2008 LSBC 18
Report issued: July 2, 2008
Citation issued: September 24, 2007

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

Jack Alexander Adelaar

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: April 21, 2008

Panel: David Renwick, QC, Chair, Carol Hickman, David Mossop, QC

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: Terrence Robertson, QC

Background

[1] On September 24, 2007, 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 directed that this Panel inquire into the Respondent's conduct as follows:

1. On or about September 29, 2006, while representing the vendor in the sale of real property, you received or accepted cash in an aggregate amount of $7,500 or more in respect of one client matter or transaction, contrary to Rule 3-51.1 of the Law Society Rules.

[2] The requirements for service of this citation upon the Respondent, pursuant to Rule 4-15, were admitted by the Respondent.

Statement of Agreed Facts

[3] Counsel submitted a Statement of Agreed Facts. In summary, the facts are as follows:

1. The Respondent was called to the Bar of British Columbia on June 29, 1972.

2. From December 1, 1997 onwards, the Respondent has practised as Jack A. Adelaar Law Corporation in Vancouver, British Columbia. Prior to that date, he practised in several different partnerships in Vancouver.

3. In 2006, the Respondent represented the vendor of certain property (the "Client") . The Client granted an option to purchase the property to a prospective purchaser (the "Purchaser") that was registered against the property on March 30, 2006.

4. The option to purchase was open for exercise until midnight on Saturday, September 30, 2006.

5. The option to purchase was to be exercised by delivery to the Respondent of written notice of exercise of the option together with a deposit in the amount of $100,000 to be held in trust by the Respondent pending completion of the transaction.

6. The Respondent was given notice of the exercise of the option by the agent and counsel for the Purchaser by letter dated September 26, 2006 which he received by fax on September 29, 2006 at 2:53 p.m. The letter stated:

> As you know, I am agent and counsel for [purchaser], the captioned purchaser. You represent the vendor.
>
> On behalf of my client I hereby give notice in accordance with the Option to Purchase Agreement between the parties registered March 30, 2006 under number [number] that [purchaser] **intends to and does hereby exercise the option to purchase** the property more particularly known and described as
>
> CITY OF VANCOUVER
>
> PARCEL IDENTIFIER [number]
>
> LOT 5, BLOCK 29, DISTRICT LOT [number], PLAN [number]
>
> My client's cheque, certified, in the amount of $100,000 and payable to your office IN TRUST will be delivered under separate cover this afternoon.
>
> [emphasis in original]

7. At approximately 4:40 p.m. on September 29, 2006, the Respondent received an envelope delivered directly by a representative of the Purchaser containing payment of the $100,000 deposit in the form of a bank draft in the amount of $90,200 and cash in the amount of $9,800.

8. The funds had to be in the Respondent's trust account by midnight on Saturday, September 30, 2006, a non-banking day. The Respondent says it was too late in the afternoon to contact the Purchaser, or his counsel and opted to deposit the cheque and cash into his trust account.

9. On or about October 31, 2006, the Respondent provided to the Law Society a written exception report regarding his receipt and deposit of cash in the amount of $9,800.

10. On December 27, 2006, Felicia Ciolfitto, Trust Assurance Auditor with the Law Society, wrote to the Respondent to request his explanation for why cash in excess of $7,500 was received and accepted in respect of one client matter or transaction.

11. On January 2, 2007, the Respondent wrote to the Law Society responding to Ms. Ciolfitto's letter of December 27, 2006. In his letter, the Respondent stated that he "received a

draft in the amount of $98,200 and the remainder of $100,000 in cash" . Upon receipt of the letter, Ms. Ciolfitto spoke with the Respondent at which time he clarified that he received $9,800 in cash. The Respondent then sent a revised letter to Ms. Ciolfitto dated January 4, 2007.

12. On January 16, 2007, Susanne Raab, a staff lawyer in the Professional Conduct Department of the Law Society, wrote to the Respondent to advise that the Professional Conduct Department had commenced an investigation regarding the information set out in his letters dated January 2 and 4, 2007 and requesting his response regarding his receipt and acceptance of cash in excess of the amount permitted by Rule 3-51.1 of the Law Society Rules.

13. By letter dated February 21, 2007, the Respondent provided an explanation in writing in respect of his receipt of cash in the amount of $9,800.

14. From its implementation in 2004 through to April of 2006, the Law Society has published the following information about Rule 3-51.1.

- April 2, 2004 - News Release entitled *Law Society of BC takes steps against money laundering*
- May - Jun., 2004 - *Benchers' Bulletin*, " Benchers pass rule to fight money laundering"
- Sep. - Oct., 2004 - *Benchers' Bulletin*, " Rule 3-51.1 on cash received by lawyers"
- Nov. - Dec., 2004 - *Benchers' Bulletin*, " Closing Comments"
- 2004 - *Annual Report 2004*, " 2004 President's Message"
- Apr. - May, 2005 - *Benchers' Bulletin*, " Lawyer independence in the balance"
- Apr. - May, 2005 - *Benchers' Bulletin*, " Lawyers restricted from accepting $10,000 or more in cash"
- June 9, 2005 - Notice entitled *Lawyers not to accept $7,500 or more in cash trust deposits*
- Jul. - Aug., 2005 - *Benchers' Bulletin*, " Updates to the Rules and Handbook"
- Jul. - Aug., 2005 - *Benchers' Bulletin*, " Lawyers not to accept $7,500 or more in cash trust deposits
- 2005 - *Annual Report 2005*, " Our Professional Standards"
- Mar. - Apr., 2006 - *Benchers' Bulletin*, " Why we won't let down our guard on money laundering"

15. The Respondent admits that on September 29, 2006 while acting for his Client, he received and accepted cash in the amount of $9,800 and he did so in breach of Rule 3-51.1 of the Law Society Rules as alleged in the citation.

16. The Respondent admits that on September 29, 2006 he was aware that the Law Society Rules limit the amount of cash a lawyer may receive to no more than $7,500 in respect of any one client matter or transaction and he knowingly and intentionally accepted the cash in breach of Rule 3-51.1 of the Law Society Rules.

Additional Evidence

[4] The Respondent gave evidence in addition to the Statement of Agreed Facts.

[5] The Respondent is 63 years of age and his practice is divided between litigation (60%) and solicitor work (20%).

[6] The Respondent stated that when he received the envelope with the funds, he tried to contact counsel for the purchaser but was unsuccessful.

[7] The Respondent knew that if he kept the money he would be in breach of the relevant rule. At the same time, he had no place to put the cash in his office as he had no safe in his office.

[8] The Respondent's bank closed at 5:00 pm and did not open on Saturday.

[9] The Respondent thought he might have tried to contact the Law Society on September 29, 2006, but he was not sure. The first time he mentioned that he might have tried to contact the Law Society was on April 21 2008, the date of this hearing. The Panel finds that it is unlikely that the Respondent did attempt to contact the Law Society on September 29, 2006.

[10] The Respondent did not contact the Law Society about the $9,800 until October 31, 2006 when he submitted a report to the Law Society.

[11] The Respondent tried to contact the purchaser's original lawyer on September 29, 2006, but was unsuccessful. A new lawyer was engaged by the purchaser and the deal went through.

Issues

[12] Did the member violate Rule 3-51.1?

[13] Did the member engage in professional misconduct?

Did the member violate Rule 3-51.1?

[14] There is little doubt that the Respondent member violated the Rule. He received cash in excess of $7,500 and put it into his trust account. He knew what he was doing was in violation of the Rule. In addition, he signed the Statement of Agreed Facts admitting to such.

[15] The relevant rule reads as follows:

> **3-51.1(1)** This Rule applies to a lawyer when engaged in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:
>
> (a) receiving or paying funds;
>
> (b) purchasing or selling securities, real property or business assets or entities;
>
> (c) transferring funds or securities by any means.
>
> (2) This Rule does not apply to a lawyer when
>
> (a) engaged in activities referred to in subrule (1) on behalf of his or her employer, or
>
> (b) receiving or accepting cash

(i) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(ii) pursuant to the order of a court or other tribunal,

(iii) to pay a fine or penalty, or

(iv) from a savings institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer must not receive or accept an aggregate amount in cash of $7,500 or more in respect of any one client matter or transaction.

(3.1) Despite subrule (3), a lawyer may accept or receive an amount of $7,500 or more in cash for professional fees, disbursements, expenses or bail, but any refund greater than $1,000 out of such money accepted or received must be made in cash.

(4) For the purposes of this Rule, foreign currency is to be converted into Canadian dollars based on

(a) the official conversion rate of the Bank of Canada for that currency as published in the Bank of Canada's Daily Memorandum of Exchange Rates in effect at the relevant time, or

(b) if no official conversion rate is published as set out in paragraph (a), the conversion rate that the client would use for that currency in the normal course of business at the relevant time.

Did the violation of the Rule amount to professional misconduct?

[16] This is the much more difficult question. The Law Society submitted, and quite rightly, that members should be aware of this Rule. Twelve publications have been issued by the Law Society in regards to this Rule. The member admits he knew of such a Rule.

[17] The crux of the difference between the Law Society and the Respondent**'s** submissions is relatively simple. The Law Society states any violation of the Rule is professional misconduct. The Respondent's counsel states that the violation of the Rule may or may not be professional misconduct depending on a number of factors. Further, in the particulars of this case, no professional misconduct took place. We agree with the position of counsel for the Respondent.

[18] There is only one case that deals with Rule 3-51.1. That is the case of the *Law Society of BC v. Lyons*, 2008 LSBC 09. The relevant provisions of that case to this are found in paragraphs 25 and 26. Those paragraphs set out the purpose of the Rule.

[25] The Law Society submitted that, by virtue of these 12 publications, by 2006 when the Respondent accepted these four prohibited amounts of cash, every member ought to have been aware of the existence of the "No Cash Rule" . Further, they demonstrate the importance to the profession of the Rule in protecting solicitor-client privilege and confidentiality as well as the

confidence of the Federal Government and the public integrity of the profession.

[26] It should also be noted that the purpose and effect of Rule 3-51.1 are to prevent money laundering in the simplest way possible – "If cash cannot be accepted, it cannot be laundered." The rule is a financial transaction rule, not a money laundering rule. It is objective and simple, and does not call for any application of judgment or due diligence as to the purpose or intentions of the person tendering the prohibited cash to the lawyer.

[19] The purpose of the Rule is quite clear: to prevent money laundering. It is an important Rule for the Law Society and its members.

[20] In *Lyons*, above, the Panel also dealt with the issue of whether a breach of the Rule is an automatic determination of professional misconduct. At paragraphs 27 to 35 of that decision, the Panel stated as follows:

[27] As a result of this being the first citation to be heard under this Rule, there are no precedents to be considered by the Panel in its assessment of whether the facts established support a finding of professional misconduct within the meaning of the *Legal Profession Act*, s. 38(4)(a) and (b):

38(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming a lawyer;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules;

[28] In these circumstances, the two applicable options under s. 38(4)(b) are professional misconduct under subsection (i) or a breach of the Rules under subsection (iii).

[29] Notwithstanding the admission of the Respondent to the charge of professional misconduct, the onus rests upon the Law Society to satisfy this Panel that indeed his actions constitute professional misconduct or a breach of the Rules.

[30] In either event, the standard of proof that must be met by the Law Society to establish

its charge is also set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [137] where it is observed:

> The Panel instructs itself as follows:
>
> (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.

[31] This Panel is satisfied that the breach of the "No Cash Rule" was established by the evidence. The key issue is whether or not the evidence supports the Law Society's contention that the Respondent's conduct goes beyond that and constitutes professional misconduct.

[32] *A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the Act or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (Law Society of BC v. Smith, 2004 LSBC 29).*

[33] The fact that there are no precedents for a finding that a breach of the "No Cash Rule" constitutes professional misconduct does not restrict this Panel. Such a finding can be made in a wide variety of circumstances. Whether conduct deserves discipline is a factual question to be decided by the member's professional peers. "What may, in each particular circumstance, constitute professional misconduct ought not to be unduly restricted." *Stevens v. Law Society (Upper Canada)* (1979), 55.O.R. (2d) 405 (Div. Ct.) at 410.

[34] It is no longer a requirement that the conduct proven be disgraceful in itself or dishonourable. The overall test for professional misconduct is set out in *Martin* (*supra*) at para. [171] where the Panel reviewed the law and concluded that the test for misconduct 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."*

[35] *In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of mala fides, and the harm caused by the respondent's conduct.*

[emphasis added]

[21] The facts in this case are quite distinct from the *Lyons* case.

[22] The Respondent had no reason to believe that he would be receiving cash in an amount in excess of $7,500. It was a one-time unexpected occurrence. The letter of September 26, 2006 from the original solicitor for the purchaser referred to monies being delivered by certified cheque.

[23] The Respondent received the $9,800 at 4:40 on Friday afternoon. The bank closed at 5:00 p.m. and was not opened on Saturday. There was no evidence presented indicating that the Respondent could have used a night deposit or another branch of the bank open on Saturday, which might have given some breathing space.

[24] However, the Respondent had no place in his office to store the money either overnight or for the weekend. If the Respondent just stuffed the money in a drawer or put it under his mattress, he might very well be in violation of the *Professional Conduct Handbook*, Chapter 7.1. That Rule requires him to store valuables (cash) in a secure place apart from the lawyer's property. There was no evidence presented to the Panel that the Respondent had a safe, safety deposit box or had access to a safety deposit box. The Panel need not consider whether this would have been a proper course of conduct.

[25] The Respondent could not contact counsel for the purchaser.

[26] The Respondent could have sent the money to counsel for the purchaser. However, there would have been a problem. He would be returning money to that lawyer in excess of $7,500. Counsel for the purchaser would then be in violation of the Rule if he accepted the money. This would not be an ethical or practical solution to the problem.

[27] Also, he could not contact the purchaser directly. There was no evidence presented to the Panel that the purchaser was self-represented. It would have been *imprudent* for the Respondent to assume so unless he contacted the original counsel for the purchaser.

[28] If he attempted to contact the purchaser directly and return the money with a covering letter of explanation, he might well have been be in violation of Chapter 4 of the *Professional Conduct Handbook*.

[29] The Respondent did not contact the Law Society for advice on September 29, 2006. Let us assume he could have reached someone at that time. What advice could an official give in such a short time frame? At the hearing, the Panel asked counsel for the Law Society what the Respondent should have done with the money. She said he should have returned it. But the question is to whom? The problems of returning it to the purchaser's counsel or the purchaser himself have already been discussed. The Panel members themselves have difficulty saying what advice they would have given the Respondent if he phoned late on Friday September 29, 2006 with such a short time period.

[30] There is another factor. The sum involved in this case is just $2,300 over the threshold required by the Rule. It is also below the threshold required for the reporting of banks under the relevant legislation.

[31] Finally, there is the restrictive time limit the Respondent was working under, namely 4:40 p.m. on a Friday.

[32] All these factors together lead the Panel to conclude there is no professional misconduct. There is no *marked departure* within the meaning and spirit expressed in *Law Society of BC v. Lyons* (*supra*) and *Law Society of BC v. Martin* (*supra*).

[33] There is one factor that the Panel has not dealt with. That is the issue of civil liability, both for the vendor and the Respondent. The Respondent quite rightly points out that the $9,800 cash was legal tender. The option agreement did not stipulate how the $100,000 was to be paid (solicitor trust cheque or certified cheque). If the Respondent rejected the $9,800 cash, he might put himself and/or his client in a position of civil liability. The Panel has found it unnecessary to deal with this factor as the above factors are sufficient to dispose of the citation.

[34] However this decision should not be taken to mean that members generally can accept cash, including sums slightly over the $7,500 limit. Such an activity is a violation of the Rule and *may in other circumstances, be professional misconduct*.

[35] The unique circumstances of the facts in this case have been stated above. Of particular importance, the Respondent was in an ethical dilemma. He could not return the money without potentially violating two other provisions of the *Professional Conduct Handbook* or putting another member in violation of the *Handbook*. As well he might have created a legal nightmare relating to the exercise of the option had he not accepted the legal tender.

[36] This case illustrates some shortcomings in the Rules that perhaps the Benchers will have to deal with at some future time.

Conclusion

[37] The Panel finds the Respondent committed a breach of Rule 3-51.1. The Panel finds on the facts of this case that that breach does not amount to professional misconduct.