2008 LSBC 02
Report issued: January 17, 2008
Citation issued: August 9, 2006

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

Michael Curt Scholz

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing dates: April 24, 25 and May 4, 2007

Panel: G. Glen Ridgway, QC, Chair, Richard N. Stewart, Dirk J. Sigalet, QC

Counsel for the Law Society: Maureen S. Boyd
Counsel for the Respondent: George F. Gregory

Background

[1] On August 9, 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 of British Columbia, pursuant to the direction of the Chair of the Discipline Committee. The citation, as amended on March 2, 2007, directed that this Panel inquire into the Respondent's conduct as follows:

1. Your conduct in releasing funds which were held pursuant to an Order of the Supreme Court of British Columbia made November 17, 1997, in Vancouver Registry Action No. C975944, which required that such funds " be held in trust by Alexander Holburn Beaudin & Lang unless otherwise ordered by the court or agreed by all parties with any interest or claim to the funds." On July 20, 2001, you caused the release of these funds as a loan to your client G. Inc.:

   (a) contrary to the investment provisions of section 15 of the *Trustee Act*, R.S.B.C. 1996, c. 464;

   (b) without appropriate instructions contrary to Rule 3-51 of the Law Society Rules; and

   (c) in breach of the terms of the Court Order.

2. Your conduct in acting for W. Ltd. and G. Inc. in relation to the same matter in circumstances which gave rise to divided loyalties contrary to Chapter 6, Rule 1 of the *Professional Conduct Handbook*.

3. [deleted]

4. Your conduct in acting for W. Ltd. to arrange a loan of funds over which it had a claim to G. Inc., when you were in a conflict of interest by reason of your employment by and financial interest in G. Corp., the parent company of G. Inc.

[2] The Law Society did not proceed with the allegation respecting the investment provisions of the *Trustee Act.*

[3] The Law Society's position was that the Respondent's conduct with respect to these matters constituted professional misconduct and a contravention of the *Legal Profession Act* or a Rule made thereunder.

[4] The Law Society and the Respondent filed a Statement of Agreed Facts. In addition, witnesses were called.

[5] The Respondent was admitted to the Bar of British Columbia on May 14, 1979, and practised from that time until 2001 with the firm of Alexander Holburn Beaudin & Lang (" Alexander Holburn"). He resigned as a partner of that firm effective June 30, 2001, but remained an authorized signatory of their trust account until August 31 of that year.

[6] On or about April 25, 2000, the Respondent was appointed a Director of G. Corp. On June 1, 2001, the Respondent was appointed President of G. Corp. On June 1, 2001, the Respondent commenced employment with G. Corp. as President, legal advisor and Vice-Chair of the Board of Directors of G. Corp. The Respondent entered into a written contract of employment with G. Corp. dated June 29, 2001.

[7] There was a six-month period of transition for the Respondent from his practice at Alexander Holburn to his employment with G. Corp.

[8] At all material times, the Respondent acted in the following capacities: for G. Corp., he was President, legal counsel, Vice-Chair, and Solicitor; for G. Inc., he was Solicitor; and for W. Ltd., he was its Solicitor.

[9] In 1997, as a result of the failure of Eron Mortgage Corporation, the Registrar of Mortgage Brokers froze the bank account of W. Ltd. W. Ltd. was a client of the Respondent. This bank account was at the Bank of Montreal and had a balance of $179,246.70 at the date it was frozen. The Bank of Montreal commenced interpleader proceedings to have those funds paid into Court for ultimate determination as to the rightful owner of those funds.

[10] D.C., who gave evidence at the hearing, was an investor in W. Ltd. He commenced an action to recover $100,000.00 of funds he had loaned to W. Ltd. He sought an order that the funds of W. Ltd., frozen at the Bank of Montreal, be paid to the credit of the action that he had commenced. This application was served on 34 respondents, many of whom, like D.C., were investors in W. Ltd.

[11] Appearances to this application were filed on behalf of the Bank of Montreal, the Province of British Columbia and the Registrar of Mortgage Brokers. An Appearance was also filed by one L.M., an investor in W. Ltd.

[12] Ultimately, the Respondent proposed and obtained agreement that the " frozen" funds held by the Bank of Montreal be paid to the Respondent's firm, Alexander Holburn. This was confirmed by the Order of Mr. Justice Tysoe, made November 17, 1997, which provides:

> ... the Bank of Montreal pay the funds in its possession held to the credit of the defendant W. Ltd. to Alexander, Holburn, Beaudin & Lang, in trust, and that such funds be held in trust by Alexander, Holburn, Beaudin & Lang unless otherwise ordered by the court or agreed by all parties with any interest in or claim to the funds.

[13] On December 24 of that year, the Bank of Montreal paid the funds in the amount of $179,245.70

to the firm pursuant to such Order, and the funds remained in such status, with the Respondent as the lawyer at Alexander Holburn primarily responsible therefore.

[14] The Respondent continued to represent W. Ltd. and provided significant legal services, for which accounts were rendered in the years 1998 to 2001 by the Respondent's firm to W. Ltd. in the amount of approximately $106,000.

[15] D.C. became a Director of W. Ltd. and, ultimately, its President in June of 1998. From his evidence at this hearing, it was clear that he was, for all intents and purposes, the functioning mind of W. Ltd. as it pursued its part of the unraveling of Eron Mortgage Corporation and attempted to re-establish itself.

[16] In May of 2001, the Respondent indicated to counsel for claimants who had loaned funds to W. Ltd. that his firm was doing no further work for W. Ltd. until arrangements were made for the payment of his account, and he discussed payment of the account with D.C., now the President of W. Ltd.

[17] In early July 2001, the Respondent indicated to D.C. that there was an opportunity to earn a greater return for the funds being held.

[18] This investment opportunity was with G. Inc., the subsidiary of G. Corp. The Respondent was, at the time of this opportunity, the President, Vice-Chairman and legal advisor of G. Corp.

[19] D.C. was aware of the role that the Respondent held with those Companies and that he was leaving his firm.

[20] The Respondent did not contact any other party to the legal proceedings to which the Order of Mr. Justice Tysoe related; however, he did receive an indication by email from D.C. that L.M., the other investor in W. Ltd. who had filed an Appearance in the action, had agreed to release interest on the trust funds.

[21] The Respondent arranged for a cheque for the funds from his firm and delivered it to G. Corp. on July 20, 2001. The amount of the funds now stood at $208,698.03. In return, he received a demand Promissory Note issued by G. Inc. in favour of Alexander Holburn, in trust, for W. Ltd. He signed that Promissory Note on behalf of Alexander Holburn.

[22] The funds were ultimately repaid to Alexander Holburn in three installments: the first on September 11, 2001; the second on December 1, 2001; and the third on February 25, 2002. A portion of the funds repaid was applied to the accounts of Alexander Holburn.

[23] It is fair at this point to clarify that the Alexander Holburn firm was not involved in any of the decisions made by the Respondent respecting these funds and their use. The Respondent acted alone respecting these matters, and the firm was unaware of his activities. The Respondent did not follow the firm's policy respecting the processing of trust cheques. In fact, he was not authorized by Alexander Holburn to sign trust cheques at the time that he did so to implement this investment.

[24] Subsequent to the Respondent's departure from Alexander Holburn, the firm investigated the transaction, returned funds paid to them to their trust account and referred the transaction to the Law Society. A member of the firm gave evidence on behalf of the Law Society at the hearing.

[25] No Court Order was obtained approving this transaction with respect to the funds.

[26] It should be noted that D.C., the President of W. Ltd., authorized Alexander Holburn to:

> invest trust funds held by Alexander Holburn Beaudin & Lang in promissory notes from the GCCC provided that we also receive a commitment from the president of G. Inc. that the funds will be held as

part of the GCCC cash reserve and that these funds will not in any way be encumbered or used so that they will be available to refund the note on demand.

This Panel concludes that the reference in the authorization to GCCC is a reference to G. Inc.

[27] As there was no Court Order approving the disbursement of funds, the issue is whether the Respondent acted properly with respect to obtaining consents as required by the Order of Mr. Justice Tysoe. Was the transaction " agreed to by all parties with any interest in or claim to the funds" ?

[28] The parties to the action were D.C. (the Plaintiff) and those respondents who had filed an Appearance, namely, the Bank of Montreal, the Province of British Columbia, the Registrar of Mortgage Brokers and L.M.

[29] The Bank of Montreal had no interest in the funds as it simply held the funds pursuant to the Order of the Registrar of Mortgage Brokers.

[30] L.M. had filed an Appearance to the action commenced by D.C. He took no further steps with respect to that Appearance. He was, from time to time, in contact with D.C., and it appears from the evidence that he was kept somewhat advised by D.C. as to what was happening.

[31] The Respondent had a meeting with D.C., the President of W. Ltd., in early July 2001. He also received an email from D.C., on behalf of W. Ltd., consenting to the funds being loaned upon W. Ltd. receiving a commitment from the President of G. Corp. that the funds would be held as part of the cash reserve, unencumbered and available for refund on demand. There is no evidence that the Respondent was the President of G. Inc., and therefore there was no evidence that the Respondent satisfied the condition of W. Ltd. attached to its authorization to lend the funds.

[32] D.C., however, gave evidence that he felt confident in the commitment made by the Respondent, due to his knowledge of the Respondent as his legal advisor and also the Respondent's new role with the parent company.

[33] D.C., in his personal capacity, was also a person whose consent was required. Although there was no evidence that he provided his separate consent (separate from that which he provided as President of W. Ltd.), it is clear that he consented to the disbursal of funds. He indicated that he had confidence in the Respondent. It is of concern, however, that the consent was obtained from D.C. directly and not through D.C.'s solicitor of record (who was not the Respondent) in the proceedings that he had commenced.

[34] The consent of the Registrar of Mortgage Brokers and the Province of British Columbia was necessary. The Respondent gave evidence that he had spoken to counsel for these parties during the period subsequent to the Order of Mr. Justice Tysoe and before the disbursal of the funds to G. Inc. Counsel had indicated to the Respondent that the Registrar and the Province had no further interest in these funds.

[35] A letter from the counsel for the Registrar of Mortgage Brokers and the Province of British Columbia, dated April 20, 2007, was tendered as evidence. Counsel states:

I can say that it was my expectation that as counsel for two of the defendants in this action, I would have received notice of any application for payment out of the funds. At that time, I would have sought instructions, but again, subject to the nature of that application I expect it would have been unlikely we would have taken any position.

Standard of Proof

[36] The onus and standard of proof is well established. In *Law Society of BC v. Martin*, 2005 LSBC 16, the Panel cited with approval the following oft-cited passage from *Jory* v. *College of Physicians and Surgeons of British Columbia*, [1985] B.C.J. No. 320 (S.C.):

> 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 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.

[37] In *Martin*, (*supra*), the Panel concluded at para. 137 that:

> (a) The onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct.
>
> (b) 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.

Decision, Count 1(c)

[38] The *Professional Conduct Handbook*, at Chapter 1, provides that a lawyer is an officer of the Court and owes a duty thereto. Compliance with Court Orders is a fundamental aspect of a lawyer's obligations to the Court and to the rule of law.

[39] At the time of the provision of funds to G. Inc., the Respondent was legal advisor to W. Ltd., the provider of the funds and was also the legal advisor in addition to being President and Vice-Chairman of G. Corp., the parent company to G. Inc. He was aware of the Court Order requiring Court approval or consents of the parties with any interest in or claim to the funds.

[40] Strict adherence to the terms of a Court Order is among the most important duties and responsibilities of a lawyer. This is true in heightened circumstances of a potential conflict of interest, as was evident with the Respondent and the parties involved in this loan transaction.

[41] The Panel is not satisfied that the Respondent properly carried out his duties in ensuring that the consents of all parties with any interest in or claim to the funds were appropriately obtained in these circumstances where the transaction was not sanctioned by a Court Order. In particular the Respondent did not obtain the consents of:

1. W. Ltd.;
2. L.M.;
3. the Registrar of Mortgage Brokers,
4. the Province of British Columbia; or
5. the 33 other respondents that were served with the motion in the Interpleader proceeding.

As such, the Panel finds that the Respondent breached the terms of the Court Order, and his conduct amounts to professional misconduct.

Decision, Count 1(b)

[42] Rule 3-51 was substantially amended in 2003, but at all relevant times, the applicable provisions were

> Deposit of trust funds
>
> **3-51** (1) Subject to subrule (3) and Rule 3?54, a lawyer who receives trust funds must deposit the funds in a trust account as soon as practicable.
>
> (2) Except as permitted under section 62(5) of the Act, a lawyer must deposit all trust funds to a pooled trust account.
>
> (3) A lawyer who receives trust funds with written instructions to place the funds otherwise than in a trust account may place the funds in accordance with appropriate instructions.
>
> (4) Unless the client instructs otherwise in writing, a lawyer must deposit all trust funds in an account that is insured by the Canadian Deposit Insurance Corporation or the Credit Union Deposit Insurance Corporation of British Columbia or guaranteed under the *Community Financial Services Act*, R.S.B.C. 1996, c. 61, s. 19.

[43] This Panel also finds that Rule 3-51 applied to the funds that Alexander Holburn was required to hold pursuant to the terms of the Court Order. The term of the Court Order that provided that the were to " be held in trust by Alexander, Holburn, Beaudin & Lang unless otherwise ordered by the court or agreed by all parties with any interest in or claim to the funds" defined the written instructions that the Respondent required before the funds could be removed from the type of trust account required by Rule 3-51(2) and (4).

[44] When the trust funds were paid out to G. Inc., they were not paid into a trust account required by Rule 3-51(2) and (4).

[45] This Panel has previously determined that the Respondent did not obtain the consents required by the Court Order. It follows therefore that the Respondent did not have the written instructions required by Rule 3-51(3) that would have permitted him to pay the funds to G. Inc. The Respondent was therefore in breach of Rule 3-51.

Decision, Counts 2 and 4

[46] With respect to counts 2 and 4 of the citation, being the allegations of acting in circumstances that give rise to divided loyalties and in circumstances of conflict of interest, the evidence established that the Respondent had been a hard-working, highly productive and financially successful lawyer, well respected within his firm and within the profession.

[47] In early 2001, the Respondent determined to make a lifestyle and career change and accepted an offer to become the President of G. Corp., one of his clients. He was to be President, legal counsel and Vice-Chairman of G. Corp. This was effective June 29, 2001.

[48] The Respondent's arrangement with Alexander Holburn provided for a phase-out from practice over the following six months.

[49] The evidence established that the Respondent had his foot in two houses, adverse in interests at the time that the funds were loaned. In the first house, the Respondent was still associated with the law firm who was the Trustee of the fund on behalf of those ultimately entitled to it. The law firm, as trustee, was the

lender. In the second house, the Respondent was also the lawyer for G. Inc., the borrower. The Respondent was also the President, employee, and Vice-Chair of G. Corp., the parent of the lender, G. Inc. The interests of G. Inc. and G. Corp. were the same.

[50] The arrangement turned out to be safe, in that the funds were paid back in full to Alexander Holburn, the lender, in trust, and the interest earned through the arrangement was substantially more beneficial to W. Ltd. than what would have been earned had the funds remained in the trust account at the Respondent's law firm.

[51] There was evidence that the loan was on a take-it or leave-it basis; in other words, there were no negotiations of the terms. The implication of this evidence is that legal advice independent of the Respondent to W. Ltd. and D.C. would not have been of any benefit because G Inc.'s terms could not be altered by legal advice provided to D.C. or W. Ltd.

[52] Even if the loan could not have been negotiated on different terms, and notwithstanding the fact that no loss was sustained by Alexander, Holburn as trustee, the lender, that does not alter the fact that the Respondent was in a position of conflict when he arranged a loan between his firm as trustee and a company (G. Inc.) of which he was the solicitor.

[53] The Respondent was acting in circumstances that gave rise to the potential for divided loyalties and in circumstances of a conflict of interest.

[54] Accordingly, the Panel has determined that the Respondent acted in circumstances that gave rise to divided loyalties and in circumstances of a conflict of interest. Counts 2 and 4 of the citation have therefore been made out by the Law Society, and the Respondent's conduct in these circumstances is professional misconduct.

[55] In arriving at its decision that the Respondent's conduct is professional misconduct, this Panel is of the view that the conduct of the Respondent established by the evidence discloses a marked departure from what the Law Society expects from its members, in his failure to properly obtain the consents of the appropriate parties to the payment out of funds from his trust account where such payment was not approved by Order of the Court; by acting in circumstances of conflict of interest in the placement of the funds with a Company of which he was President and legal advisor; and in investing those funds contrary to Rule 3-51 of the Law Society Rules.

2008 LSBC 10
Addendum issued: April 1, 2008
Report issued: January 17, 2008
Citation issued: August 9, 2006

The Law Society of British Columbia

In the matter of the *Legal Profession Act*, SBC 1998, c.9

and a hearing concerning

MICHAEL CURT SCHOLZ

Respondent

Addendum to the Decision of the Hearing Panel on Facts and Verdict

Hearing date: April 24, 25 and May 4, 2007

Panel: G. Glen Ridgway, QC, Chair, Richard N. Stewart, QC, Dirk J. Sigalet, QC

Counsel for the Law Society: Maureen S. Boyd
Counsel for the Respondent: George F. Greogry

[1] The Panel makes the following amendment to the report on Facts and Verdict, issued January 17, 2008, by adding new paragraphs [23] and [24] as follows and renumbering the subsequent paragraphs accordingly:

> [23] It is fair at this point to clarify that the Alexander Holburn firm was not involved in any of the decisions made by the Respondent respecting these funds and their use. The Respondent acted alone respecting these matters, and the firm was unaware of his activities. The Respondent did not follow the firm's policy respecting the processing of trust cheques. In fact, he was not authorized by Alexander Holburn to sign trust cheques at the time that he did so to implement this investment.
>
> [24] Subsequent to the Respondent's departure from Alexander Holburn, the firm investigated the transaction, returned funds paid to them to their trust account and referred the transaction to the Law Society. A member of the firm gave evidence on behalf of the Law Society at the hearing.

[2] The amended report is attached.