2008 LSBC 22
Report issued: July 29, 2008
Citation issued: January 29, 2008

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

Brian Borthwick Norton

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: May 8, 2008

Panel: G. Glen Ridgway, QC, Chair, June Preston, Ronald Tindale

Counsel for the Law Society: Eric Wredenhagen
Appearing on his own behalf: Brian B. Norton

Background

[1] On January 29, 2008, 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 on the direction of the Chair of the Discipline Committee. The citation directed that there be an inquiry into the Respondent's conduct as follows:

> 1. On or about September 25, 2007, while acting on behalf of your client SL in the purchase of real property, you received or accepted cash in an aggregate amount of $7,500 or more in 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.

Agreed Statement of Facts

[3] Mr. Wredenhagen, on behalf of the Law Society of British Columbia, and Mr. Norton, on behalf of himself, submitted an Agreed Statement of Facts. The facts can be summarized as follows:

1. The Respondent was called to the Bar of British Columbia on October 1, 1968.

2. From March 18, 1996, the Respondent has practised as Brian B. Norton at Norton Law Office in Kelowna, British Columbia.

3. In or about September, 2007, the Respondent was retained by SL (the " Client") to act on her behalf and provide services regarding a proposed purchase of real estate by the Client (the " Purchase").

4. On Tuesday, September 25, 2007, the Respondent attended on the Client for the execution of mortgage and other documentation related to the Purchase. Following the execution of these documents, the Client handed the Respondent cash in the amount of $45,000 CDN (the " Cash Deposit") as part payment of the purchase price.

5. At this time, the Respondent advised the Client that any cash payments made to him in excess of $10,000 would have to be reported under money laundering statutes. The Client did not object.

6. At the time he received the Cash Deposit, the Respondent had read communications from the Law Society regarding its concerns with the maintenance of solicitor-client confidentiality, and had from time to time reviewed the Law Society Rules (the " Rules") concerning trust accounts and deposits. However, the Respondent did not specifically consider or recall the prohibition in Rule 3-51.1 against receiving cash in the amount of $7,500 or more (the " No-Cash Rule") at the time of receipt of the Cash Deposit.

7. At the time the Respondent received the Cash Deposit, the Law Society had issued the following communications to its members regarding the No-Cash Rule:

(a) News Release dated April 2, 2004, outlining steps taken by the Law Society of British Columbia against money laundering;

(b) *Benchers' Bulletin* (2004, No. 3, May-June issue) explaining that the Benchers of the Law Society of B.C. had passed a rule to fight money laundering;

(c) *Benchers' Bulletin* (2004, No. 4, Sept.-Oct. issue) by Felicia Folk, Practice Advisor, on trust obligations of the lawyer.

(d) December 15, 2005 article (*Benchers' Bulletin* 2004, No. 5, Nov.-Dec. issue) by William M. Everett, QC, President's View - " Closing Comments" , listing many of the accomplishments of the Benchers in the prior 15 months, including mention of efforts to combat money laundering.

(e) *Benchers' Bulletin* article (2005, No. 2, April-May issue) by Ralston S. Alexander, QC entitled " Lawyer independence in the balance" .

(f) *Benchers' Bulletin* article (2005, No. 2, April-May issue) reminding members of anti-money laundering rules, entitled " Lawyers restricted from accepting $10,000 or more in cash" .

(g) Notice dated June 9, 2005, notifying members that the Benchers amended Law Society Rule 3-51.1 at the meeting in June, 2005 to provide that lawyers are not to accept $7,500 or more in cash trust deposits (reducing the threshold from $10,000).

(h) *Benchers' Bulletin* (2005, No. 3, July-August issue), which provided updates to the Law Society Rules and *Professional Conduct Handbook*, including those affecting Rule 3.51.1.

(i) *Benchers' Bulletin* article (2005, No. 3, July-August issue) entitled " Lawyers not to accept $7,500 or more in cash trust deposits" .

(j) *Benchers' Bulletin* article (2006, No. 2, March-April issue) entitled " Why we won't let down our guard on money laundering" .

8. On September 25, 2007, the Respondent deposited the Cash Deposit to his trust account at the Toronto Dominion bank.

9. On the evening of September 25, 2007, the Respondent reviewed the reporting requirements for large sums of cash and realized he had breached a Rule in accepting the Cash Deposit.

10. The following morning (Wednesday, September 26, 2007), the Respondent reviewed information available on the Internet, and prepared a draft report to FINTRAC, which was not sent.

11. Also on the morning of Wednesday, September 26, 2007, the Respondent drafted and sent, by fax, a letter to the Executive Director of the Law Society reporting his breach of the No-Cash Rule.

12. Having received no response from the Law Society by the end of the day on Friday, September 28, 2007, the Respondent decided to return the money to the Client in cash. Following that decision, the Respondent reviewed the Rules for trust disbursements, and in particular Rule 3-56(1)(c) governing monies paid into the trust account by mistake.

13. On Monday, October 1, 2007, the Respondent met with the Client and advised her that he had made a mistake in accepting the Cash Deposit from her. He explained that he would have to return the Cash Deposit to her and informed her that he could not continue to act for her in the circumstances.

14. The Respondent subsequently made arrangements to transfer the file to another law firm. The Respondent did not advise the new firm of the reason for the transfer.

15. On Wednesday, October 3, 2007, the Respondent wrote a trust cheque to himself for $45,000 CDN, delivered it to the bank, endorsed it, and took delivery from the bank of the cash equivalent.

16. On October 3, 2007, the Respondent prepared an Acknowledgment for the Client to sign, met with her and had her sign the Acknowledgment, and returned the Cash Deposit to the Client.

17. The Respondent has had no further communications with or from the Client or any of the law firms involved in the Purchase.

18. The Respondent admits that on September 25, 2007, while acting for his Client, he received and accepted cash in the amount of $45,000 CDN in breach of Rule 3-51(1) of the Law Society Rules.

[4] In addition to the Agreed Statement of Facts, the Respondent gave evidence at these proceedings. In summary he indicated the following:

(a) The Client in question was not known to him and was referred to him. This Client apparently lived in Penticton which is approximately one hour from the Respondent's offices.

(b) At the meeting with the Client, the Respondent did not recall whether or not he was expecting any funds from the Client.

(c) The Respondent at that time was operating primarily out of his house, although he had a virtual office at the Spall Business Centre.

(d) This was a real estate transaction, and the Client provided him $45,000 in cash. The Respondent

indicated that this caught him by surprise and he did not expect cash.

(e) The Respondent had an erroneous understanding of the Rules and indicated to the Client that he would have to report the receipt of the funds.

(f) At the time that he accepted the funds, the Respondent was not aware that he was doing anything wrong. The funds were deposited into his trust account in a financial institution.

(g) Later that evening, after accepting the funds, the Respondent reviewed the Law Society materials and realized that he had made an error. The Respondent indicated that he had never read the No Cash rule before. The Respondent ultimately tried to contact the Law Society and was not able to do so immediately. The Respondent returned the money to the Client. The Respondent reported himself to the Law Society.

The Position of the Parties

[5] The position of the parties is quite simple. The Law Society indicates that the breach of the Law Society Rules amounts to professional misconduct on the part of the Respondent. The Respondent indicates that, while he agrees that he breached the Rules, it does not in this particular case amount to professional misconduct.

[6] At the heart of these proceedings is Rule 3-51.1(1) which 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.

Analysis

[7] The real question in this hearing is whether or not the actions of the Respondent constituted professional misconduct.

[8] The Panel had the assistance of two authorities that deal with Rule 3-51.1. The first case is the *Law Society of BC v. Lyons*, 2008 LSBC 09, and the second is the recent decision of the *Law Society of BC v. Adelaar*, 2008 LSBC 18.

[9] In the case of the *Law Society of BC v. Lyons* (*supra*) at paragraph [35], the Panel stated the following:

> 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.

[10] In the case before this Panel it is accepted that there was no *mala fides* on the part of the Respondent. Also there appears to be no harm occasioned to the Client in this matter. Of note were the Respondent's attempts to contact the Law Society with regard to the dilemma he found himself in, and the fact that he, in a short period of time, returned the money to the Client and made arrangements to transfer the file to another law firm.

[11] In the *Law Society of BC v. Adelaar* (*supra*) at paragraph [19], the Panel quite succinctly stated:

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

[12] In *Lyons* at paragraph [32], the Panel noted the following:

> 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).

[13] The Respondent was unaware of Rule 3-51.1 at the relevant time despite an extensive publication of the Rule by the Law Society of British Columbia.

[14] This particular case, as in the decision of *Adelaar*, turns on its facts.

[15] In coming to a conclusion, this Panel relies on the following:

(a) The Respondent had no dishonest intent in his actions in accepting the money.

(b) In the evening of the day that he accepted the money, the Respondent reviewed the reporting requirements for large sums of cash and realized that he had breached a Rule in accepting the Cash Deposit.

(c) He immediately, in the morning the day after accepting the money, drafted and sent by fax a letter to the Executive Director of the Law Society reporting his breach of the No Cash Rule.

(d) Despite doing that, the Respondent received no immediate response from the Law Society. After waiting for approximately two days, the Respondent decided to return the money to the Client in cash.

(e) After waiting the weekend, the Respondent returned the monies to the Client and informed her that he would not be able to act for her and made arrangements for a new lawyer to take over her file.

(f) No harm was occasioned on the Client as a result of the Respondent's conduct.

[16] In the particular facts of this case, it is the Panel's opinion that the Respondent, after discovering his mistake, took all the necessary steps to rectify the error.

Conclusion

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