2005 LSBC 49
Report issued: November 16, 2005
Citation issued: February 9, 2005

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

Douglas Welder

Respondent

Decision of the Hearing Panel

Hearing date: July 22, 2005

Panel: Ralston S. Alexander, Q.C., Chair, G. Glen Ridgway, Q.C., Gerald Lecovin, Q.C.

Counsel for the Law Society: Brian McKinley
Counsel for the Respondent: In person

Background

[1] By citation dated February 9 th, 2005, this Panel was directed to inquire into the conduct of the Respondent with respect to matters set out in a schedule to the citation which provided as follows:

1. That you failed to remit funds collected for payment of GST.
2. That you failed to remit funds collected for payment of Social Services Tax.
3. That you failed to remit funds collected as employee source deductions for payment of income tax.

[2] An agreed Statement of Facts was filed in which the member acknowledged that he did the acts alleged, and that in so doing, professionally misconducted himself. The Panel finds that the Respondent has professionally misconducted himself in respect of all counts of the matters described in the citation.

[3] By an agreement between Counsel for the Law Society and the Respondent, it was agreed that the Panel, having made a determination of professional misconduct, could move to consider an appropriate penalty in the circumstances and the parties made submissions in that regard.

[4] This is the second time that the Respondent has professionally misconducted himself in this manner. The Panel noted that while there are precedents for the penalty to be meted out on a first offence, there are no precedents for the appropriate penalty to be levied on a second offence. It is therefore necessary for the Panel to look at the background against which this second set of offences took place. Most of the facts which follow, and upon which the Panel has relied, are not contained in the agreed Statement of Facts, but rather emerge from the evidence given by the member on examination and cross examination.

[5] When giving evidence at the Law Society hearing held on February 14, 2002, (which hearing was dealing with the initial citation issued for the Respondent's failure to remit taxes collected from clients) the Respondent estimated that the amount of money he owed to different arms of the Governments of Canada

and British Columbia, was between $242,000.00 and $270,000.00. He testified, at that hearing, that his net annual income for 1999 was about $130,000.00 and for 2000 about $86,000.00. He said that he had not then considered bankruptcy but rather that he wanted to repay the monies that were owed. He owned a company which had a potentially valuable software asset and he wanted to be able to develop it and pay off his debts out of the profits. One of the members of this Panel sat on that previous panel and noted to the Respondent that the earlier panel had, in no uncertain terms, expressed to the Respondent the view that the Respondent's proposed course of action was unworkable.

[6] At that first hearing the Respondent was reprimanded, fined $2,500.00 and costs were ordered against him. A condition was imposed that the Respondent inform the Executive Director of the Law Society on a quarterly basis, by means of a Statutory Declaration, the total fees billed by him and the total remittances made by him to each of Goods and Services Tax collectors and Social Services Tax collectors during the previous quarter.

[7] He was also ordered, in that decision, to present his full financial position to a licensed trustee in bankruptcy who would then report to the Executive Director of the Law Society on the financial circumstances of the Respondent.

[8] Thereafter, the Respondent duly reported and from April 15, 2002 until April 2004, noted his billings. He reported that he had made no payments on account of GST and only some payments on account of PST. It was only from and after July 15, 2004, (following his assignment in bankruptcy) that he made payments to both.

[9] The Respondent's statement of affairs, sworn March 1, 2004 showed that he then owed various arms of the government $687,975.58. Of this amount $94,048.97 was owed for unpaid GST, $28,423.01 for unpaid PST and $60,937.87 for unpaid source deductions collected from his employees.

[10] His explanation for not having paid these debts was that he did not have funds available. In a letter dated July 7, 2004, addressed to the Law Society, the Respondent explained the reasons for this shortfall. The Respondent testified that he had used the funds he was generating from his law practice for his aforementioned software project. He explained that the software investment turned out to be a disaster and had cost him everything he had.

THE PRESENT SITUATION

[11] At present, the income of the Respondent is back to what it was in 1999 and he is able to draw from it approximately $7,000.00 per month to meet his expenses. While he has given up his software project, he has a property in Glenmore (a suburb of Kelowna) which he wishes to develop. According to the documents filed in the bankruptcy, this property has no value. It is owned in equal partnership with his mother. The Respondent has been unsuccessful in convincing the local authorities to extend their utilities 10 km so that he can develop the project but he is soldiering on. The Respondent has suggested that a suspension would take away his only means of paying his debts and of supporting his family and instead that a substantial fine should be imposed.

[12] The documents filed in the bankruptcy indicate total debts of $915,083.02, against assets of $55,187.88. As one of the creditors in his bankruptcy is the Law Society of B.C. in the amount of $2,500.00 (the amount of the fine levied at the hearing on February 14, 2002) the Respondent's suggestion of a substantial fine does not appear an attractive option to this panel.

[13] Aside from continuing to invest in the software program, the Respondent used the funds generated by

his Law Practice to pay other expenditures. These expenditures bear comment.

[14] The Respondent and his wife separated originally in 2002 and separated permanently on May 1, 2003. He has assumed the entire financial obligation of supporting his three daughters who live with him in the former matrimonial home which is owned by his wife. His youngest daughter was involved in an accident on November 11, 2003 and his spending time with her until she got better, accounted for his drop in income for a year. She has since recovered to the extent that she can play soccer at the highest level again. Her medical bills have been paid by I.C.B.C.

[15] His two older daughters, both adults, are to attend universities, one in the United States. One daughter will need about $20,000.00 per annum and the Respondent has committed himself to provide this support. The other older daughter will be taking a teacher training diploma. She too will require financial assistance, which the Panel believes will be no less than $3,000.00 per annum.

[16] The Respondent's wife commenced an action for divorce two years ago but the only step she has taken is to obtain an order under section 57 of the *Family Relations Act*. This is a triggering event order which entitles each party to an interest in each family asset. The member has made some proposals to his wife, particulars of which the panel was not given, except that they included a suggestion that she contribute to the support of her daughters. The wife earns $43,000.00 per annum. The Respondent states that he thinks his wife should contribute because of his poor financial condition. However, she has made no answer to his requests.

[17] Reference to the Federal Child Support Tables indicate that with this income the wife would be liable to pay $778.00 per month for the support of three children - this amount being due without considering additional payment obligations for any extraordinary expenses. In light of his wife's income and his financial problems, it is incomprehensible why the Respondent has, since the date of his separation, voluntarily paid to his wife the sum of $1,000.00 per month for her support. This payment is being made without the benefit of a court order which would at least afford the Respondent some income tax relief.

[18] In his Statement of Affairs filed with his bankruptcy application, the Respondent showed discretionary expenses of $4,063.00 per month. In addition, the Respondent is paying the Trustee in Bankruptcy $1,100.00 per month until July/August, 2006. Of his expenses, the monthly rent paid by the Respondent to his wife was $1,600.00, a sum covered the cost of mortgage payments and taxes on the home. The value of the home according to the Respondent was approximately $600,000.00. It was subject to a mortgage of $128,000.00.

[19] In April 2004, the wife re-mortgaged the property with the knowledge and approval of the Respondent, increasing the loan to $300,000.00. With the additional monies acquired thereby, the wife paid her income tax, owed as a result of money she earned from a previously successful business venture into which she was placed by the Respondent ($75,000.00), and to repay her uncle for a down payment on a condominium in which she is living ($40,000.00). The balance of $60,000.00 was not accounted for.

[20] As a result of the increase in the amount of the mortgage, the mortgage payments went from $1,600.00 per month to $2,300.00. The Respondent then increased the rent he was paying to her, to that amount.

[21] Another asset of the bankrupt Respondent is a Strata Title Office from which he runs his law practice. He pays rent of $1,080.00 per month, an amount sufficient to pay the mortgage payments on the office premises. Strangely, this property owned by one of his companies, is shown as having no value in the bankruptcy documents.

[22] The Respondent is paying $400.00 per month to support the Glenmore property, which also has a mortgage against it. He has two tenants on that property who presumably pay the balance of the mortgage.

This property too, in the bankruptcy of the Respondent, is declared to have no value.

[23] The picture that emerges from all of the foregoing is that of a debtor, who has incurred additional debt while (a) paying his wife maintenance of $1,000.00 which permits her to purchase a new condominium, (b) paying $400.00 per month on a piece of property which he deposes to have no value, (c) permitting his wife to encumber her home, a prima facie family asset, and thereby decreasing its value, and (d) increasing his rental payments to his wife by 35% to cover her additional costs as a result of the aforementioned re-mortgaging.

[24] The monies received by the Respondent in his practice for GST, PST and employee deductions were diverted to pay for these expenses.

[25] The Panel was advised by Law Society Counsel that because these monies are not placed in a separate trust account they are not considered "trust funds" and so the Respondent cannot be accused of wrongfully taking trust funds. Nevertheless, this Panel views the taking of those monies, given to a lawyer for a specific purpose and used by that lawyer for his own purposes, as a serious breach of a fiduciary obligation.

[26] At the time of the hearing the Respondent acknowledged that he had not been able to pay the latest installments of GST and PST totaling $4,800.00. He also acknowledged being in arrears for current payroll deduction amounts.

[27] This Panel believes that if permitted to continue practicing law, the Respondent's past and present behavior indicates that he will continue to a accumulate further indebtedness while increasing the value of his supposedly valueless assets. The condoning of such behavior by the Law Society would reflect badly on that institution.

[28] Accordingly, this panel finds that the proper penalty in this case to be as follows and so orders.

[29] We direct that the Respondent shall be suspended from the practice of law for a period of one year from the date of the publication of these reasons. Upon the return of the Respondent to practice, and as provided in section 38(5)(c) of the *Legal Profession Act* we further direct, as a condition imposed upon the practice of the Respondent, that the Respondent provide on a monthly basis, evidence satisfactory to the Discipline Committee of the Law Society of the Respondent's full compliance with the tax remitting requirements of the *Income Tax Act*, the *Excise Tax Act* and the *Social Services Tax Act* and that he continue to provide that evidence until relieved of this condition by the Discipline Committee. As a further condition placed upon the Respondent's practice, we direct that the Respondent fully cooperate with the Discipline Committee from time to time and at all times by providing to that Committee all information requested by that Committee so as to ensure that that Committee is able to determine and ensure that the continued practice by the Respondent poses no danger to the public interest. This condition will also endure until the Respondent is relieved of this condition by the Discipline Committee.

[30] The Respondent shall forthwith pay the costs of this hearing, set by this Panel at $2,450.00.