

2011 LSBC 09

Report issued: March 10, 2011

Citation issued: July 20, 2010

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

Christopher John Van Twest

Respondent

**Decision of the Hearing Panel
on Facts and Determination**

Hearing date: December 21, 2010

Panel: **Majority Decision:** Glen Ridgway, QC, Chair, Alan Ross

Minority Decision: Kenneth Walker

Counsel for the Law Society: Maureen Boyd, Andrew Duncan, Articled Student

Counsel for the Respondent: Ian Aikenhead, QC

Background

[1] The citation against Christopher John Van Twest (the "Respondent") was issued on July 20, 2010. Service is admitted. This matter proceeded on an Agreed Statement of Facts with additional *viva voce* testimony from the Respondent.

[2] The citation sets out two allegations:

1. In or about March 2008, while acting for your clients RN and AN in the purchase of real property, you received or accepted cash in an aggregate amount of \$7,500 or more in one client matter or transaction, when you were engaged on your client's behalf in some or all of paying funds, purchasing real property, or transferring funds, contrary to Rule 3-51.1 of the Law Society Rules.

2. In your Trust Report for the period ending December 31, 2008, which you certified to be "true and correct", you represented to the Law Society that:

(a) your practice had not received, into trust or general, in respect of one client matter or transaction, an aggregate amount of cash of \$7,500 or more, when you knew or ought to have known that your answer was not true; and/or

(b) your practice maintained a cash receipt book that provided the practice with a receipt for any cash received and a duplicate receipt to be given to the party remitting trust funds in cash, when you knew or ought to have known that your answer was not true.

Admission and Facts

[3] The Law Society and the Respondent agreed that allegation 1 was made out and made a joint submission that the conduct constituted the contravention of a Law Society Rule. That issue will be discussed briefly below.

[4] The Respondent also admits that the underlying facts comprising allegation 2(a) and (b) have been established. The Respondent says, however, that in the circumstances of this case, the error in reporting on his 2008 Trust Report constituted a negligent, but non-culpable mistake or, in the alternative, a breach of the Law Society Rules.

[5] The facts are:

1. The Respondent was admitted to the Bar of the Province of British Columbia in 1976. Since 1983 he has practised as a sole practitioner in Vancouver.
2. The Respondent has acted for RN and AN (the "Clients") since the late 1970s. The family owns a restaurant business and other unrelated businesses.
3. In early 2008, the Clients retained the Respondent to represent them in the purchase (the "Purchase") of property in Metro Vancouver (the "Property") .
4. On March 18, 2008, in order to complete the Purchase, the Clients provided the Respondent with funds totaling \$111,000. The funds provided comprised a cheque in the amount of \$102,000 plus cash in the amount of \$9,000. Those funds were deposited to a trust account on March 18, 2008.
5. The Respondent was aware of the Rule against accepting cash, but thought that the maximum amount that he could accept was \$10,000.
6. The Respondent did not provide a receipt to the Clients for the cash received.
7. On March 28, 2008, the Purchase completed, and the Property was transferred to the Clients. The Respondent used the funds in the trust account in the amount of \$111,000, which included the \$9,000 cash, to complete the Purchase.
8. In October, 2008, the Law Society performed a Compliance Audit of the Respondent's practice. Among other problems, the Audit discovered that the Respondent had received \$9,000 in cash from the Clients. A summary report was completed and provided to the Respondent, who signed it on November 24, 2008. The Respondent was advised that a "cash breach" required a referral to the Law Society's Professional Conduct Department for investigation.
9. On February 9, 2009 the Respondent received a letter from the Law Society discussing several issues, including the receipt of \$9,000 in cash and the failure to maintain a cash receipt book of duplicate receipts. The letter asked the Respondent to provide answers to several questions, including questions regarding the receipt of cash.
10. The Respondent wrote a letter dated March 20, 2009, indicating that he had been under the impression that the limit for cash transactions was \$10,000. He also advised that he had ordered, and would maintain in future, a cash receipt book.
11. On March 27, 2009 (one week after his letter), the Respondent completed his Trust Report for 2008. The Trust Report asks the following questions:
 14. 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?
 15. Does the practice maintain a cash receipt book that provides the practice with a receipt

for any cash received and a duplicate receipt to be given to the party remitting trust funds in cash?

12. The Respondent answered "No" to Question 14 and "Yes" to Question 15. Both answers were incorrect and the Respondent has no explanation as to why he answered the questions in that way when he had admitted the opposite was true in a letter one week earlier.

[6] The mystery as to why the Respondent failed to answer Questions 14 and 15 correctly is either simplified, or deepened, by the fact that, in answer to Question 40 on the Trust Report regarding unclaimed trust funds, the Respondent specifically referenced his letter of March 20, 2008 to the Law Society.

Allegation 1 – Breach of the "No Cash" Rule

[7] As mentioned above, the Respondent admitted the facts in allegation 1 and the parties made a joint submission that the breach of the "no cash" rule, in these circumstances, constituted a breach of the Rules. The circumstances include the fact that the Clients had been known to the Respondent for a long time. There was no suggestion of criminal activity on the part of the Clients.

[8] The Panel accepts the joint submission. This finding is consistent with the reasoning in prior rulings regarding Rule 3-51.1 in *Law Society of BC v. Adelaar*, 2008 LSBC 18, *Law Society of BC v. Chan*, 2009 LSBC 20 and *Law Society of BC v. Norton*, 2008 LSBC 24.

Allegation 2 – Incorrect Answers on Trust Report

[9] As mentioned above, the Respondent admits the underlying facts in allegation 2(a) and (b). The Law Society says that this conduct constitutes professional misconduct. The Respondent says that, given the unusual circumstances, his conduct constitutes a simple negligent, non-culpable mistake. In the alternative, he submits that his conduct constituted, at worst, a breach of the Rules.

[10] The unusual circumstances of this case relate to the Respondent's prior acknowledgement, in correspondence to the Law Society, that he had received cash in excess of \$7,500 and that he did not have a cash receipt book. The Respondent does not have any explanation for his incorrect answer to questions 14 and 15. At another point in the Trust Report he referred to the March 20 letter. As noted, that letter contained the correct information.

[11] There are three possible outcomes for this combined allegation. The Panel could find that:

- (a) the error constituted professional misconduct;
- (b) the error constituted a breach of the Law Society Rules; or
- (c) the error was a simple, negligent slip that attracts no finding of culpability.

[12] The positions of the parties on each potential adverse determination are set out below.

Professional Misconduct

[13] The Law Society argues that the Respondent's conduct in respect of the Trust Report constitutes professional misconduct. Counsel emphasizes the importance of the Trust Report to the administration of the Law Society and the protection of the public.

[14] The test for establishing professional misconduct has been discussed in many contexts. For the purposes of this case, we find the reasoning in *Law Society of BC v. Martin*, 2005 LSBC 16 (at para. [154])

to be appropriate:

... The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[15] A gloss on the Martin reasoning was developed in *Re: Lawyer 10*, 2010 LSBC 02. In that case the panel clarified that (at para. [31]):

... it may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.

[16] Counsel for the Law Society submits that:

1. The determination of professional misconduct must be focused on the Respondent's conduct and the degree to which that conduct falls below the expected standard and "displays gross culpable neglect of his duties as a lawyer."
2. The Respondent's conduct exhibits a gross culpable negligence in his reporting obligation to the governing body.

[17] *Law Society of BC v Lyons*, 2008 LSBC 32 discusses the factors to be considered in determining when a breach of the Rules is so serious that it amounts to professional misconduct (at para [35]):

In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or the Rules, panels must give weight 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.

[18] Although there is no prior case where there is a finding that filing a Trust Report with incorrect answers constituted professional misconduct, counsel for the Law Society directed the Panel's attention to *Law Society of BC v. Hu*, 2010 LSBC 10 and *Law Society of BC v. Bonfield*, 2008 LSBC 23. In those cases, the respondents admitted that their conduct in submitting incorrect Trust Reports constituted professional misconduct. However, in both cases the conduct was more culpable than in the present case.

[19] Counsel for the Respondent submits that the Respondent's conduct does not come close to meeting the test for professional misconduct outlined in *Martin* and *Lawyer 10*. Citing *Lawyer 10*, counsel for the Respondent notes that the question to be asked is whether the mistake was innocent or culpable. He submits that, on the evidence, the Respondent's mistake was clearly innocent.

Breach of the Rules

[20] Counsel for the Law Society argues that "breach of the Rules" is not an available finding in respect of allegation 2(a) and (b). Counsel submits that there is no specific Rule providing that the answers included in a Trust Report must be true. Hence, it is not a breach of the Rules to provide incorrect answers on a Trust Report.

[21] As a result, counsel for the Law Society argues that the only two possible outcomes on allegation 2(a) and (b) are either a dismissal, or a finding of professional misconduct.

[22] Counsel for the Respondent argues, each in the alternative, that:

- (a) the Respondent's conduct constituted a minor slip and allegation 2(a) and (b) should be dismissed;

(b) if counsel for the Law Society is correct regarding the "rules breach" (i.e. if "rules breach" is not available), then the Respondent's conduct does not meet the test for professional misconduct and allegation 2(a) and (b) should be dismissed;

(c) if counsel for the Law Society is not correct regarding the "rules breach" (i.e. if "rules breach" is available) and if the Panel does not find that the Respondent's conduct constituted a minor slip, then the correct finding is that the Respondent breached a Rule.

[23] The first issue to determine is whether a "breach of the Rules" is a finding available on these facts.

[24] For the reasons set out below, we do not accept the submission of counsel for the Law Society that the facts of this case cannot support a finding of "breach of the Rules" .

[25] Rule 3-72 provides that a lawyer must deliver a completed trust report. Subrule (5) provides:

A trust report delivered to the Executive Director under the Rule must

(a) be in a form approved by the Discipline Committee,

(b) be complete to the satisfaction of the Executive Director, and

(c) include all signatures required in the form.

[26] There is no written provision that the information in the Trust Report must be "true and correct." However, as submitted by counsel for the Respondent:

any rule which requires a lawyer to provide a trust report, and in fact certify the accuracy of that trust report, must by its nature imply or even directly state, as required by the Rules, that the trust report be accurate. Therefore, if the trust report is not accurate, we say that it could be considered, and should be considered a breach of the rules ...

[27] Further the report must be "complete to the satisfaction of the Executive Director." The Respondent's Trust Report for 2008 was not "complete to the satisfaction of the Executive Director" because two of the answers were not correct. As a result, the Executive Director referred the matter for investigation.

[28] On that basis, we find that an adverse determination of "breach of the Act or Rules" is available in this case.

Discussion

[29] Both parties focus on the proximity in time between the Respondent's March 20, 2009 letter and his completion of the Trust Report on March 27, 2009. However, each side views that short gap from a different angle.

[30] Counsel for the Law Society submits that that propinquity establishes that the Respondent knew that his answers were incorrect and was wilfully blind or reckless when he certified that the Trust Report was true and correct. In the result, she submits that the March 20 letter supports a finding of professional misconduct.

[31] Counsel for the Respondent takes the opposite view. He argues that the Respondent had already admitted the breaches of the Rules to the Law Society in the March 20 letter. There was nothing to be gained (or lost) by answering the questions correctly (or incorrectly). As a result, he argues, the actions of the Respondent must be viewed as a negligent slip that was without culpability.

[32] Having reviewed all of the evidence, the Panel is of the view that the timing of the March 20 letter and the Trust Report is more exculpatory than inculpatory with respect to allegation 2(a) and (b).

[33] The Respondent knew that he was in breach of the "no cash" rule and his obligation to maintain a receipt book. He had been advised by the Law Society auditors of those problems. He had admitted those facts to the Law Society in the March 20, 2008 letter. As noted above, the Respondent's 2008 Trust Report, in respect of another answer, actually referenced the March 20, 2008 letter. We do not mean to suggest that, by referencing the letter, he is deemed to satisfy the requirements of the Trust Report with respect to questions 14 and 15. However, his reference to the letter provides some evidence of the Respondent's state of mind at the time of completing the Trust Report. He was not trying to deceive anyone. He simply answered the question incorrectly.

[34] As noted above in paragraph [16] the *Lyons* decision sets out some of the factors to be considered, in determining whether conduct that is a breach of the Rules also constitutes professional misconduct. Those factors include:

- a. the gravity of the misconduct;
- b. its duration;
- c. the number of breaches;
- d. the presence or absence of *mala fides*; and
- e. the harm caused by the respondent's conduct.

[35] The Respondent's misconduct in respect of allegation 2(a) and (b) constituted a single, momentary mistake. There was no *mala fides* and no harm. Although the importance of the Trust Report makes the error significant, we believe that the gravity is outweighed by the other factors.

[36] In the result, we find that the Respondent's incorrect answers to questions 14 and 15 on the Trust Report were not culpable mistakes.

[37] It follows that the Respondent's actions with respect to providing incorrect answers on his Trust Report do not support a finding of professional misconduct. This finding is based on the unusual facts of this case. The Panel recognizes the importance of Trust Reports and the reliance that the Law Society places on lawyers providing answers that are true and correct. However, on these facts, we do not find professional misconduct.

[38] The next question is whether the false Trust Report supports a finding of a breach of the Rules, or whether it is a simple innocent, negligent mistake.

[39] Not every breach of the Act or Rules will result in an adverse finding. There have been, and there will continue to be, minor mistakes on Trust Reports that do not properly attract the sanction of the Law Society. The distinction between these different types of mistake in respect of the Rules was also discussed in *Lyons* (supra) (at para. [32]):

A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the Act or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

[40] The *Lyons* case distinguishes between "insignificant" breaches of the Act or Rules and other breaches.

[41] As noted above, the Trust Report is an important document in respect of the administration of the audit function of the Law Society. It is relied upon to confirm the ongoing compliance of lawyers relating to their accounting functions. With very few exceptions, a breach of the Rules relating to the portion of the Trust Declaration that deals with those accounting functions cannot be said to be "insignificant" .

[42] As noted above, counsel for the Respondent, in his written submissions, concedes that, if the Panel does not find that the Respondent's error was a mere slip, then a finding of a "rules breach" is an appropriate determination.

[43] We find that the Respondent's error was "not an insignificant breach of the Rules." It follows that the Respondent's conduct constitutes a breach of the Rules.

Minority Decision of Kenneth Walker

Allegation 1 – Breach of the "No Cash" Rule

[44] I agree with the majority in regard to allegation 1 regarding the "no cash rule" . This was a breach of the Rules.

Allegation 2 – Incorrect Answers to the Trust Report

[45] I agree with the majority that these allegations do not constitute professional misconduct for the reasons they provide. However, I disagree with the majority that the incorrect answers on the Trust Report constitute a breach of the Rules.

[46] While the majority agree with counsel for the Respondent in concluding that this is a breach of the Rules, I agree with counsel for the Law Society in result, that it cannot be a breach of the Rules.

[47] It is helpful to first review Rule 3-72.

Rule 3-72 requires:

... a lawyer must deliver a completed trust report to the Executive Director ...

(5) A trust report delivered to the Executive Director under this rule must

- (a) be in a form approved by the Discipline Committee
- (b) be complete to the satisfaction of the Executive Director, and
- (c) include all signatures ...

[48] Like the majority, I find interpretation of 3-72(5)(b) difficult. I interpret "complete to the satisfaction of the Executive Director" means that unintended minor errors are not breaches of the Rules. This language contemplates that the Executive Director may be satisfied that a Trust Report is complete albeit with some minor inaccuracies. Further, the Executive Director may require answers to be corrected to the satisfaction of the Executive Director through correspondence with the lawyer, which would not give rise to a breach. The language in the Rule leaves room for simple mistakes, or inconsistencies.

[49] In view of the language contained in *Lyons*, (supra) the conduct in this case is not grave, and constitutes a simple error. The Respondent answered the questions and momentarily erred, but included with the Trust Report the letter that contained the accurate information. This is not a case of numerous, or continuous errors (only two questions of the Trust Report were answered inaccurately). The majority has

found that there is an absence of *mala fides*. There has been no harm caused to the Law Society or the public by the inconsistency of information provided to the Executive Director. In fact, the Executive Director, through the compliance audit, and the letter of March 20, had all of the correct information. In the result, I find that the minor mistakes made in this Trust Report were insignificant within the meaning of *Lyons*.

[50] I then find no breach of the Rules. I pause here to note that there was no evidence at the hearing that the Executive Director was not satisfied with completion of the Trust Report. The majority concludes that because the matter was referred to the Discipline Committee we should conclude the Executive Director must have been dissatisfied. I believe that the matter was referred not because of "dissatisfaction" but because of the professional misconduct issue relating to "recklessness" .

[51] I agree with the majority's decision in paragraph [41]. Trust Reports are very important documents, and the Law Society expects lawyers to be diligent in their completion. I further adopt the language of the majority where they state in paragraph [39], "Not every breach of the Act or Rules will result in an adverse finding. There have been, and there will continue to be, minor mistakes on Trust Reports that do not properly attract the sanction of the Law Society."

[52] But, as I have earlier indicated, my conclusion is different from the majority. I view the improperly answered questions, in this case, are minor mistakes, and not a breach of the Rules. I would therefore dismiss allegation 2(a) and (b).