2009 LSBC 21
Report issued: July 14, 2009
Citation issued: September 10, 2008

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

Andrew James Liggett

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: April 29, 2009

Panel: Gavin Hume, QC, Chair, David Mossop, QC, David Renwick, QC

Counsel for the Law Society: Maureen Boyd
Counsel for the Respondent: David Taylor

Background

[1] On September 10, 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.

[2] The citation directed that the Panel inquire into the Respondent's conduct as follows:

1. At various times from 2004 onwards, you failed to maintain your books, accounts and records in accordance with Division 7 of Part 3 of the Law Society Rules, and in particular:

(a) from at least February 28, 2005 to November 7, 2006, you permitted more than $300 of your own funds to remain in your pooled trust account, contrary to Rule 3-52(4);

(b) at various times between August 2005 to approximately November 2006, you made payments from trust funds when your trust accounting records were not current, contrary to Rule 3-56(1.2);

(c) in or about 2005, 2006, 2007, and 2008, you did not record transactions in accounting records in chronological order and in an easily traceable form, contrary to Rule 3-59(3);

(d) for various periods from January 2006 onwards, you did not retain all supporting documents for both trust and general accounts, contrary to Rule 3-59(4);

(e) from approximately January 2005 to April 2008, you failed to maintain a book of original entry or data source, contrary to Rule 3-61(1);

(f) at various times in 2005, 2006 and 2007, you did not keep file copies of all bills delivered to clients or persons charged, filed in chronological, alphabetical or numerical order, contrary to Rule 3-62;

(g) at various times in 2005, 2006 and 2007, you did not record each general transaction promptly, and in any event not more than 30 days after the general transaction, contrary to Rule 3-63;

(h) for each of the months of February, April, July, August, September, October, November and December of 2005 and each of February, March, August and September of 2006, you did not prepare a monthly trust reconciliation within 30 days of the effective date of the reconciliation, contrary to Rule 3-65; and

(i) you did not retain the detailed listings related to each monthly trust reconciliation, contrary to Rule 3-65,

i) in or about 2005 and 2006, and

ii) in respect of the monthly trust reconciliation for December, 2007.

2. You failed to comply, or failed to cause your office staff to comply, with an Order dated July 13, 2006 made by the Chair of the Discipline Committee pursuant to Rule 4-43 of the Law Society Rules, when you or your office staff failed to produce the following documents demanded by the Law Society auditor:

(a) from approximately June 2007 to at least April 2008, you failed to produce your client file and all file documents related to either or both of the following clients: CM and MC;

(b) from June 2007 to July 2007, you failed to provide your client file and all file documents related to your client DB; and

(c) from approximately April 29, 2008 to at least May 21, 2008, you failed to produce the March 31, 2008 trust account bank reconciliation, including all supporting documents.

[3] At the hearing, counsel agreed that the Schedule to the citation be amended to exclude allegation 1(d):

1(d) for various periods from January 2006 onwards, you did not retain all supporting documents for both trust and general accounts, contrary to Rule 3?59(4);

[4] The Panel is satisfied that it has the jurisdiction to accept the withdrawal of that allegation from the Schedule to the citation.

[5] The requirement for service of the citation upon the Respondent, pursuant to Rule 4-15 of the Law Society Rules, was admitted by counsel for the Respondent.

[6] An Agreed Statement of Facts (" ASF") was filed as Exhibit 2 in these proceedings. The Panel was advised by counsel for the Respondent that he was withdrawing his agreement to para. 39 of the ASF which states:

Mr. Liggett admits that his conduct constitutes professional misconduct.

[7] Counsel for the Law Society is not opposed to the withdrawal of that admission. We are satisfied that we have the discretion to accept the withdrawal of the admission. The determination of the issue whether the Respondent's conduct constitutes professional misconduct is within the purview of the Panel's decision and can be made whether an admission is made or not (cf. *Law Society of BC v. Welder*, 2007 LSBC 29).

[8] Therefore, the issue before the Panel was whether the conduct of the Respondent, who admits readily that he was in breach of the *Act* or Rules, as particularized in the amended Schedule attached to the citation, amounted to professional misconduct.

[9] Prior to hearing any submissions, counsel for the Law Society and the Respondent were advised that the Respondent's conduct had been referred to the Practice Standards Committee in 2006. At that time, Mr. Renwick was a member of that Committee. Counsel were satisfied that Mr. Renwick could remain on the Panel and that this hearing could proceed.

[10] Mr. Liggett testified before this Panel.

[11] The material facts from the ASF and from the Respondent's testimony are:

1. The Respondent was called to the Bar in 1991 after completing his articles with Ray Connell. He then went on to practise in his own firm, Liggett & Associates, which he subsequently changed to Sea to Sky Law Corporation. It was his dream to have a number of law firms in the North Shore and Squamish, and it was his dreams that partly were his undoing. At times, he had branch offices in Squamish, Bowen Island, Gibsons and North Vancouver.

2. The Respondent was previously involved with the Police Reserves and was a Deputy Sheriff.

3. In 2005, the Respondent expanded his branch offices to include Burnaby and he hired a full-time bookkeeper. However, the physical locations and number of locations created problems.

4. The Respondent described 2006 as being the " year from hell" . His bookkeeper quit and the CGA that he had hired, Mr. Plunkett, advised him of the errors that had been made by his former bookkeeper. This was compounded by the fact that he did not complete his Form 47 by June 30, 2006.

5. As a result of failing to complete his Form 47, he was suspended from approximately July 1, 2006 until August 24, 2006.

6. During his two months of suspension he lost income, resulting in significantly reduced cash flow.

7. In or about May 2006, the Law Society ordered that an examination of the Respondent's books, records and accounts take place under Rule 3-79. Mr. Russell Law of Markay Company Ltd. attended the Respondent's business premises on 14 occasions between May 23, 2006 and March 29, 2008. His findings are set out in the ASF. Initially, Mr. Law was unable to complete the audit as the " books and records are not up to date and it is missing several trust and general bank statements, paid items" In Mr. Law's opinion:

(a) the Respondent's trust and general accounts had not been maintained on a regular basis for some time when he first examined them in May of 2006;

(b) the general accounts were unreconcilable as accounting information had either not been entered, or had been entered incorrectly and never been properly corrected;

(c) the books and records are not properly maintained in an easily traceable form and thus it was not possible to complete the investigation; and

(d) there was no evidence of misappropriation of client trust funds.

8. The Respondent had to sell his home in North Vancouver to help with the cash flow, to pay debts

and pay for the ongoing accounting services.

9. The Respondent had problems getting staff for his Burnaby office.

10. The Respondent had to sell his Lonsdale office in North Vancouver in November of 2006.

11. The Respondent was served divorce papers in November, 2006 resulting in a custodial dispute with his estranged wife, which did not resolve until November, 2008.

12. The Respondent used money from an inheritance to finance his business.

13. In December 2008 the Respondent sold his Burnaby office, resulting in a significant loss to him.

14. The Respondent described his feelings when approached in May 2006 by the auditor, as being horrified as to the extent of his misfeasance, and was embarrassed by the lack of proper recordkeeping.

15. The Respondent took the concerns of the Law Society seriously, but was unable to attain adequate and proper help to assist with the problems, which were compounding monthly.

Issue and Analysis

[12] Section 38(4) of the *Legal Profession Act* states:

> (4) After a hearing, a panel must do one of the following:
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> (a) dismiss the citation;
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> (b) determine that the respondent has committed one or more of the following:
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> (i) professional misconduct;
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> (ii) conduct unbecoming a lawyer;
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> (iii) a breach of this Act or the rules;
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> (iv) incompetent performance of duties undertaken in the capacity of a lawyer;
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> (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;
>
> (c) make any other disposition of the citation that it considers proper.

[13] The burden of proof rests on the Law Society. The standard of proof is set out in the Supreme Court of Canada decision in *F.H. v. McDougall*, 2008 SCC 53, and adopted by a Law Society Hearing Panel in *Law Society of BC v. Schauble,* 2009 LSBC 11.

[14] In *McDougall* the Court concluded at para. 40 that:

> ... it is time to say, once and for all in Canada, that there is only one civil standard of proof at common

> law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. ....

[15] In *Schauble* the Hearing Panel followed this standard, and summarized the onus and standard of proof as follows (para. [43]):

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: " ... evidence must be scrutinized with care" and " must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But ... there is no objective standard to measure sufficiency.

[16] Accordingly, the burden of proof rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the necessary facts to support a finding of professional misconduct on the balance of probabilities. In considering its findings, the Panel has applied this test.

[17] What constitutes professional misconduct? Under section 34(4)(b) of the *Legal Profession Act*, SBC 1998, c. 9, the most recent decisions are *Law Society of BC v. Martin*, 2005 LSBC 16 and *Law Society of BC v. Lyons*, 2008 LSBC 09. These cases establish that the test for professional misconduct is:

> Whether the facts, as set out, disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[18] This is the test that we have applied.

[19] A number of authorities were relied upon by counsel in considering the distinction between a breach of the *Act* or Rules and professional misconduct. It is clear that each case is determined on its own facts.

[20] In *Law Society of BC v. Adelaar*, [1998] LSDD No. 123, a decision prior to *Martin (supra)*, the test for professional misconduct was conduct that was disgraceful or dishonourable. In that case, there was the long delay by a lawyer in obtaining a state of compliance in bringing his accounting records to the standard as required by the Rules. In that case, the panel felt that the Respondent's conduct was " very close" to professional misconduct and that, in part, this was due to his " stubborn and petulant attitude." Counsel for the Respondent suggested to us that the Respondent's attitude was far from " stubborn and petulant," and we accept that characterization.

[21] In *Law Society of BC v. Geller*, 2004 LSBC 24, the Respondent admitted that he had breached four accounting rules over a two-year period. At the time the hearing took place the breaches had been rectified. The Panel concluded that his conduct constituted a breach of the Rules and commented further (para. [5] and [6]) that:

> [5] I accept the submission of Law Society counsel that the Respondent's breaches are not small matters. Obviously if lawyers do not keep records as required, such investigations as the Law Society may see the need to make can become much more difficult than they should be.
>
> [6] Plainly the Respondent neglected his important record-keeping obligations. But I was told, and I accept, that the neglect occurred at a time when the Respondent was distracted by an unfortunate combination of events in his private life. ...

[22] In *Law Society of BC v. Smith*, 2004 LSBC 29, the Respondent admitted that he breached the Rules by failure to prepare and maintain monthly trust reconciliations, failure to maintain trust accounting records, permitting a trust shortage of $7,410.89 to continue and a failure to report the trust shortage. The Panel

accepted the admission of the breach of the Rules and noted (para. [6] and [7]) that:

> [6] ... The breaches of the Rules committed by the Respondent were several and, while not resulting in any loss to a client or done with any dishonest intent, not insignificant. The breaches were the result of the Respondent paying little attention to the administrative side of his practice.
>
> [7] Lawyers like to practice law; few find the administrative side of the practice rewarding in any sense. Nevertheless, it is an important part of the practice and the Rules have been instituted to ensure that the public interest is protected.

[23] In *Law Society of BC v. Uzelac*, [2003] LSBC 35, there was a number of allegations against the Respondent, including breaches of a number of the trust accounting rules, withdrawal of funds from trust contrary to the requirements of the Rules, and failure to report unsatisfied judgments. The Panel, in concluding that the Respondent's conduct was professional misconduct, stated (para. [26]):

> With respect to counts 1, 2, 4 and 5, the Panel views this conduct as part of a continuing course of action evidencing a complete neglect of the Respondent's obligations to maintain trust records. Individually taken, breaches of Accounting Rules might not be regarded as professional misconduct. However, the case before us, taken as a whole, satisfies this Panel that the Respondent professionally misconducted himself regarding these counts.
>
> Of significant importance to the Panel was the lengthy period of time over which the allegations occurred and the finding that the breaches " were not inadvertent or transient" (para. [29]).

[24] In *Lyons (supra)*, the Panel considered the distinction between the breach of the *Act* or Rules and an adverse determination of professional misconduct, and noted (para. [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).

[25] However, the Panel went on to state in *Lyons* at para. [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.

[26] Counsel for the Law Society submitted that the Respondent's conduct in breaching the accounting rules and failure to produce the requested documents in a timely manner met the test for professional misconduct, as it was a marked departure from the conduct that the Law Society expects of its members. The factors submitted are as follows:

> (a) there were breaches of several of the accounting rules;
>
> (b) the failure to maintain books and records was not isolated but systemic. When the auditor, Mr. Law, first attended at the Respondent's office in May, 2006, he was unable to complete an audit of any trust transactions due to the lack of records;

(c) Mr. Law attended no less than 14 times between May 23, 2006 and March 29, 2008 to carry out examinations and investigations, and even then he was unable to complete the examination and investigation because the books and records were not up to date or in a form to be audited;

(d) this situation was compounded by a failure to produce books and records so that a Rule 4-43 investigation could be conducted;

(e) in October 2007 and January 2008 the Respondent provided action plans to rectify the problems with his books and records with a timetable. Neither of these action plans were met;

(f) the books and records were only brought into substantial compliance by early April 2009, almost three years after the initial Rule 3-79 audit commenced;

(g) even though the citation was issued in September 2008, the Respondent's books and records were not brought into substantial compliance for nearly eight months.

[27] Counsel for the Respondent provided a number of explanations for why the Respondent's books and records were in such a state when first investigated and why it took so long for compliance, which reasons included:

(a) difficulty in hiring and retaining competent staff;

(b) difficulties in keeping the PC Law and computer system operational;

(c) difficulties in accessing technical support from PC Law;

(d) the Respondent's cash flow problems affected his ability to pay for the required services;

(e) his accountant quit in March of 2006, and he could not hire a replacement bookkeeper.

[28] Of particular note, the Respondent was suspended from July 1, 2006 until August 24, 2006 for failing to submit his Form 47. During this two-month period there was little or no effort to get his books and records in order.

[29] In mitigation, counsel for the Respondent also indicated that no trust monies went missing, which was verified when compliance was noted.

[30] Counsel for the Respondent also noted that the Respondent used a significant portion of his own funds to pay for the professional help to bring his books into compliance.

[31] Counsel for the Respondent reviewed the various decisions and submitted that the Respondent's situation was similar to that in *Adelaar (supra)* as to timing, but not as to the finding of attitude, frustration or disinterest. Here, the Respondent was generally cooperative.

[32] Counsel also suggested that the Law Society not pursuing allegation 1(d) of the Schedule to the citation suggests that all of the supporting documents have been retained; this was analogous to *Adelaar*.

[33] Counsel for the Respondent also submitted that the observations made by a single Bencher in *Geller (supra)* was apropos to his client's circumstances (para. [6]):

Plainly the Respondent neglected his important record-keeping obligations. But I was told, and I accept, that the neglect occurred at a time when the Respondent was distracted by an unfortunate combination of events in his private life. Through his counsel the Respondent assured me that the breaches would not be repeated and, with the condition requiring the regular reports from the chartered

accountant, I am satisfied that the assurance is a good one.

[34] Counsel for the Respondent made a similar assurance to us.

[35] In distinguishing the findings in *Smith (supra)*, counsel for the Respondent suggested that, rather than him paying little attention to the administrative side, he in fact was alive to the concerns. The problem was that this was a " perfect storm" . He had branch offices closing and was forced to liquidate them to pay the practice debt, and he had to mortgage and sell personal property to cover business and practice debt. As well in *Smith*, there was a condition of " trust shortage" , which was not the situation in our case. There was no suggestion of malfeasance or misappropriation.

[36] Counsel for the Respondent also submitted that the *Uzelac* case was distinguishable on its facts.

[37] Counsel for the Respondent also suggested that the decision in *Lyons (supra)* was a much more serious problem and was dealing with the " no-cash rule" . There were important social policy considerations in play which was not the situation here.

[38] In analyzing the standard expected by his peers, counsel for the Respondent indicated that the peers do not expect perfection of a lawyer, but rather honesty and honour, and they expect the lawyer to correct transgressions. This was his client's position, and he readily acknowledged that there was a clear breach of the *Act* and Rules.

Decision

[39] The Panel is satisfied that, in considering all of the submissions and factors and in spite of a number of factors playing on the Respondent's practice and personal life; we are concerned specifically about:

1. The length of time taken to rectify the transgressions.
2. The failure to follow through with the two action plans.
3. The notice given to the Respondent of the problems as early as May, 2006.
4. The failure to produce any meaningful compliance during the period of his suspension.

[40] The systemic problems with his books, which were apparent when the auditor first arrived in May of 2006, and the above-mentioned concerns leave us no alternative but to come to the conclusion that the Respondent's conduct is a marked departure from that which the Law Society expects of its members, and as such is professional misconduct.