

2005 LSBC 33

Report issued: September 29, 2005

Citation issued: March 10, 2004

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

Re: Lawyer 6

Respondent

Decision of the Hearing Panel

Hearing date: July 27, 2005

Panel: Gordon Turriff, Q.C., Chair, Gavin Hume, Q.C., Warren Wilson, Q.C.

Counsel for the Law Society: Todd Follett

Counsel for the Respondent: F. Andrew Schroeder

Background

[1] On March 10, 2004, the Respondent was cited under the *Legal Profession Act* and Rule 4-13 of the Law Society Rules at the direction of the Chair of the Discipline Committee. The citation, as amended, directed a panel to inquire into the following allegation:

"1. That [Respondent] having collected the sum of \$7,690.69 from [his] clients in 2002 for G.S.T., failed to remit that sum contrary to the provisions of the *Excise Tax Act*, R.S.C. 1985, c. E-15."

Facts

[2] The facts are agreed. They can be summarised shortly.

[3] The Respondent was called to the Bar in British Columbia on January 15, 1979. He has practised in Vancouver throughout his career and has practised as a sole practitioner since 1995.

[4] On July 17, 2003, the Respondent informed the Executive Director, pursuant to Rule 3-45(2)(a) of the Law Society Rules, that he had signed a Notice of Intention to Make a Proposal to his creditors under the *Bankruptcy Act*.

[5] Law Society staff then requested certain information from the Respondent concerning his financial status and drew his attention to Rule 3-45(4)(a) concerning his trust account and the Respondent responded to the inquiry. Law Society staff later requested further information about GST collected from his clients during the 2002 taxation year, but apparently not remitted.

[6] The Respondent answered this inquiry with the explanation that since 1995 he had routinely remitted GST on a yearly basis, rather than quarterly. He also explained that the Receiver General had never questioned his having done so.

[7] In August, 2003, the Respondent made an amended Proposal to Creditors which was accepted. In June,

2004, he provided the Law Society with a copy of a Certificate of Full Performance of Proposal dated March 29, 2004.

[8] The Respondent admitted that he had not remitted amounts totaling \$7,690.69 which he had collected from his clients in 2002 for the payment of GST, as required by section 228(2) of the *Excise Tax Act*.

[9] The Respondent has no professional conduct record.

Analysis and Conclusion

[10] The issue we considered was whether the Respondent's failure to remit the GST he had collected was either professional misconduct or conduct unbecoming a member of the Law Society. Section 228(2) of the *Excise Tax Act*, provides:

"Where the net tax for a reporting period of a person is a positive amount, the person shall, except where subsection (2.1) or (2.3) applies in respect of the reporting period, remit that amount to the Receiver General,

(a) where the person is an individual to whom subparagraph 238(1)(a)(ii) applies in respect of the reporting period, on or before April 30 of the year following the end of the reporting period; and

(b) in any other case, on or before the day on which the return for that period is required to be filed."

[11] Counsel for the Law Society argued that the allegation made in the citation was proved by the Respondent's admission that he had not remitted the money he had collected for GST and that the failure to remit was professional misconduct or, alternatively, conduct unbecoming of a member of the Law Society. Counsel further submitted that the expectation of members of the public, and particularly the expectation of the Respondent's clients, who had paid him the money for GST, was that the collected GST would be remitted as required by the *Excise Tax Act*. We were urged to consider that the GST collected was in the nature of a trust, although counsel did not argue that the collected money was trust money in a conventional sense.

[12] Counsel for the Respondent argued that the failure to remit could not support a finding of guilt in the circumstances of the Respondent's bankruptcy. He characterised the collection and remittance of GST as "primarily a business obligation" that "raised no professional issue such as dishonesty." He pointed out that the *Excise Tax Act* defined the relationship between the Receiver General and the Respondent as one of principal and agent and stressed that while section 222(1) of the *Act* may create a trust of sorts nonetheless section 222(1.1) of the *Act* provides that subsection (1) does not apply "at or after the time a person becomes bankrupt" .

[13] Counsel for the Law Society accepted that as a result of the bankruptcy the Respondent was not a statutory trustee. In the circumstances, as we see it, the Receiver General was a creditor with the same rights as all other creditors in the Respondent's bankruptcy and with no special right as the beneficiary of a statutory trust.

[14] We are not persuaded that members of the public, including the Respondent's clients, would hold him or the legal profession in disrepute for failing to remit when he had made a proposal in bankruptcy which was accepted by his creditors and fully performed, essentially resulting in his financial obligations, including the obligation to pay the unremitted GST, being wiped clean.

[15] Obviously, we must assume that Parliament believed that it was in the public interest to enact the

Bankruptcy and Insolvency Act. When weighing the public interest in having bankruptcy laws which permit the redemption of people who become insolvent against the public interest in effectively compelling members of the Law Society to remit GST even when they were insolvent, we side with the public interest in redeeming insolvent people.

[16] Counsel for the Law Society also argued that the Respondent's failure to remit the GST was a breach of Rule 2 of Chapter 2 of the *Professional Conduct Handbook*. When asked if the Law Society regularly cited bankrupt lawyers for failure to pay practice debts, we were told that it was not the practice of the Law Society to cite every such lawyer. We see no logical reason for the Law Society's practice of citing bankrupt members who fail to pay GST but not of citing members for failing to pay other practice debts. As we see it, the public interest in enforcing Rule 2 of Chapter 2 against a bankrupt member is outweighed by the public interest reflected in the *Bankruptcy and Insolvency Act*.

[17] With the acknowledgement by counsel for the Law Society that there is no statutory trust created by the *Act* for GST collected in the case of members who become bankrupt, we see no reason why the Receiver General should be considered differently from any other practice creditor. Certainly we see no reason why the Law Society should appear to be preferring the Receiver General as a creditor or, by its policies, to be compelling insolvent members to prefer the Receiver General over others of their creditors.

[18] We do not suggest that failure to pay GST will never result in a finding of professional misconduct. Patently, dishonest failure to pay will attract a penalty. But no suggestion has been made that the Respondent acted dishonestly.

[19] We make no comment about PST. The matrix relating to the collection and remittance of PST was not raised in this case. If the collection of PST involves the imposition of a statutory trust, then our view of a failure to remit PST may differ from our view relating to GST.

[20] In the result, we decide that the Respondent is not guilty of professional misconduct and is not guilty of conduct unbecoming a member of the Law Society . In the circumstances, we need address no other issues raised by counsel.

[21] We dismiss the citation. If counsel wish to speak to the question of costs, arrangements to reconvene the Panel can be made through the Hearing Administrator.