2009 LSBC 09
Report issued: March 19, 2009
Oral Reasons: February 17, 2009
Citation issued: December 8, 2008

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

**Joseph Takayuki Hattori**

Respondent

**Decision of the Hearing Panel**

Hearing date: February 17, 2009

Panel: Joost Blom, QC, Chair, David Mossop, QC, June Preston

Counsel for the Law Society: Eric Wredenhagen
Counsel for the Respondent: Jerome D. Ziskrout

# Background

[1] This matter comes before the Panel by way of a conditional admission of a disciplinary violation and consent to disciplinary action, which have been accepted by the Discipline Committee pursuant to Rule 4-22. At the hearing we gave our oral decision accepting the admission and the consent to disciplinary action. These are our reasons.

[2] The Schedule (as amended on January 15, 2009) to the citation reads as follows:

> 1. In the course of representing your clients (1) [municipality] (the " Municipality" and (2) Dr. LP, LN and MN (the " Complainants" ) in litigation over the estate of VM, you acted in a conflict of interest, and in particular you:
>
> a. failed to explain to each of your clients the principle of undivided loyalty, contrary to subrule 4(a) of Chapter 6 of the *Professional Conduct Handbook*;
>
> b. failed to secure the informed consent of the Municipality and of the Complainants as to the course of action to be followed once it was evident that a conflict of interest had arisen between them, contrary to subrule 4(d) of Chapter 6 of the *Professional Conduct Handbook*;
>
> c. continued to act in the litigation, contrary to Chapter 6, Rule 5 of the *Professional Conduct Handbook*;
>
> d. continued to act for the Municipality and against the interest of the Complainants once you had ceased to act for them, contrary to Chapter 6, Rule 7 of the *Professional Conduct Handbook*.

2. In the course of your representation of the Municipality and the Complainants, you failed to provide service to the Complainants in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation by, in particular, disregarding the Complainants' instructions to oppose an application for the sale of property and by failing to provide the Complainants with advice in respect of that application, contrary to Chapter 3, Rule 3 of the *Professional Conduct Handbook*.

[3] Eric Wredenhagen, for the Law Society, advised that the Discipline Committee had decided not to proceed on allegation 1(d) of the Schedule to the citation.

[4] Service of the citation was admitted both before us and in the Statement of Agreed Facts, below.

## Statement of Agreed Facts

[5] The Statement of Agreed Facts (hereafter " SAF" ), redacted to omit confidential material, reads as follows:

1. The Respondent, Joseph Takayuki Hattori was admitted to the bar of the Province of British Columbia on May 20, 1975.

2. From January 1, 1981 to July 20, 1983, the Respondent practised law with the firm Tymchuk Brown. From July 20, 1983 to July 5, 1985 the Respondent practised out of shared office space. From July 5, 1985 to November 17, 1990 the Respondent practised with the firm McDade & Hattori. From November 17, 1990 to September 30, 2002 the Respondent practised out of shared office space. Since September 30, 2002 the Respondent has been practising as part of the firm now known as Courtyard Law Offices in Kelowna.

3. The Respondent practises primarily in the areas of civil litigation and family law, but also in the areas of motor vehicle litigation, corporate law and real estate.

4. In 1997, an individual named VM signed a will (the " 1997 Will" ) in which she appointed JW as her executrix, and in which she left certain real property to JW and to her husband KW.

5. In January 2002 VM's lawyer, Brian Willow, made demand that ownership of VM's properties, which were conveyed to JW and KW in 1999, be transferred back to VM.

6. In March 2002, VM executed a new will (the " 2002 Will" ), revoking the 1997 Will. The 2002 Will left certain property to the Municipality and the residue of VM's estate to the complainants LP, MN and LN (collectively referred to as the " Complainants" ), as well as to other individual beneficiaries. (The Complainants, the Municipality and the other beneficiaries are collectively referred to as the " Client Group" .) JW and KW were not beneficiaries under the 2002 Will.

7. VM died on May 7, 2003. Prior to her death, an action had been commenced (Action 1) in her name by the Public Guardian & Trustee as Litigation Guardian. Following VM's death, the Client Group brought application to be substituted as plaintiffs on the recommendation of Allan Betton, whom they had jointly retained as counsel.

8. The substitution of the plaintiffs in Action 1 was effected by a Consent Order dated March 30, 2004.

9. JW and KW also commenced litigation over the VM estate, naming the Client Group and others as defendants (Action 2). As in Action 1, the Client Group was jointly represented by Allan Betton.

10. In or about October 2004, Mr. Betton concluded that he would have to withdraw as counsel since he was a potential witness with respect to VM's testamentary capacity. Accordingly, he recommended that the Respondent be retained as counsel in his place, and this recommendation was accepted and the Respondent was retained in or about November 2004 with respect to both litigation matters by the same client group.

11. At the time he was retained, and thereafter, the Respondent did not follow the requirements set out in Chapter 6, Rule 4 of the *Professional Conduct Handbook*. Specifically, he did not explain to his clients the principle of undivided loyalty, nor did he secure the informed consent of each client as to the course of action to be followed in the event of a conflict arising among them.

12. On December 13, 2004, the Respondent sent a letter to the Municipality, the Complainants and others setting out the background to the litigation over VM's estate.

13. The circumstances of the joint retainer, and of the transfer of the file from Allan Betton to the Respondent, were set out in a letter from the Municipality dated December 20, 2004 and were further confirmed in a letter from the Respondent to the Client Group dated December 30, 2004.

14. The December 20, 2004 letter refers to a meeting held October 27, 2004 at which Allan Betton announced the need for him to withdraw and at which GB, the Chief Administrative Officer of the Municipality, confirmed the proceeding of the meeting as follows:

> Following Allan Betton's summary, the undersigned asked for the following clarification from each beneficiary attending the meeting, specifically:
>
> - whether each wished to continue to pursue the case.
>
> - whether each would pay a share of the costs, either in accordance with the formula calculated by the Municipality based on the percentage of the estate they would inherit, or an alternate amount as presented by each.
>
> - whether there was consensus on engaging the services of the new lawyer recommended by Allan Betton to take over the case.
>
> In response, all parties:
>
> - confirmed they wish to pursue the matter.
>
> - confirmed they were willing to share costs generally in accordance with the proposed formula outlined, although timing for payment of individual apportionment was not finalized.
>
> - agreed to accept Allan Betton's recommendation of a lawyer to take over the case.
>
> It was agreed that Allan Betton would therefore forward the file to the Kelowna firm of Hattori Shaw for review.

15. The Respondent was retained and subsequently met with GB and LP on November 30, 2004:

> On November 30, 2004, Mr. Joe Hattori held a preliminary meeting with LP and the undersigned. At that time Mr. Hattori explained the process he would follow, beginning with a thorough review of the file in order to prepare an opinion letter and his assessment of the case for consideration by the beneficiaries. The beneficiaries would then consider whether they wished to proceed.

16. At the November 30, 2004 meeting, the Respondent proposed that communications regarding the litigation would be made primarily between the Respondent and the Municipality:

> He further proposed that he have a single contact among the beneficiaries and that, for convenience, unless others had a strong opposition, that the contact be the Municipality. He could then provide correspondence to the Municipality that, in turn, could be distributed to the other parties. If there were joint decisions to be made, the parties could then decide whether they wished to meet as a group to discuss any matters and whether Mr. Hattori should be present or not.
>
> The undersigned clarified that Mr. Hattori would initiate any contact with beneficiaries or witnesses as required in the management of the file, and those costs would be apportioned as agreed among the beneficiaries noted in this letter. However, if individual beneficiaries initiated the contact, these costs would be billed to and paid by the respective beneficiary directly and not apportioned as part of the case.

17. The Municipality further confirmed the terms of the joint retainer by letter to the Respondent dated January 28, 2005.

18. In June 2005, JW and KW brought an application for an order to sell one of the properties comprising part of the VM estate and for the net sale proceeds to be held in trust pending the outcome of the litigation.

19. The Municipality advised by letter that it was not opposed to the proposed sale of the property. The Complainants, however, were opposed to the application, and made their opposition known to the Respondent.

20. The Respondent does not recall purposely disregarding the Complainants' instructions, but acknowledges that those instructions were disregarded when he delivered a Response on behalf of his clients, including the Complainants, indicating that the sale of the property was unopposed, and that a release of a certificate of pending litigation on the property would be registered.

21. The Respondent also executed a consent order to effect the sale of the property. The property was listed for sale in or about August 2005 and sold in or about October 2005. The sale was confirmed in a letter from the Municipality dated September 12, 2005.

22. In or about October 2005 the Respondent examined a psychiatrist, Dr. A, who had examined VM in 2002.

23. On April 4, 2006, the Respondent sent a letter to the Municipality summarizing the status of the litigation and suggesting a course of action and anticipated budget. This letter was forwarded by the Municipality to the Complainants on or about April 12, 2006.

24. The Complainants terminated their retainer of the Respondent on May 5, 2006. The Respondent continued to act as counsel to the Municipality. On June 12, 2006, acting on their own, the

Complainants prepared and sent an offer of settlement to Robert Ross (counsel for JW and KW) and to the Respondent. JW and KW rejected the offer.

25. The Complainants subsequently retained as legal counsel Gregg Cancade.

26. On November 1, 2007, the Respondent, acting on behalf of the Municipality, presented an offer of settlement (the " Offer" ) to the relevant parties, including to the Complainants' new lawyer. The Offer essentially provided that the Municipality would receive its bequest (a piece of real property), JW and KW would receive the residue of the estate, and the Complainants, the Respondent's former clients, would receive nothing and would bear their own costs.

27. The Complainants complained to the Law Society (the " Complaint" ) regarding the Respondent by way of letter dated December 31, 2007. That letter also attached an overview drafted by the Complainants.

28. The Respondent admits that he acted in conflict of interest by:

(a) at the time of his retainer by the Client Group, failing to explain to each client the principle of undivided loyalty;

(b) failing to secure the informed consent of the Municipality and of the Complainants as to the course of action to be followed once it was evident that a conflict of interest had arisen between them; and

(c) continuing to act in the litigation on behalf of the Municipality and not the Complainants once it was evident that there was a conflict between them.

29. The Respondent admits that he failed to provide service to the Complainants in a conscientious, diligent and efficient manner by providing a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation by disregarding the Complainants' instructions to oppose an application.

30. The Respondent admits that his conduct, as set out herein, constitutes professional misconduct.

[6] Both counsel made submissions to us that supplemented the information in the SAF.

[7] It was common ground that the Respondent's course of action in not opposing the sale of the property, as described in para. 20 of the SAF, although it wrongly disregarded the Complainants' express wishes, had not been detrimental to the Complainants' material interests. In purely objective terms it probably made sense for the sale to go ahead.

[8] In response to a question from the Panel about how the Complainants now thought about the Respondent's failure to act in accordance with their instructions, Mr. Ziskrout, for the Respondent, advised that the Complainants had received copies of the Respondent's letter of May 28, 2008, to Law Society counsel in which he (the Respondent) fully admitted his error and did everything he could to make amends. In the letter he said he was " deeply embarrassed about my inability to remember and consequently explain to the Law Society how this error occurred." He admitted, " I failed to recognize my obligations and to discuss with the clients the matters required" by the *Professional Conduct Handbook*. He had, he said in the letter, gone through all his open files to ensure he was following client instructions. He had returned all the fees the Complainants had paid for his services. Mr. Ziskrout's impression was that the Complainants were now much less upset about the Respondent's conduct. He had spoken to one of the Complainants by

phone and she had said that, in light of what she now knew, she accepted that the Respondent had not done anything really wrong.

### Discussion of Decision

[9] We accept the Respondent's admission of professional misconduct as contained in the SAF at paras. 28-30.

[10] The penalty to which the Respondent has consented, and which the Law Society recommends, is a fine of $3,000 and payment of costs of $1,000. We accept this as an appropriate penalty.

[11] We have taken into account a number of mitigating factors. The Respondent's disregard of his clients' instructions, though a breach of his fundamental obligation to his client, was essentially inadvertent. He was mortified to discover that he had somehow overlooked the Complainants' expressed wishes to oppose the sale of the property. The difficulty in recognizing and dealing with the conflicting positions of his clients may have been caused in part by the fact that he had stepped into an already existing joint retainer (see SAF para. 10). He may have assumed, consciously or otherwise, that the ground rules for the clients' relationships with each other had been established by the previous lawyer. Once his breach of duty to the Complainants was brought to his attention, he did everything he could to make amends, including apologizing to them and refunding the fees they had paid for his services. He also undertook, in the letter to the Law Society that the clients received, to enrol in and complete the Law Society's Small Firm Practice Course and to review the *Professional Conduct Handbook*, the Law Society Rules and the *Legal Profession Act*.

[12] We do, however, emphasize the importance of scrupulously observing the conflict of interest rules in the *Professional Conduct Handbook*. As the Panel observed in *Law Society of BC v. Coglon*, [2002] LSBC 21 at para. 47, " [T]he Law Society cannot have, and the public interest cannot have, any real assurance that well-motivated actions taken in conflict of interest will cause less harm than those basely motivated." This case is a textbook example of how a joint retainer is always a relationship fraught with risk and thus to be handled with great care. The lawyer who accepts a joint retainer must ensure the steps required by Chapter 6, Rule 4 of the *Professional Conduct Handbook* are taken at the outset. Because the Respondent had not established with his clients what was to happen if a conflict of interest were to arise, he had no option when the conflict did arise but to cease acting for all the clients. This case also illustrates that the lawyer on a joint retainer must constantly be alert to the fact that conflicts of interest between the clients can appear suddenly at any time and in quite unexpected ways.

## Decision

[13] We therefore order that, on or before 20 July 2009, the Respondent:

1. pay a fine in the amount of $3,000, and
2. pay costs in the amount of $1,000.

[14] This decision will be published in due course as required by Rule 4-38.