2010 LSBC 09
Report issued: April 30, 2010
Citation issued: April 18, 2008

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

Henry Alexander (Sandy) McCandless

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: April 21, 2010

Panel: Bruce Lerose, QC, Chair, Haydn Acheson, William Jackson, QC

Counsel for the Law Society: Jaia Rai
No-one appearing on behalf of the Respondent

Background

[1] The Law Society filed as Exhibit 1 in this Penalty phase of the hearing correspondence that has satisfied this Panel that the Respondent had notice of this hearing date and his options of attending, applying for an adjournment or filing written argument. He failed to exercise any such option. Accordingly, the Panel held that the Penalty hearing would proceed in the absence of the Respondent pursuant to s. 42(2) of the *Legal Profession Act*.

[2] The citation against the Respondent arose out of his involvement in an investment scheme in which, it was alleged:

> 1. In the course of the Respondent's representation of TIC, which participated in an investment scheme through IFC, he engaged in conduct intended to give the shareholders of TIC or some of them the impression that their investment was secure and continuing to generate earnings after he became aware that the B.C. Securities Commission had ordered, among other things, that all persons cease trading in the IFC investment in its Temporary Order and Notice of Hearing dated November 1, 2006 and/or after he became aware that as a result of an investigation by the U.S. Securities and Exchange Commission, a U.S. Court had ordered the appointment of a Receiver over the property and assets of IFC. The Respondent's conduct includes but is not limited to the following:
>
> (a) He failed to inform TIC's shareholders or some of them of the Temporary Order and Notice of Hearing issued by the B.C. Securities Commission and/or the appointment of the Receiver for IFC.
>
> (b) Through TSC Corp., a company controlled by the Respondent, he loaned funds to TIC so that TIC could make regular earnings payments to its shareholders once IFC was no longer in a position to make them, without advising the shareholders or some of them of the true source of

their earnings payments.

(c) [deleted]

2. Through TSC Corp., a company controlled by the Respondent, he invested his own funds in IFC through TIC while he was acting for TIC, placing himself in a conflict of interest.

3. The Respondent accepted funds into his trust account from or on behalf of JC for investment through TIC and then released those funds to DF so that JC would have an interest in the IFC investment scheme in place of DF in circumstances that required the Respondent to either

(a) decline to accept, or to return the funds; or

(b) advise JC of material facts related to the IFC investment known to him, including the fact of allegations being made in B.C. Securities Commission and U.S. Securities and Exchange Commission proceedings and actions taken by these regulators in relation to the IFC investment

but the Respondent did not do either.

[3] The facts are fully set out in our decision on Facts and Verdict issued on February 1, 2010 (2010 LSBC 03).

[4] In the above decision, this Panel found that the Respondent's conduct was professional misconduct as it pertained to allegation 1(b) based on evidence that, even after he became aware of the allegations against IFC, the Respondent engaged in conduct that gave TIC's shareholders the impression that their investments were secure and continuing to generate earnings.

[5] In the above decision, this Panel found that the Law Society had not proven on the balance of probabilities the allegation set out in paragraph 1(a) of the citation and that allegation in the citation was dismissed.

[6] In the above decision, this Panel " had no difficulty finding that the Respondent placed himself in a clear conflict of interest, when TSC Corp., a company controlled by him, invested funds in IFC through TIC while the Respondent was acting for TIC." Accordingly, this Panel found that the Respondent had engaged in professional misconduct.

[7] In the above decision, this Panel found, " that the Respondent acted contrary to his professional obligation to ensure that he did not act in a manner that has the potential of perpetuating a fraud on a member of the public. In addition, he failed in his obligation to give full and proper legal advice to TIC in respect of JC's investment" and accordingly engaged in professional misconduct.

Analysis

[8] Section 38(5) of the *Legal Profession Act* sets out the various disciplinary actions available to a hearing panel, which range from a reprimand to disbarment.

[9] Counsel for the Law Society submitted that the appropriate disciplinary action in the present case is disbarment or a lengthy suspension.

[10] The primary focus of the *Legal Profession Act* is the protection of the public interest. The imposition of disciplinary sanctions is intended, therefore, to ensure that the public is protected from acts of professional misconduct.

[11] Similarly, the purpose of Law Society disciplinary proceedings is to protect the public, maintain high professional standards and preserve public confidence in the legal profession. See *Law Society of BC v. Hordal*, 2004 LSBC 36 at para. [51].

[12] In *Law Society of BC v Ogilvie*, [1999] LSBC 17, the hearing panel set out what has since become generally accepted as a useful, albeit not exhaustive, list of considerations to be taken into account in assessing an appropriate penalty. Not all of them are relevant in all cases and in some cases other factors may require consideration.

The nature and gravity of the conduct proven

[13] The Respondent had been specifically advised and thereby warned that two government securities regulators were investigating IFC as a fraudulent scheme. He then both failed to warn the investors and continued to or allowed his position as a lawyer to give credibility to the suspect scheme. He further facilitated the continuation of the scheme by investing his own money while in a clear conflict of interest. Finally, he failed to warn new investors of the risk after becoming aware of the allegations of fraud.

[14] This behaviour is very similar to the wilful and obdurate actions of the respondent in continuing to buttress a highly suspicious and ultimately fraudulent scheme in the decision *Law Society of BC v. Edwards*, 2007 LSBC 04.

The age and experience of the respondent

[15] The Respondent was called to the Bar on May 17, 1971. He withdrew from practice January 25, 2008.

The previous character of the respondent, including details of prior discipline

[16] The Respondent's Professional Conduct Record consists of the following:

(a) In 1979 a reprimand and a fine in the amount of $250 imposed after a finding that the Respondent had failed to advise the wife of a client that she should obtain independent legal advice before executing a document.

(b) In 1992 a Conduct Review for contacting a represented party directly.

(c) In 1998 recommendations made by the Competency Committee (predecessor to the Practice Standards Committee) aimed at restricting the Respondent's practice areas and improving his standard of practice.

(d) In 2003 a one-month suspension as a result of a Rule 4-22 conditional admission concerning entering a scheme to avoid Goods and Services Tax by paying cash and later attempting to mislead a self-representing defendant whom the Respondent was suing to the effect that service by facsimile of a Writ of Summons was sufficient for Court proceedings.

(e) In 2005 a Conduct Review for a conflict of interest wherein the Respondent had lent money to a client.

The impact upon the victim

[17] The investors, in particular JC, relied on the Respondent's status as a lawyer, whereby they have lost thousands of dollars and are awaiting possible reimbursement of some percentage from the receivers appointed by the U.S. Securities and Exchange Commission.

The advantage gained, or to be gained, by the Respondent

[18] The Respondent, as an investor himself through his corporation, lost thousands of dollars, but during the first five days of hearing he insisted that he believed that, by continuing to invest his money in the scheme, he would ultimately make a profit as he was increasing his percentage share of the profits.

The number of times the offending conduct occurred

[19] The Respondent was involved in the investment scheme from November 17, 2005 to the bitter end on July 4, 2007.

Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances

[20] In *Law Society of BC v. Blinkhorn*, 2010 LSBC 08, the hearing panel held at para. [8] that, even in cases of misappropriation where disbarment is the usual penalty, it can be avoided if " the respondent presents compelling evidence of extraordinary mitigating circumstances to satisfy the hearing panel that the protection of the public interest and reputation of the profession does not require disbarment."

[21] The Respondent firmly held the position that the scheme was not fraudulent until well after being confronted with the investigation of the Law Society. Due to the non-participation of the Respondent in this Penalty Hearing, there is no evidence of mitigating circumstances.

The possibility of remediating or rehabilitating the Respondent

[22] As in the *Edwards* case cited above, the Respondent in the present case failed to adhere to warnings that the investment scheme may be fraudulent and continued to believe in the legitimacy of the scheme in circumstances that any prudent lawyer would not.

[23] In addition, as in the *Edwards* case, the evidence coupled with this Respondent's Professional Conduct Record puts in serious doubt the possibility of rehabilitation. The Professional Conduct Record is a pattern of failing to delineate between personal, professional and business relationships that has placed the Respondent, his friends, and his clients in financial risk.

The impact on the Respondent of criminal or other sanctions or penalties

[24] This Panel is unaware of any other sanctions or penalties imposed on the Respondent.

The need for specific and general deterrence and the need to ensure the public's confidence in the integrity of the profession

[25] Previous interventions by the Law Society have had little or no impact on deterring repetitive misconduct by this Respondent. Accordingly, specific deterrence is required.

[26] As stated in paragraphs [10] and [11] above, the primary goal of the *Legal Profession Act* and the Law Society of British Columbia is the protection of the public. Such protection of the public requires an emphasis on general deterrence, which in turn will increase and maintain the public's confidence in the integrity of the profession.

The range of penalties imposed in similar cases

[27] Counsel for the Law Society cited a number of cases in which the lawyer was involved in questionable investment schemes. The penalty in each was a suspension. However, each case concerned misconduct

that was less egregious than the present case, nor did the lawyers apparently have discipline histories to the extent present in this case.

[28] In *Law Society of BC v. Skogstad*, 2009 LSBC 16, the respondent failed to warn investors that he was not protecting their interests. However, he did warn his client as soon as he learned of the potential fraudulent nature of the investments but was unable to warn the investors as he didn't know who they were.

[29] In *Law Society of BC v. Hops*, [2000] LSDD No. 11, the respondent failed to warn the non-client investors that he was not protecting their investments and did not have any duties as a trustee. The Respondent's actions to perpetuate the scheme were far less than in the present case, nor was he in a conflict.

[30] In *Law Society of BC v. Bohun*, [2003] LSBC 8, the respondent was duped by his client into making representations to the investors that could have led them to believe their investments would be repaid.

[31] The Law Society of Upper Canada had four decisions concerning lawyers who were duped into participating in fraudulent schemes. These decisions -*Law Society of Upper Canada v. Di Francesco*, [2003] LSDD No.44, *Law Society of Upper Canada v. McKerrow*, [2002] LSDD No. 61, *Law Society of Upper Canada v. Peddle, Jr*., [2001] LSDD No. 64 and *Law Society of Upper Canada v. Tulk* , [1993] LSDD No. 115 - all deal with lawyers that had no idea that they were facilitating a fraud until the very end and took steps to either warn investors or cooperate with regulators to obtain substantial restitution for the investors. In each of the cases cited in paragraphs [28] through [31], despite being less involved in perpetuating the fraud than the Respondent and having no discipline history, each lawyer was suspended from practice for varying periods of time.

[32] The proven misconduct in the present case is extremely serious and is conduct that exposed the public to considerable harm and taints the reputation of the legal profession. As a result, in order to maintain the public's confidence in the legal profession, a significant disciplinary response is warranted.

[33] There do not appear to be any mitigating factors present. On the contrary, there are significant aggravating factors. The evidence in the present case and the Respondent's Professional Conduct Record reveal a pattern of misconduct resulting from a lack of objectivity and professional judgement on the Respondent's part when dealing with clients or persons with whom he has developed social relationships.

[34] Similarly, the evidence in the present case and the Respondent's Professional Conduct Record reveal repeated instances of failure by the Respondent to recognize classic conflicts of interest.

[35] The Respondent's Professional Conduct Record reveals an inability of the Respondent to learn from Law Society intervention and prior discipline.

[36] The evidence in the present case establishes that the Respondent had an almost " blind faith" in the IFC scheme and its principals at the expense of his client and members of the public without even an acknowledgment that he should have known better.

[37] Accordingly, the decision of this Panel is that the appropriate penalty is disbarment, and we so order.

Costs

[38] The Panel's authority to order costs is derived from Section 46 of the *Legal Profession Act* and Rule 5-9 of the Law Society Rules.

[39] Prior discipline decisions support an award of costs against the Respondent on a full indemnity basis if reasonable in the circumstances. What is reasonable in any given case is dependent on the facts of each

case. However, as a matter of policy the Law Society no longer seeks costs on a full indemnity basis.

[40] The actual costs of the Law Society in the present case total approximately $120,000. These costs include a Rule 4-43 investigation, disbursements pursuant to Rule 5-9(1), hearing fees for six days pursuant to Rule 5-9(1) and counsel fees pursuant to Rule 5-9(1) and 5-9(2).

[41] In this case, the Law Society seeks 35% recovery of the Rule 4-43 investigation costs and 35% recovery of counsel fees, with the exception of counsel fees associated with the review, preparation and delivery of disclosure, for which 30% recovery is sought.

[42] Accordingly, the amount of costs sought by the Law Society is $47,000.

[43] The decision of *Law Society of BC v. Racette*, 2006 LSBC 29, indicates some factors to consider in determining an award of costs. These include the seriousness of the offence, the financial circumstances of the respondent, the total effect of the penalty and the extent to which the conduct of each party has resulted in costs accumulating or conversely being saved.

[44] Considering the above factors, this Panel finds that the misconduct of the Respondent was very serious, the Respondent did indicate on day five of the hearing that he was in dire financial straits, the penalty of disbarment will obviously curtail the ability of the Respondent to generate income and the Respondent has a right to have his case heard.

[45] The Law Society presented a draft Bill of Costs in the amount of $47,000. The Law Society is entitled to be indemnified by the Respondent in that amount, and we so order.