2011 LSBC 03
Report issued: February 3, 2011
Oral Reasons: December 2, 2010
Citation issued: April 6, 2010

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

David Stephen Rulton Burgess

Respondent

Decision of the Hearing Panel

Hearing date: December 2, 2010

Panel: David Renwick, QC, Chair, Patricia Bond, Benjimen Meisner

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: Henry Wood, QC

Background

[1] The citation was authorized by the Discipline Committee on January 21, 2010 and issued on April 6, 2010.

[2] The citation alleges that the Respondent accepted $50,000 in cash in breach of Rule 3-51.1 of the Law Society Rules (" Rules"), commonly referred to as the " No Cash Rule" .

[3] The Respondent admits that he was properly served with the citation pursuant to Rule 4-15 of the Rules.

[4] The issue to be decided is, whether on the facts, a breach of the Rules has been established. The Law Society's position is that a breach has, in fact, occurred, while the Respondent argues that no breach has occurred because the conduct complained of fell within the exceptions to Rule 3-51.1(2) of the Law Society Rules.

[5] Rule 3-51.1(3) of the Rules provides that:

> (3) While engaged in an activity referred to in sub-rule (1), a lawyer must not accept an aggregate amount in cash of $7,500 or more in respect of any one client matter or transaction.

[6] The parties have agreed to the facts as set out in the Agreed Statement of Facts (Exhibit 3 in these proceedings), which is subject to a Non-Disclosure Order that provides that attachments 1 to 5 and 9 of the Agreed Statement of Facts must not be disclosed to the public. The purpose of the Non-Disclosure Order is to protect the privacy of the parties to whom this matter relates.

[7] Briefly put, the Respondent acted for a wife who had entered into a Separation Agreement dated June 27, 2007. The Agreement provided that the husband would buy out the wife's interest in a rental property by

way of payments that were to take place over time.

[8] The agreed purchase price was $180,000. The Respondent was to hold the funds in trust until the final payment was made, at which time the property would be transferred into the husband's name. The Respondent was familiar with both the husband and the wife and knew their families.

[9] On April 21, 2008, the husband, wife and the Respondent met and discussed the arrangements for payment. The following day, the three met again, and the husband was being difficult about what he had allegedly agreed to the previous day. Ultimately, an agreement was reached, and the husband unexpectedly produced $50,000 cash. The Respondent initially indicated he could not accept the cash; however, the Respondent, the husband and the wife attended at the Respondent's bank where bank staff counted the money. The Respondent then deposited the funds into his trust account, pending registration of the transfer of the property and ultimate payout to the wife.

[10] It was agreed that the husband threatened he would simply return to the United States rather than cooperate with buying out the wife's interest in the property. The Respondent was influenced by this threat because, if the husband had carried it out, it would create great inconvenience for the Respondent's client, who would have had to pursue a sale of the property, likely incurring additional costs and delay.

[11] Two days after the Respondent deposited the cash into his trust account, he asked his assistant to contact the Law Society. She did so and spoke with a practice advisor who advised that the circumstances did not fall within any exception to the No Cash Rule. The practice advisor requested that the Respondent contact him, and although the Respondent returned the call on one occasion, he did not speak to the practice advisor. The Respondent did not report his acceptance of the cash until he filed his 2008 trust report on March 11, 2009.

Position of the Respondent

[12] Counsel for the Respondent raises in his defence the exceptions to the Rule, and in particular, Rule 3-51.1(2)(b) (ii) and (iv), which provide as follows:

> (2) This Rule does not apply to a lawyer when
>
> (a) engaged in activities referred to in sub-rule (1) on behalf of his or her employer, or
>
> (b) receiving or accepting cash
>
> (i) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,
>
> **(ii) pursuant to the order of a court or other tribunal,**
>
> (iii) to pay a fine or penalty, or
>
> (iv) **from a savings institution or public body**.
>
> [emphasis added]

[13] Counsel for the Respondent argues that the exceptions to Rule 3-51.1 contemplate situations where there is minimal or no risk that the involved funds are " dirty" or that the circumstances have been contrived as a means of laundering funds. He submits that the payment of the funds was made in accordance with 3-51.1(2)(b)(ii) (pursuant to an order of a court) as there were terms in the Separation Agreement that had been incorporated into a Decree of Divorce ordered by a U.S. Court.

[14] The Separation Agreement dated June 27, 2007 provided, *inter alia*, that the husband was entitled to purchase the wife's interest in the " rental property" provided certain conditions were met.

[15] The Separation Agreement was an exhibit to the Divorce Order, granted in the State of Idaho, dated July 17, 2007, which states:

> 5. Pursuant to the parties' June 27, 2007 Separation Agreement, the terms and conditions of that Separation Agreement are hereby incorporated into this Decision of Divorce as though the same had been fully set for the herein and each such terms and conditions of the June 27, 2007 Separation Agreement constitutes the further order of this Court.

[16] In the alternative, counsel for the Respondent argues that the funds had been withdrawn from a savings institution as referred to in Rule 3-51.1(2)(b)(iv), on the basis that the husband had, in fact, obtained the funds from his bank two days before.

[17] In support of the Respondent's position, his counsel argues that we must examine the purpose of the Rule, which was to demonstrate and empower *" the legal profession's commitment to guard against their trust accounts being used in money laundering or fraudulent schemes* " [1]. He argues that, because there was virtually no risk that the husband had brought in laundered funds, as the husband had received the funds from a financial institution an exception to the Rule is invoked.

Position of the Law Society

[18] Counsel for the Law Society argues that the interpretation of the Rules should be in accordance with principles of statutory interpretation and quotes E. A. Driedger in *Construction of Statutes*, (2nd ed., 1983) as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament. [2]

[19] Counsel for the Law Society notes that the object of the *Legal Profession Act* is to uphold and protect the public interest in the administration of justice. Self-regulation is fundamental to that object. Counsel relies on the Review Decision in *Law Society of BC v. Chan*, 2009 LSBC 20:

> [11] One of the driving factors in this case is the history and importance of Rule 3-51.1. Lawyers in British Columbia are currently exempt from the regulations passed under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, which would otherwise require a reporting of certain cash transactions. The Law Society's implementation of this Rule was designed to demonstrate that the legal profession is in the forefront of the fight against money laundering, while also protecting solicitor-client privilege and the independence of the profession.

[20] Counsel for the Law Society takes the position that the Rule provides an absolute prohibition against accepting cash other than in limited circumstances. It is intended to apply broadly so that cash cannot be

laundered. Articles have been published in several issues of the *Benchers' Bulletin* about the Rule, for the purpose of ensuring that lawyers are aware of the importance of the Rule and the Law Society's intention to strictly enforce the Rule.

[21] Counsel for the Law Society states that the court order exception does not apply because, although the terms of the Separation Agreement were confirmed in a court order, the order did not provide for a cash payment to be made. The Law Society states that the interpretation taken by the Respondent is too broad and is unreasonable in light of the intentions of the Benchers in establishing the Rule in the first place.

[22] With respect to the argument that the funds had been withdrawn from a financial institution, counsel for the Law Society argues that position of the Respondent would undermine the purpose and intent of the Rule, which was to relieve counsel of the requirement to exercise their judgment or due diligence as to the purpose or intentions of the person tendering the prohibited cash to the lawyer. The fact is that, at the time he received the funds, the Respondent had no evidence that the funds had come directly from the husband's bank. In this case, the Respondent " lucked out" and was able to obtain the bank documents, after the fact.

Reasons

[23] We accept the Law Society's position that the driving force behind the rules was to:

(a) protect the public interest by ensuring that lawyers are not complicit in money laundering schemes;

(b) maintain solicitor-client privilege through an exemption from the regulations passed under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*; and

(c) maintain the independence of the bar.

[24] The Law Society cannot meet those objectives if they adopt the interpretation of the Rule as counsel for the Respondent suggests.

[25] The Panel finds that there is no ambiguity in the meaning of Rule 3-51.1(2)(b)(ii). In order to qualify for the exception, a lawyer must establish that the funds were received pursuant to a court order that specifically provides for a cash payment.

[26] On the plain reading of Rule 3-51.1(2)(b)(iv), in order to fall within the rule, the lawyer must receive the cash directly from a savings institution. Again, if the Rule were to be interpreted as suggested by counsel for the Respondent, the onus on the lawyer to determine where the funds originated and whether they were legitimately gained, would be overwhelming. While there will be instances where that is readily done, there are many more instances in which it will be impossible for a lawyer to determine the source and legitimacy of the funds. In the result, the Law Society has invoked a strict rule to meet the objectives set out above.

[27] Finally, we find that it is not acceptable to read into the Rule further exceptions where a lawyer believes that no money laundering or fraud has occurred. The Law Society has created a rule to secure an exception from federal legislation that would breach solicitor-client privilege and compromise the independence of the bar. While the Rule may be inconvenient at times, it was invoked for good reason and should be enforced in order to secure its objectives.

[28] Accordingly, we are all of the view that the Respondent's actions in this case resulted in a breach of the No Cash Rule.

Disciplinary Action

[29] As to disciplinary action, the Law Socie ty seeks a fine of $2,500. In addition, the Law Society asks the Panel for an order that the Respondent pay costs in the amount of $3,300, representing 30% recovery of counsel fees.

[30] We are mindful of the factors set out in *Law Society of BC v. Ogilvie* [1999] LSBC 17.

[31] A number of cases were provided showing a range of fines for incidents involving a breach of the No Cash Rule. Each is unique to the facts, and they provide a range for a fine between $500 and $1,500.

[32] In *Law Society of BC v. Lyons*, 2008 LSBC 09, 2008 LSBC 32, 2008 LSBC 38, the Panel determined that the conduct constituted a Rule breach as well as professional misconduct, (which was admitted by the Respondent). A fine of $1,500 and costs of $2,700 was imposed. The lawyer was specifically advised of the requirements of the Rule and deliberately breached it twice in the same file. Mr. Lyons self-reported to the Law Society.

[33] While the respondent in *Law Society of BC v. Adelaar*, 2009 LSBC 01,was aware of the Rule, the timing of receipt of the cash and the impossibility of returning the cash without violating other ethical requirements made a breach of the Rule one of several bad options. A fine of $1,000 and costs of $500 were imposed.

[34] In *Law Society of BC v. Norton,* 2008 LSBC 36, the lawyer accepted $45,000 in cash from his client. Later that evening, he reviewed the Law Society materials and realized that he had made an error. The Respondent promptly reported his error to the Law Society and repaid (in cash) the funds to the client. There was no allegation of professional misconduct. Mr. Norton was fined $500 and required to pay costs of $500.

[35] In another case, *Law Society of BC v. Chan*, 2009 LSBC 31, when the lawyer was not in the office, his office received $40,000 in cash from a client in China who intended to apply for immigration to Canada. Ultimately, the client changed his mind and requested that the funds be returned to him. The lawyer wrote a trust cheque to reimburse the funds to his clients. In this case, again the citation was for breach of the rule, rather than for professional misconduct. The lawyer was fined $1,000 and required to pay costs of $1,000.

[36] Applying the above cases to the case at hand, we find that the disciplinary action should reflect the following:

(a) while the Respondent's actions were deliberate, he was well intentioned in his receipt of the funds. He did not personally benefit from the receipt of the cash, and no one was harmed, nor were anyone's interests compromised as a result of his actions. On the contrary, the Respondent's client is very appreciative of the Respondent's services to her;

(b) the Respondent realized he was in breach of the Rule, but he was not diligent in reporting to or discussing the matter with the Law Society, despite Mr. Bilinsky's telephone call and message for him to return the call. Nonetheless, the Respondent self-reported the breach in his trust report at the end of the year;

(c) the Respondent has no relevant conduct history; and

(d) the breach of the Rule did not amount to professional misconduct.

[37] We find that there are no aggravating circumstances that would result in a disciplinary action in the upper range. Therefore, an appropriate fine is $750, and the Respondent will pay costs of $1,500. The panel so orders, the fine and costs to be paid by February 28, 2011.

[1] Notice to the Profession of June 9, 2005

[2] As quoted by the Supreme Court of Canada decision of *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para.26; *R. v. Sharpe*, 2001 SCC 2 at para.33