyance in his office, he insured that the monies from the sale of his client's home would come to him and he would thereby be assured of being able to withdraw his fees therefrom and this was " a gain" for him. That is in fact what happened. The Panel finds therefore that these facts come within the definition " practice of law" and that the Respondent was practising law when he breached his undertaking to the Law Society.

[9] The Respondent also argues that, even if he was practising law at the time, he did not breach his undertaking wilfully because of his negligence in believing that by not accepting a fee, he was not practising law. It is agreed that mere negligence is excluded from the mental element required for conviction.

[10] The degree of *mens rea* necessary for a conviction is discussed in *R. v. Oluwa*, [1996] B.C.J. No. 1065 (C.A.). Therein, commencing at paragraph 88, the Court discussed the degree of *mens rea* to support a conviction where actual guilty knowledge was not proven. We quote as follows:

88. Absent any evidence to the contrary, the facts of this case are such that it is permissible to infer that the appellant actually did know that his flight would make a scheduled stop in Vancouver. If he did not actually know of this stop, it is my view that it would be sufficient to support a conviction if the evidence establishes that the appellant was wilfully blind or reckless as to that fact. The concept of the mens rea required in a criminal case is discussed in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1309, where Dickson J. (as he then was) stated:

... the Crown must establish a mental element, namely, that the accused who committed the

prohibited act did so intentionally or recklessly with knowledge of the facts constituting the offence or with wilful blindness towards them. Mere negligence is excluded from the concept of the mental element required for conviction.

2. Mens rea: recklessness and wilful blindness

89. We have received useful memoranda from counsel on the question of recklessness and wilful blindness.

(a) Is wilful blindness as to whether the plane would stop in Canada sufficient to establish mens rea for the offence of " importing into Canada" ?

90. In *R. v. Sansregret*, [1985] 1 S.C.R. 570 at 584, the court contrasted wilful blindness and recklessness:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not with to know the truth.

91. I wish to observe that proof of the last clause in the above quote, " because he does not wish to know the truth" , cannot be a part of the Crown's burden. The reasons for the failure of the appellant to inquire, if such was the case, are so subjective that they could seldom be proven, and wilful blindness is usually an alternative position that assumes the appellant did not actually know some notorious fact which he probably knew anyway but of which proof cannot be given. These words, in my view, are merely a characterization the law places upon the failure of someone to learn or recognize what should have been known if it was not known.

92. Mr. Sanders reminds us of the limitations properly to be placed upon this concept, and cites the following passage from Williams, *Criminal Law: The General Part*, 2d ed., (London: Stevens & Sons Ltd., 1961) at p. 159, which was quoted in *Sansregret*:

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant entented (sic) to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

93. With respect, while this passage was indeed quoted in *Sansregret*, it seems only to have been mentioned for the purpose of illustrating the limits of the principle. In practical terms, it means what it says, namely that the principle can be applied only when it can " almost be said that the defendant actually knew." In *Sansregret*, a sexual assault case, the accused said he did not know the victim was not consenting, and both the victim and the trial judge accepted the honesty of his belief that

the victim was freely consenting. In spite of this, the Supreme Court of Canada applied the wilful blindness principle to find that the accused must have known the victim was not consenting. As McIntyre J. said at p. 237, there was self-deception to the point of wilful blindness.

94. The concept of wilful blindness cannot be considered in a factual vacuum, in isolation from the reasonable inferences to be drawn from known facts. In this case, with respect, I cannot conclude other than that the appellant, if he did not know his flight would stop in Canada, which seems inconceivable, was wilfully blind to that fact. His lack of knowledge, if any, resulted from his wilful failure to obtain information which was readily available and which was of significant importance to him. Because of his wilful blindness, the law attributes such knowledge to him.

(b) Is recklessness as to whether the plane would be stopping in Canada sufficient to satisfy the mens rea element of " importing into Canada" ?

95. In *Sansregret*, supra, McIntyre J. said, at p. 582

In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea, must have an element of the subjective. It is found in the attitude of one who, aware that there is a danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who see the risk and who takes the chance. It is in this sense that the term " recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence.

[11] Paragraphs 114 to 120 of the Agreed Statement of Facts show that the Respondent was alive to the exactitude of the restrictions under which he was placed. He wrote to the Law Society confirming his understanding. He wrote again seeking clarification regarding his undertaking and was told " thus, in view of the Practice Standards Committee, you should not be acting on any type of matter affecting an interest in real estate where you are or should be providing legal advice pertaining to the transaction. It is a simple matter to have the clients referred to a local solicitor who would carry out those particular functions for the client."

[12] There were further communications between the Respondent and the Law Society as a result of which the Law Society again wrote, stating " The Committee confirms your undertaking as of February 1, 2001 not to practise in the areas of Wills and Estates and Real Estate, does not include:

1. advising clients on service rights agreement;

2. giving your family client advice on their rights relating to real property and witnessing their signatures on Land Title documents provided you are not involved in any other aspect of any real property transaction including clearing title.

[13] There are two questions this Panel must address. Firstly, what did the Respondent believe when he did the work, and secondly, if he believed that he was doing nothing wrong, ought he to have?

[14] In his evidence in chief, the Respondent stated

... and so what I said I would do is I would take her signature and write a few cheques, and I wouldn't charge her for it. I don't charge to write cheques - I thought it was my contribution to a

mom trying to set up a new life with her five children. So I looked at the definition of practice of law in the *Act* and it said that it is doing something with an expectation of reward or gain, so I thought that if I didn't charge her and didn't expect to receive anything, it was almost like pro bono except I got money from her on the family side of things, that I wasn't engaged in the practice of law and that is why I did that.

[15] However, on cross-examination, he stated that he hadn't looked up the practice of law definition before he did the work.

[16] This last statement contradicts his evidence in chief. Accordingly, we cannot accept his evidence on this point and conclude that the Respondent has not proven that he believed he was not practising law when he did so. This leaves us with the fact that the Respondent knowingly breached his undertaking.

[17] If we are wrong in failing to accept his evidence that he thought that he was not practising law when he did so, we are satisfied that, in view of his previous correspondence with the Law Society, he ought to have made an inquiry with the Law Society as to whether, under the circumstances, not charging a fee for his services would not be a breach of his undertaking, and that he was wilfully blind by not doing so. Accordingly, the Respondent is guilty of that count on the citation.

### The Complaint of Georges Rivard

[18] The agreed facts are as follows:

(a) On October 4, 2004, the Respondent was acting as duty counsel at the Fort St. John Provincial Court. On that day, Mr. Georges Rivard acted as Crown Counsel on behalf of the Ministry of the Attorney General, British Columbia. Mr. Steven Cope was acting on behalf of the Federal Crown.

(b) On October 4, 2004, the Respondent was representing L.B., who had been charged under Section 5(2) and 4(1) of the *Controlled Drugs and Substances Act* (" CDSA" ). L.B. was also charged with breach of probation.

(c) On October 4, 2004, before L.B.'s case was called, the Respondent and Mr. Rivard discussed sentencing with respect to L.B.

(d) Mr. Rivard advised the Respondent of his sentencing position regarding a possible guilty plea for the breach of probation charge. Mr. Rivard told the Respondent that, in the circumstances, his view was that a range of 21 to 30 days jail sentence was appropriate.

(e) In response, the Respondent asked Mr. Rivard to consider an intermittent sentence on two grounds. The Respondent told Mr. Rivard that L.B. would be able to retain his employment in two jobs, one being an attendant at an oil change garage. The Respondent admits that he also told Mr. Rivard that " Federal Crown is only asking for a fine" regarding the CDSA charge.

(f) Mr. Rivard relied on what the Respondent told him. Mr. Rivard advised the Respondent that, on the basis that the Federal Crown was only asking for a fine, and that L.B. would be able to retain his employment, L.B. would not oppose an intermittent sentence.

(g) Just prior to the matter being called in Court, Mr. Rivard was advised by Steven Cope that there was no agreement between the Respondent and the Federal Crown to only ask for a fine, that no

discussion at all regarding the sentencing of L.B. had occurred.

(h) In fact, the Respondent did not discuss the Federal Crown's position on sentencing with it. Neither Mr. Cope nor anyone else from the Federal Crown told the Respondent that its position would be to ask for a fine in respect of L.B.

(i) The Respondent admits that Mr. Cope did not tell him that the Federal Crown would be seeking a fine in respect of L.B., and that he had not discussed the sentencing of L.B. with Mr. Cope or any other member of the Federal Crown when he told Mr. Rivard that " Federal Crown is only asking for a fine."

[19] At the commencement of the hearing and pursuant to Rule 5-6, the Panel ordered that certain information including the identity of the Respondent's client and the communication between the Respondent and his client should not be disclosed. As a result, our analysis leading to our conclusion will not be included in these reasons, though they were made available to counsel for the Law Society and counsel for the Respondent.

[20] In reaching our conclusion, we considered what was said in *Oluwa* (supra). In summary, we concluded that the Respondent was either " reckless" or " wilfully blind" as those phrases are discussed in *Oluwa* and as a result, guilty of the offence charged.

## General Credibility

[21] When a lawyer pleads innocent intention, the onus is upon him to provide the basis for that intention. This is evidence that only he can give. The Panel must first look to see if his explanation is reasonable in itself. Then it looks to surrounding circumstances to see whether they support or reject the explanation. If the surrounding circumstances are neither probative nor dis-probative, the Panel is left solely with the Respondent's story. The Respondent then has the right to call upon his credibility. In this hearing, the matter of the Respondent's credibility was canvassed. It was pointed out that in the matters before us, the Respondent has admitted lying to his clients and the Law Society on several different occasions. He has also acknowledged trying to deceive the Law Society by forging documents. This is not the first occasion he has admitted to prevaricating. On July 11, 2001, he admitted to misleading a client and the Law Society and forging a document. In addition to the reasons set out above, this past history also leads us to find that he is not a credible witness.