

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

Re: Lawyer 2

Respondent

Decision of the Hearing Panel

Hearing date: January 8, 2004

Panel: John Hunter, Q.C., Chair, Gordon Turriff, Q.C., Art Vertlieb, Q.C.

Counsel for the Law Society: Todd Follett

Counsel for the Respondent: M. Kevin Woodall

[1] The issue before us in this proceeding is whether a member of the Law Society who breaches a statutory time limit for the passing of trustee accounts is guilty of a disciplinary offence under the *Legal Profession Act*.

[2] This issue arises in a citation issued by the Executive Director on January 23, 2003 alleging that the Respondent had professionally misconducted himself and conducted himself in a manner unbecoming a member in relation to his actions as a trustee under a will.

[3] The particulars of the conduct cited by the Executive Director are as follows:

1. While acting as trustee in the matter of the estate of L.M., you failed to pass accounts as required by the *Trustee Act* from 1990 through to, at least, 1997.
2. While acting as trustee in the estate of L.M., you failed to account to the beneficiary of the trust A.M. when required to do so.
3. While acting as trustee in the estate of L.M., you charged fees to the estate for your services as trustee at the rate charged for your legal services rather than the rate payable for trustee services, although the will did not permit you to do so.
4. You failed to properly supervise your staff in their work on the estate of L.M. contrary to Chapter 12, Ruling 1 of the *Professional Conduct Handbook*. In particular, you did not supervise your staff to ensure accounting matters concerning the estate were properly dealt with.

[4] The hearing of the citation took place on January 8, 2004. The Respondent was represented by counsel, who admitted service of the citation as amended. By agreement between the Law Society and the Respondent, the hearing proceeded on an Agreed Statement of Facts. The agreed facts (omitting references to the documents attached to the Statement) were as follows:

- (a) The Respondent was called to the bar of the Province of British Columbia on September 14, 1972.

- (b) The Respondent has practised law at Courtenay in British Columbia from September, 1972 to the present.
- (c) The Respondent's client, LM, died on January 31, 1988.
- (d) The Respondent was appointed the Executor of the estate of LM by letters probate granted on February 26, 1988.
- (e) The Respondent also became the trustee of a trust established under the Will of LM for the benefit of LM's daughter AM. This trust ran with the Respondent as trustee from January 31, 1988 to January 20, 1998.
- (f) During his service as trustee for AM, the Respondent charged various sums to the trust as trustee fees. These fees were charged by the Respondent at the same hourly rate as his legal fees, rather than calculated according to Section 88 of the *Trustee Act*.
- (g) Pursuant to the ruling of Master Horn passing the Estate accounts, the assessment of trustee fees on the same basis as legal fees was not permitted by the Will of LM.
- (h) Prior to receiving the ruling of Master Horn passing the Estate accounts, the Respondent billed and collected fees from the trust for AM. Mr. Justice Halfyard in his Reasons for Judgment at page 6 states the amount of these fees " appears to have been between \$4,700 and \$7000." The Respondent indicates the amount was approximately \$5,000. Upon receiving the ruling of Master Horn passing the Estate accounts, the Respondent refunded this amount to the trust. The amount that Master Horn ultimately allowed as remuneration was \$12,777.47, see paragraph 16 below.
- (i) The Respondent passed accounts as Executor of the Estate of LM on March 21, 1997, concluding the Estate accounting.
- (j) In 1996, AM retained counsel, MS, in order to obtain information from the Respondent regarding the trust and to obtain a passing of accounts by the Respondent concerning the trust.
- (k) In furtherance of this retainer, MS served notice on the Respondent requiring him to pass accounts concerning the trust in December, 1996. Demands from MS to the Respondent for information concerning the accounting of the trust continued through 1997.
- (l) On November 24, 1997, a petition for an order to pass the trustee accounts was filed by MS on behalf of her client AM and served on the Respondent. The Respondent thereupon filed an ex parte application to pass the accounts on December 4, 1997. The application of MS was then withdrawn.
- (m) It is agreed that the Respondent's failure to pass accounts annually within one month of the anniversary of the granting of probate when required to do so at the instance of the beneficiary AM constitutes a breach of Section 99(2) of the *Trustee Act*.
- (n) By not passing accounts concerning the trust for LM from 1988 until 1998, the Respondent contravened S.99(1) of the *Trustee Act*, which requires that accounts must be passed within two years of the granting of probate unless they are otherwise approved.
- (o) The Respondent's application for passing of his accounts and approval of his requested trustee fees in the amount of \$17,057.62 was heard by Master Horn as Registrar of the Supreme Court of British Columbia, on August 12, 1998 and November 18, 1998.
- (p) It was the recommendation of Master Horn that the Respondent's fees as trustee be set at

\$12,777.47, and that this sum be set off against costs of the beneficiaries counsel in conducting the accounting. It is agreed that the findings of fact and law of Master Horn are accepted by the Respondent and the Law Society and are to be considered evidence in these proceedings.

(q) An application was made to the Supreme Court of British Columbia by counsel for AM and others to confirm the decision of Master Horn setting the trustee fees of the Respondent and for other relief. This application was heard by Mr. Justice Halfyard on October 18, 19 and 22, 1998.

(r) After hearing the matter, Mr. Justice Halfyard confirmed the recommendation of Master Horn that the Respondent's fees be reduced and granted certain other relief. It is agreed that the findings of fact and law of Mr. Justice Halfyard are accepted by the Respondent and the Law Society and are to be considered evidence in these proceedings.

(s) The Respondent relied on his office staff to submit the accounting work as required to receive the necessary approvals on the estate of LM and the trust for AM. The Respondent admits in a letter to the Law Society dated April 26, 2000 that:

" With regard to the Trust and Estate accounting, I was advised that the accounting had been submitted and approved of by the beneficiaries, including (AM). I believed at the time that everything done was done properly and all necessary approvals had been obtained. It was not until years later that the issue arose through Ms. T that the account that was approved was limited to the accounting re the chattels and not to the estate or the trust. At first I did not believe it, but upon review I found that I had been either been (sic) misled or failed to more carefully understand the reports and more carefully supervise the purported work of my staff. I conceded the issue to Ms. T and started the estate accounting from day one.

(t) The Respondent admits that he did not supervise his staff adequately in order to ensure that accounting matters concerning the trust for AM in the estate of LM were properly dealt with.

[5] The gravamen of the offence cited here is the failure to comply with the requirements of the *Trustee Act* that a trustee under a will must pass accounts within two years of the date of his or her appointment, or annually if required to do so by notice from the beneficiary of the trust. The specific provisions of sub-sections 99(1) and (2) of the *Trustee Act* are as follows:

99(1) Unless his or her accounts are approved and consented to in writing by all beneficiaries, or the court otherwise orders, an executor, administrator, trustee under a will and judicial trustee must, within 2 years from the date of the granting of the probate or letters of administration or within 2 years from the date of his or her appointment, and every other trustee may at any time obtain from the court an order for passing his or her first accounts, and he or she must pass his or her subsequent accounts at the times the court directs.

(2) Despite subsection (1), an executor, administrator and trustee, including a judicial trustee, if so required by notice served on him or her at the instance of a person beneficially interested in the property covered by the trust, must pass his or her accounts annually within one month from the anniversary of the granting of the probate or letters of administration or of his or her appointment, but the court may on application make an order it considers proper as to the time and manner of passing the accounts.

[6] It is common ground that the Respondent failed to comply with sub-section 99(1) of the *Trustee Act* in that he did not pass accounts within two years of his appointment and also failed to pass his accounts after

notice was served upon him to do so by the beneficiary. The evidence before us indicates that he had relied on his staff to submit the accounting work necessary to meet his obligations, and did not adequately supervise this staff's work. It would appear that the admitted facts would support a finding of negligence against the Respondent, but there is no suggestion that his actions were deliberate.

[7] It is also common ground that the Respondent gained no benefit from this breach of his duties and the beneficiary suffered no financial detriment. No dishonesty is alleged and it is not suggested that the Respondent benefited from the delay. In the initial court hearing in this case, Master Horn found that the trust fund had been preserved, and concluded that "[t]he administration has been, on the whole, successful" : *Re Munroe Estate*, June 25, 1999 (B.C.S.C.) at para. 63.

[8] The Respondent did, however, breach his statutory duty to pass accounts in a timely manner and in the second court hearing in this case, Halfyard J. characterized the breach as a "serious" one: *Re Munroe Estate*, Nov. 2, 1999 (B.C.S.C.) at para. 12. The issue for us is whether this constitutes professional misconduct under the *Legal Profession Act* or conduct unbecoming a member of the Law Society.

[9] Master Horn made a finding of fact that the Respondent "was not acting as a solicitor in his dealings with the trust, but as an appointed trustee" : *Re Munro Estate*, June 25, 1999 (B.C.S.C.) at para. 57. The Law Society accepted this finding and, accordingly, we proceed on the footing that the conduct which gives rise to the citation was not conduct which arose during the practice of law. This raises the threshold question whether such conduct can be the subject of citation for professional misconduct under the *Legal Profession Act*.

Professional Misconduct

[10] Professional misconduct is not defined in the *Legal Profession Act*. The Benchers have adopted as a working distinction the proposition that professional misconduct refers to *conduct occurring in the course of a lawyer's practice* while conduct unbecoming refers to conduct in the lawyer's private life (*Law Society of British Columbia v. Watt* [2001] LSBC 16, at para. 5).

[11] This statement of principle is consistent with the contemporary view that:

Lawyers will generally be vulnerable to allegations of professional misconduct (rather than conduct unbecoming a barrister and solicitor) only in respect of acts performed in their professional capacity.

MacKenzie, *Lawyers and Ethics* (2nd ed. 1999), p. 26-23

[12] A single act of negligence without more will not normally support a citation for professional misconduct. Negligence is normally dealt with through referral to the Professional Standards Committee, unless the negligence may be described as habitual or is accompanied by other factors which would amount to professional misconduct.

[13] Counsel for the Law Society has argued that lawyers may be found to have committed professional misconduct when the conduct "can reasonably be regarded as an extension of their professional status or activities," citing MacKenzie, *supra.*, at p. 26-23. We are not satisfied that we have a sufficient evidentiary foundation in this case to conclude that the factual premise behind this proposition is made out. Accordingly, we would leave the correctness of this proposition to be considered in a case where the evidence supports the factual premise.

[14] In this case, it has been accepted that the Respondent was not acting in his capacity as a barrister or

solicitor when he carried out his responsibilities as trustee. Accordingly, we do not find that his failure to meet the statutory time limits for passing his accounts was professional misconduct under the *Legal Profession Act*.

[15] The accepted fact that the Respondent was not acting in the capacity of a barrister or solicitor is also dispositive of the third and fourth particulars. The Respondent has admitted that he failed to supervise his staff adequately, but the required supervision did not relate to his legal practice and thus cannot form the basis of professional misconduct. Similarly, the citation relating to the fees charged as trustee do not relate to the member's legal practice, and cannot form the basis of professional misconduct.

Conduct Unbecoming

[16] Conduct unbecoming is defined in section 1 of the *Legal Profession Act* as follows:

"conduct unbecoming a lawyer" includes a matter, conduct or thing that is considered, in the judgment of the benchers or a panel,

- (a) to be contrary to the best interest of the public or of the legal profession, or
- (b) to harm the standing of the legal profession;

[17] Although the Benchers' working distinction suggests that conduct unbecoming refers to conduct outside the practice of law, it is probably more accurate to state that in British Columbia, conduct unbecoming may be the subject of disciplinary action whether or not the conduct arises as part of or outside the practice of law. The definition in British Columbia is not by its terms limited to "conduct in a lawyer's personal or private capacity" as is the case in the *Ontario Rules of Professional Conduct*. In *Prescott v. Law Society of British Columbia* [1971] 4 W.W.R. 433 at 440, the Court of Appeal has held that:

it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession" .

[18] Whether particular conduct is to be characterized as conduct unbecoming is highly contextual and dependent on the specific facts and circumstances:

Conduct by a member that may be acceptable in one set of circumstances or done in one capacity may not be acceptable in another -- this determination would necessarily be fact-driven

Kempling v. British Columbia College of Teachers, 2004 BCSC 133, at para. 31

[19] The traditional view has been that conduct must be dishonourable or disgraceful to merit the condemnatory characterization of conduct unbecoming a member. Conduct unbecoming has been described as "conduct for which a member is worthy of censure, despite it not being related to the member's practice" : *Law Society of British Columbia v. Stevens* [2001] LSBC 12, at para. 10.

[20] A useful (though by no means exhaustive) statement of the duty to avoid dishonourable conduct can be found in chapter 2 of the Professional Conduct Handbook in these terms:

A lawyer must not, in private life, extra-professional activities or professional practice, engage in

dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[21] The Law Society takes the position that breach of the statute constitutes conduct unbecoming. There is no doubt that breach of a statute *can* constitute conduct unbecoming. For instance, breach of the *Criminal Code* will usually constitute conduct unbecoming. Recent examples include *Law Society of British Columbia v. Watt*, [2001] LSBC 16 and *Law Society of British Columbia v. Stevens, supra*. But in our view it is not axiomatic that a breach of the technical requirements of a statute by a member acting outside the capacity of a lawyer will be characterized as conduct unbecoming. It will generally be necessary for the conduct to be dishonourable or disgraceful or otherwise reflect adversely on the integrity of the member or the profession or the administration of justice to amount to conduct unbecoming.

[22] In our view, the conduct of the Respondent does not descend to that level. There was no suggestion of dishonesty in the Respondent's conduct, which appears to have been based on his reliance on (and failure properly to supervise) his accounting staff. We do not consider the conduct to be disgraceful or dishonourable, or otherwise to amount to conduct unbecoming a member. The failure to comply with the statutory time requirements was more in the nature of negligence than a disciplinary offence. This does not render the conduct acceptable, but does suggest that the proper disposition relates to practice standards rather than discipline.

Breach of the *Trustee Act*

[23] Section 38(1) of the *Legal Profession Act* provides that after a hearing, a panel must do one of the following:

- (a) dismiss the citation;
- (b) determine that the respondent has committed one or more of the following:
 - (i) professional misconduct;
 - (ii) conduct unbecoming a lawyer;
 - (iii) a breach of this Act or the rules;
 - (iv) incompetent performance of duties undertaken in the capacity of a lawyer;
 - (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.

[24] In our view, the appropriate disposition of the citation is a determination that the Respondent has committed a breach of the *Trustee Act* while acting as a trustee by failing to pass accounts in accordance with his statutory obligations. We do not find this to be professional misconduct or conduct unbecoming a barrister or solicitor.

[25] We have been told that the Respondent is currently working with the Practice Standards Committee in relation to his estate practice. In our view, the finding that the Respondent was in breach of the *Trustee Act* is an adverse finding within the meaning of section 38(5) of the *Legal Profession Act* and, accordingly,

pursuant to section 38(5)(f)(i) we direct the Respondent to complete a remedial program to the satisfaction of the Practice Standards Committee in relation to compliance with statutory time limitations and staff supervision.

[26] In light of this adverse finding, we make no order as to costs.