2008 LSBC 30
Report issued: September 19, 2008
Citation issued: April 9, 2008

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

Lu Chan

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: August 27, 2008

Panel: William Jackson, Chair, Leon Getz, QC, Meg Shaw, QC

Counsel for the Law Society: Eric Wredenhagen
Counsel for the Respondent: William G. MacLeod

The Citation

[1] The citation against the Respondent was issued on April 9, 2008 and was properly served on his counsel, in accordance with the Law Society Rules.

[2] The Schedule to the citation directs us to inquire into certain conduct on the part of the Respondent, particularized as follows:

> 1. On or about June 22, 2006, while representing a client from China in an immigration matter, you received or accepted cash in an aggregate amount of $7,500 or more in respect of one client matter or transaction, contrary to Rule 3-51.1 of the Law Society Rules.
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> 2. In the alternative, on or about June 22, 2006, while representing a client from China in an immigration matter, you received or accepted cash in an aggregate amount of $7,500 or more for professional fees, disbursements, or expenses but refunded an amount greater than $1,000 out of such money accepted or received by trust cheque instead of cash, contrary to Rule 3-51.1(3.1) of the Law Society Rules.

[3] The Respondent has admitted the breach of Rule 3-51.1 in allegation #1 of the Schedule to the citation. The Law Society did not proceed with the breach alleged in allegation #2.

[4] The question before us is whether the Respondent's admitted breach constitutes, in the circumstances, a " mere" breach of the Rules or is properly to be characterized as professional misconduct. The Law Society takes the latter position and the Respondent takes the former.

Background

[5] The Respondent has practised as a sole practitioner since his call to the bar in November of 1993. His preferred area of practice is in the field of immigration law and his clientele consists overwhelmingly of residents of the People's Republic of China and of Taiwan.

[6] There is a relatively brief Agreed Statement of Facts from which it appears that in the Trust Report for the year ended December 31, 2006, that the Respondent submitted to the Law Society in March of 2007, he answered " yes" to Question 14 in Section B: " Did the practice receive, into trust or general, in respect of one client matter or transaction, an aggregate amount of cash of $7,500 or more?"

[7] The Respondent added the following information:

> On June 22, 2006, I received a total amount of $40,000 USD in cash from a client from China who intended to apply for immigration to Canada under the Province of PEI's " Business Partners" program. The PEI government requires an applicant to commit to learn English language and to reside in PEI after their immigration to Canada. Accordingly, an applicant is required to put down in escrow $20,000 CAD as guaranty for residency in PEI and $20,000 CAD as language deposit, until they fulfill these two conditions. Usually, clients would request Canadian lawyers to make these payments on their behalf to the government appointed escrow agent in PEI.
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> This client brought the funds to Canada in cash because she was not able to transfer the funds from China to Canada via a bank in China, due to China's foreign currency control policy. On the other hand, she did not have a bank account in Canada.
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> I am aware of my duty under Chapter 4, Section 6 of the *Professional Conduct Handbook* and do not usually take cash in large amount [sic] from clients. In this particular case, before I agreed to accept the cash in trust, I reviewed the client's situation carefully and was satisfied that the client was a legitimate business person and the source of the funds was legitimate. . . .
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> The client did not eventually go ahead with her application for immigration to PEI and the full amount in my trust was returned to her without deduction or service charge.

[8] The circumstances surrounding the Respondent's admitted breach were elaborated on by his counsel in a lengthy letter to the Law Society dated November 30, 2007. The relevant parts of this letter are:

> Facts re the Cash Transaction
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> On May 10, 2006, Mr. Chan received a phone call from a potential client in China, Ms. YW, a Chinese citizen residing in China (the " Client"). The Client inquired about a Canadian student visa application for their son who was, by that time, in his last year in high school in China and was considering pursuing a university education in Canada in 2007. . . .
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> Mr. Chan had known YW and her husband, RZ, for years. As far as Mr. Chan knew, they were both university educated. They used to work for a state owned TV set manufacturing company in China. He was a sales manager. In or about 2000, they started a small family owned consulting business which provided career planning and business planning services to their clients. From time to time, they referred clients to him who wanted to apply for admission to Canadian universities and to apply for Canadian student visas, as well as clients who wanted to apply for immigration to Canada.
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> This time, YW was anxious to get a Canadian student visa for their son before August, 2007.
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> He told her that their son might not be able to get a Canadian student visa from the Canadian Embassy in Beijing because the Embassy would require proof of sufficient funds to support a student in Canada

and the sufficiency of funds, as required by the Embassy, was an amount over ¥ 800,000 (approximately $100,000 CAD) deposited in a bank for a period over 18 months. The couple did have that amount of saving, but the money was not deposited in a bank. Most of their savings were in the stock market in China. Even if they cashed in their investments and deposited the proceeds in a bank account, it still would not meet the Embassy's requirement of an 18 month history of such a bank deposit.

Mr. Chan, then, suggested that she and her family consider immigration to Canada. By doing this, their son would not need a student visa to study in Canada. They were interested. Mr. Chan then suggested that they consider the Provincial Nominee Program (" PNP") of the Province of Prince Edward Island. The immigration process under that program for PEI is very fast. It could be a matter of 9 to 12 months, while a student visa application would take as much as 4 to 5 months in Beijing and a Federal immigration process would take 3 to 5 years for Chinese citizens.

YW decided to pursue immigration under the PEI PNP program, instead of the student visa application. She and Mr. Chan moved very fast in order to meet their target date of August 2007 for getting their son into university in Canada for the fall of 2007. The Client signed a retainer agreement on May 31, 2006, and provided basic personal information and some of the supporting documents for the immigration application on the same day.

To apply for the PEI PNP program, the PEI government requires an applicant to deposit $100,000 in a provincial government designated escrow account in PEI, plus a $25,000 good faith residency deposit and a $20,000 language deposit. The total amount to be deposited in the PEI government account is $145,000. Without receiving the funds, the government would not assess an applicant's application and issue a Certificate of Nomination.

In the retainer agreement, it was stipulated that the Client could make the payment of the funds to the PEI government directly or, to Mr. Chan in trust. If the payment is made to the PEI government, it should be in Canadian currency. The Client was not able to get Canadian dollars in China as it was not a major currency in China. Therefore, they decided to remit the funds in US dollars to Mr. Chan in trust and he would convert it to Canadian dollars and make the payment to the PEI government on their behalf. They then proceeded to prepare other documents and to make the payments.

In regard to the background of this matter, it is important to keep in mind the very different conditions that apply in China in regard to carrying out financial transactions. In China, personal cheques are simply not available and are not used. Also, bank drafts payable to parties outside China are generally not available to individuals. Similarly, it is generally not feasible for an individual to send funds from China by wire transfer. There is a limit of about $5,000 US per year, per person on such transfers. Accordingly it is normal for individuals to carry out business there on a cash basis.

Cash Payment

On June 16, 2006 Mr. Chan received the first payment from the Client. It was USD $60,000 paid in traveler's cheques. On June 22, 2006, he received a further USD $40,000 in cash from the Client. Mr. Chan was not in the office at the time when the cash was paid to his office. His secretary/bookkeeper took the cash and waited for his instruction.

When he returned to office and saw this amount of cash payment, Mr. Chan was concerned that the bank may not accept this amount of cash. He called the Client to get payment in another form. He requested a bank draft or certified cheque or traveler's cheque or even wire transfer. Mr. Chan was

told by the Client that it was not possible due to China's foreign currency control policy. They did not have any overseas bank account to make the wire transfer. They were anxious to start the immigration process as soon as possible and requested that he assist them in order to avoid any delay.

Mr. Chan was aware of the Chinese policy on foreign currency controls. In the past, he had some immigration clients from China whose applications were delayed simply due to the difficulties in transferring funds out of China. Mr. Chan wanted to assist the Client.

On the other hand, Mr. Chan was generally aware of his duty under Canadian law and under the requirements of the profession and to be on guard against money laundering. On that day, before Mr. Chan called the Client about the cash payment, he double-checked the *Professional Conduct Handbook*. He specifically reviewed Chapter 4, Section 6:

> 6. A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.

Note 3 of that section provides:

> 3. A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make Inquiries. For example, a lawyer should make inquiries of a client who:
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> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matters, or
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> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

Mr. Chan assessed the background of the Client and their family and felt that in light of the Client's family and business background and in light of the circumstances, it was safe for him to conclude that they were not involved in money laundering. Mr. Chan, thus, decided to facilitate them in accepting the cash payment into his trust account, so that he could expedite their immigration application.

The mistake Mr. Chan made here, and which he acknowledges, was that he did not know or further check the Law Society Rules. Particularly, he was not aware of Rule 3-51.1(3). The Rule is simple and clear: it is an absolute bar for a lawyer to accept cash payment into their trust account of $7,500 or more, no matter whether money laundering is involved or not.

Disbursement of Funds to a Third Party

The disbursement of the funds was a result when the Client stopped their immigration application in July, 2006.

At the time of receipt of the cash payment, Mr. Chan also had a thorough discussion with the Client about the $25,000 residency deposit required by the PEI government. This amount was required by the PEI government to assure that immigrant families will reside in PEI after they become landed

immigrants. She told Mr. Chan that they wanted to reside in Vancouver, instead of PEI, so that they could be closer to their home country. Mr. Chan told them that he could not make representations on their behalf to the PEI government that they would reside in PEI, while their true intention was to reside in Vancouver. Mr. Chan also advised them that the Provincial Nominee Program in the Province of BC would not be suitable for them. The Client hesitated and requested for more time to consider.

On or about July 6, 2006, after further consideration, the Client confirmed with Mr. Chan that they definitely did not want to reside in PEI and they wanted him to stop their work. By that time, Mr. Chan had not done any work on this file and decided to close the file without charging them a fee.

He further asked the Client for instruction on the disbursement of the funds. The Client advised Mr. Chan that they wanted to keep the funds overseas in case they made a decision to send their son overseas for a university education and they needed the foreign currency to pay for tuition fees. They provided him with a name of their relative/friend, WW, and instructed him to make the cheque payable to this person.

Mr. Chan then prepared an Instruction to Pay. It was signed back by the Client on or about July 12, 2006. A trust cheque was issued on the same day upon the Client's instruction.

[9] The Respondent essentially confirmed this account in his oral evidence before us. It will be noted, however, that it differs in one respect from the disclosure contained in the Trust Report. In the latter, the Respondent indicated that the funds had been returned " *to her* without deduction or service charge." [emphasis added] That, it seems, is not strictly accurate. The funds were in fact returned to a person - WW - designated by the Client but apparently not known to the Respondent.

RULE 3-51.1 (the " no cash" rule)

The history and importance of the Rule

[10] Rule 3-51.1 was first adopted in 2004. It appears in Division 7 of Part 3 of the Law Society Rules. Part 3 is entitled " Protection of the Public" . Division 7 is entitled " Trust Accounts and other Client Property" . Its material provisions, for present purposes, are subsections (1) and (3):

Cash transactions

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.

(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.

[11] The Rule has been the subject of notice or commentary in various places, including a number of issues of the *Benchers' Bulletin*, on at least 12 occasions since it was first adopted in 2004. The Benchers have repeatedly made it clear that they regard the Rule with some seriousness.

Analysis

The precedents and principles

[12] The authorities establish that while a breach of the " no-cash" Rule may amount to no more than a " Rules breach" it may also, depending on the circumstances, rise to the level of professional misconduct. Professional misconduct is conduct that is " a marked departure" from what the Law Society expects of its members (*Law Society of BC v. Martin,* 2005 LSBC 16 at paragraph [171]) and the onus is on the Law Society to establish this. The standard of proof " is higher than the balance of probabilities but less than reasonable doubt" and " rises in direct proportion to the gravity of the allegation and the seriousness of the consequences" (*Law Society of BC v. Martin,* (*supra*) at paragraph [137]).

[13] There are three published decisions, all in 2008, in which allegations of breach of Rule 3-51.1 have been considered: *Law Society of BC v. Lyons*, 2008 LSBC 09; *Law Society of BC v. Adelaar*, 2008 LSBC 18; and *Law Society of BC v. Norton*, 2008 LSBC 22. In both *Adelaar* and *Norton* the Respondent admitted having committed a breach of the Rule but argued that in the circumstances this did not constitute professional misconduct. In both cases the Hearing Panel agreed.

[14] In *Lyons*, the first case involving an alleged breach of the Rule, the Respondent member admitted both the breach and that it constituted professional misconduct. The Panel said (at paragraph [29]):

> Notwithstanding the admission of the Respondent to the charge of professional misconduct, the onus rests upon the Law Society to satisfy this Panel that indeed his actions constitute professional misconduct or a breach of the Rules.

[15] The Panel concluded on the facts that the Respondent member was guilty of professional misconduct.

Drawing the Line

[16] In *Lyons* (*supra*) the Panel adopted the widely followed proposition in *Law Society of BC v. Martin,* (*supra*) at paragraph [171] that the test of professional misconduct is " whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects of its members" . It said (*Lyons* at paragraph [35]) that " weight must be given 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." On its face, this is not an exhaustive catalogue of material considerations.

[17] In this case, the relevant considerations are, we think, the following:

(a) As noted by the Hearing Panel in *Lyons* (at paragraph [26]):

> ... the purpose and effect of Rule 3-51.1 are to prevent money laundering in the simplest way possible - " If cash cannot be accepted, it cannot be laundered." The rule is a financial transaction rule, not a money laundering rule. It is objective and simple, and does not call for any application of judgment or due diligence as to the purpose or intentions of the person tendering the prohibited cash to the lawyer.

(b) At the time the breach occurred, the Rule had been in place for two years or more. In *Law Society of BC v. Kirkhope,* 2005 LSBC 23, which did not concern Rule 3-51.1, the Hearing Panel said, at paragraph [15]:

> We accept that every lawyer cannot be expected to know every law. For example, the day after the rule was passed by the Bencher's [sic] prohibiting lawyers from accepting $10,000 or more in cash from a client except in certain circumstances, it would be understandable that many lawyers would not be aware of that new rule. If a lawyer accepted more than $10,000 on that day, then said they were unaware of the requirement, it might be an excusable error. Six months later the same error becomes less understandable and excusable.

(c) At the time the breach occurred, the Rule had been the subject of extensive communications from the Law Society, most recently in the March-April 2006 issue of the *Benchers' Bulletin*, published a scant few months before the breach occurred and in which the seriousness with which the Benchers regarded the matter had once again been emphasized;

(d) In contrast to the position in *Lyons*, the Respondent did not deliberately set out to disregard the Rule. On the contrary, he considered what he thought were his professional obligations in the circumstances, albeit that consideration, as he acknowledges, was - due, we must assume, to ignorance - incomplete. The Respondent says that he was generally aware of his duty under Canadian law and under the requirements of the profession and to be on guard against money laundering. He says that, on June 16, 2006, before he called the Client about the cash payment, he double checked the *Professional Conduct Handbook* and, in particular, reviewed Chapter 4, Section 6, which enjoins a lawyer from engaging in any activity that he or she knows or ought to know assists in or encourages any dishonesty, crime or fraud. The Respondent says that, in light of this, he considered what he knew about his client and determined that he could safely conclude that no money laundering was involved. He concedes, however, that he did not know of or further check the Law Society Rules, in particular Rule 3- 51.1(3). In this respect, the position is similar to that in *Norton*, where the lawyer " did not specifically consider or recall the prohibition in Rule 3-51.1" at the time he received the cash (*Norton*, paragraph [3], sub. 6).

(e) The Respondent faced no dilemma comparable to that confronted by Mr. Adelaar as described in paragraphs [6] to [11] of the decision in *Adelaar.*

(f) In *Adelaar* the lawyer reported his receipt of cash in breach of the Rule to the Law Society within about a month of the occurrence. In *Norton* the report was made within a few days of the breach. In this case, the Respondent received the cash in June 2006 but, presumably because he did not realize that the Rule had been violated, did not report the matter to the Law Society until, in March 2007, he filed his 2006 Trust Report.

Conclusion

[18] We accept the Respondent's account that he did make an effort to consider his professional obligations in the circumstances and to comply with them; unfortunately, he got it wrong. He did, however, make the effort.

[19] While perfection is no doubt a standard to be aspired to, we do not think it can reasonably be said that the Law Society ordinarily expects its members to be perfect. It follows that merely to fall short of perfection cannot sensibly be considered to meet the test of professional misconduct. Something more is required, whether it be described, as it was in *Law Society of BC v. Martin,* (*supra*) at paragraph [154], as conduct manifesting " culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer" or in some other way.

[20] We have concluded, though somewhat hesitantly in the circumstances, that the Respondent is not guilty of professional misconduct. What saves him is that he made the effort to examine his professional obligations and to act consistently with them, albeit that his examination was incomplete or imperfect. The principal reason for our hesitation is that we share the implicit view of the Panel in *Kirkhope,* (*supra*), that the Rule has now been in place long enough and its importance and seriousness have been emphasized often enough, that we are close to the point where a failure to comply with the Rule due to ignorance of its existence and requirements should ordinarily no longer be considered exculpatory.

[21] In the result, the Panel finds that the Respondent has committed a breach of Rule 3-51.1 of the Law Society Rules, but has not committed professional misconduct.