2009 LSBC 16
Report issued: May 22, 2009
Oral decision: May 20, 2009
Citation issued: February 15, 2005

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

Donald Wayne Skogstad

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: May 20, 2009

Panel: Robert W. McDiarmid, QC, Chair, Ralston S. Alexander, QC, Thelma O'Grady

Counsel for the Law Society: Jean P. Whittow, QC and David Volk
Counsel for the Respondent: Bryan G. Baynham, QC and Emily Williamson

Background

[1] In a decision issued July 3, 2008 (2008 LSBC 19) following ten days of hearing between October 23, 2006 and March 13, 2008, the Respondent was found to have professionally misconducted himself in that he:

(a) failed to advise investors that he was not representing their interests, contrary to Chapter 4, Ruling 1 of the *Professional Conduct Handbook*; and

(b) failed to record the source of all funds received, contrary to Rule 3-60.

[2] Several counts of the citation were dismissed, including, in particular, the most serious count which alleged that the Respondent assisted V (the Respondent's corporate client) in the perpetration of a fraudulent investment scheme. The Panel found as follows:

> Although permitting his trust account to be used as a place to pool these investment dollars is not appropriate, the evidence does not support an allegation that he assisted V and persons associated with V in the perpetration of an investment scheme that he knew or ought to have known was a deception or betrayal of the public. The investment scheme he assisted with does not appear to have been fraudulent; the investments he was directed to make by V and by F on behalf of V turned out in two instances to be frauds, but that does not make him, nor V, nor persons associated with V, part of the scam, ...

[3] Counsel for the Law Society and for the Respondent jointly proposed the following disposition pursuant to Law Society Rule 4-35 and Rule 5-9. The Respondent shall:

(a) be suspended for three months; and

(b) pay a contribution to the costs of the proceedings of $20,000, by May 1, 2010.

[4] The Respondent asks that the suspension be served commencing December 14, 2009. His counsel explained, and confirmed through letters provided, that the Respondent has a busy trial calendar. The Panel was advised that he has trials running through to December 10, 2009, as one of the reference letters written for the Respondent by a colleague points out (Exhibit 2, Tab 5):

> An unplanned suspension will cause many adjournments and probably mean lost Court time due to the inability to organize trials on such short notice. This will cause inconvenience to his clients.

General Principles

[5] In their joint submission, counsel set out the general principles applicable.

[6] In *Law Society of BC v. Hammond*, 2004 LSBC 32, the Benchers wrote:

> We are mindful of the requirement imposed upon the Benchers of the Law Society by Section 3 of the *Legal Professional* [sic] *Act* which requires that the legal profession be governed in the best interests of the public. We note in Gavin McKenzie's publication *Lawyers and Ethics: Professional Responsibility and Discipline* (Carswell, 1993) under the general heading " Purposes of Discipline Proceedings" , the following appears:
>
> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. If a lawyer has committed a criminal offence it is for the criminal courts, not the legal profession, to inflict punishment. All sanctions necessarily have punitive effects, which are tolerable results of the protective and deterrent functions of the discipline process. The goals of the process are, nevertheless, nonpunitive.
>
> The seriousness of the misconduct is the prime determinant of the penalty imposed. ...

This passage was quoted and adopted by the panel in *Law Society of BC v. Hordal*, 2004 LSBC 36.

[7] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the panel set out a list of factors to be considered in the imposition of penalty:

> 10. The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> (a) the nature and gravity of the conduct proven;
>
> (b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties in similar cases.

[8] Counsel then addressed the various factors.

[9] The most serious factor here is that the Respondent permitted his trust account to be used to pool monies for persons who were not his clients for use in various investments. The Respondent provided to F, principal of V, banking coordinates for the Respondent's trust account. F provided those to others. Individual investors could make direct deposits to the Respondent's trust account. This happened on numerous occasions. It was noted in the decision of the Hearing Panel on Facts and Verdict that approximately $990,000 (168 deposits) was not identified with an investor name. A significant portion of those monies was " invested" in " Bank Debenture" programs and in the " Railway Bonds Program" ? those " investments" were scams.

[10] The Respondent became aware of the potential fraudulent nature of the Bank Debenture program and was able to pass those concerns on to F, but obviously was not able to pass those concerns on to all the individual investors because he did not know who they were.

[11] The Panel found that the use by the Respondent of his trust account to pool investment monies was entirely inappropriate. Trust accounts must only be used for the legitimate commercial purpose for which they are established, namely to aid in the completion of a transaction in which the lawyer or firm plays a role as legal advisor and facilitator. The Respondent had no such role. He was merely a convenient and apparently legitimate conduit for funds from the individual investors to the various schemes decided upon by F for V. The trust account served no legitimate role in these events and should not have been so employed.

[12] The failure of the Respondent to discharge his obligations to both identify persons making deposits and to advise them that those persons' interests were not being protected by the Respondent as a lawyer must have had a singularly negative impact on the reputation of the legal profession generally in the minds of the investors.

[13] However, what distinguishes this case from other cases is that the Respondent was not a participant in the fraudulent schemes and did not personally profit from the investors' money.

[14] Counsel reviewed several of the *Ogilvie* factors. Several mitigating factors were canvassed by counsel

for the Respondent, including the impact this process has had on the Respondent's health, the fact that the Respondent sought professional advice in the form of counseling upon becoming aware of the problems, years before the citation was issued, the insight the Respondent has gained into the difficulties with his conduct, his high reputation in his community, both with lawyers and others in the community, his legal abilities, the fact that he takes on difficult cases, and, not the least, the fact that he at times takes on difficult cases pro bono.

[15] In all of the circumstances, the penalty proposed addresses the seriousness of the Respondent's misconduct while recognizing the appropriate mitigating factors. Similar cases in British Columbia and in Ontario have generally resulted in suspensions of between one and nine months. In the circumstances of this case, the joint submission of a three month suspension is appropriate.

[16] With respect to costs, the Panel was advised that total costs were in the range of $200,000. The Respondent was partially successful in these proceedings, with the most serious allegation against him being dismissed, it being clear to the Panel that he did not assist his clients with the perpetration of a scam, but rather that his client was the victim of a scam. Past disciplinary decisions demonstrate wide latitude in the imposition of costs. In cases of divided success, costs were reduced (see, for example, *Law Society of BC v. Boles*, 2007 LSBC 43). As well, past panels have held that costs should not be so high as to amount to " de facto disbarment" (*Law Society of BC v. Christie*, 2008 LSBC 01).

[17] In the circumstances, the joint costs proposal strikes the appropriate balance.

[18] Accordingly, we order that the Respondent:

(a) be suspended for 3 months, with the suspension to be served commencing December 14, 2009; and

(b) pay a contribution to the costs of the proceedings of $20,000, by May 1, 2010.