2011 LSBC 26
Report issued: August 31, 2011
Citation issued: March 5, 2009

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

Gary Russell Vlug

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: April 13 and 14, 2010, June 14 and 15, 2011
Panel: Gavin Hume, QC, Chair, Bruce LeRose, QC, Thelma O'Grady

Counsel for the Law Society: Eric Wredenhagen and Maureen Boyd (April 2010); Maureen Boyd (June, 2011)
Appearing on his own behalf: Gary Vlug

introduction

[1] A citation was issued against the Respondent on March 5, 2009. The citation authorized the Panel to inquire into the following conduct of the Respondent:

> 1. In the course of representing your clients LJ, VJ, VP and RP (the "Clients") in a personal injury claim, you negotiated a settlement on behalf of the Clients, and received from ICBC a cheque for an amount which you knew or believed to be in excess of the settlement amount to which the Clients were entitled. Notwithstanding such knowledge or belief on your part, you took no steps upon receipt of the payment to clarify this apparent error with ICBC; instead, you paid to the Clients the amount you believed to be due them, and advised them that the apparent excess should be held in your trust account, without notifying ICBC, until the applicable limitation period had passed for ICBC to seek reimbursement of any excess payment. In so doing, you engaged in:
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> > (a) dishonourable or questionable conduct casting doubt on your professional integrity or competence, or reflecting adversely on the integrity of the legal profession or the administration of justice, or both;
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> > (b) sharp practice.

[2] The hearing occurred on April 13 and 14, 2010. At the conclusion of the hearing on April 14, 2010, counsel for the Law Society indicated that he wished to consider making an application to call rebuttal evidence. It was agreed that the hearing would adjourn and, if Law Society counsel concluded that the Law Society intended to call rebuttal evidence, the application would be dealt with in writing. The Law Society did conclude that it wished to call rebuttal evidence. There was an extensive exchange of submissions. The application was granted (see *Law Society of BC v. Vlug*, 2010 LSBC 16, issued July 22, 2010). The hearing was reconvened on June 14 and 15, 2011 for purposes of hearing the rebuttal evidence and

argument.

[3] The following are our reasons for our decision on Facts and Determination.

Background

[4] Certain facts were agreed to. In summary, they established the following:

> 1. The Respondent was admitted to the Bar of British Columbia on August 28, 1992 and has practised as sole practitioner in Vancouver. The focus of his practice is family law and motor vehicle litigation acting for plaintiffs.
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> 2. The Respondent was retained by four clients in May 2006 to pursue a claim for damages for negligence arising out of a motor vehicle accident that occurred on May 4, 2006. A contingency fee arrangement was entered into wherein the Respondent would be paid fees of 25 per cent of the amount recovered if the claims were settled without a trial. The Respondent negotiated a settlement with JG, a claims adjuster at ICBC. On January 12, the clients signed a release provided by ICBC in consideration of a payment of $32,000 by ICBC. On January 16, 2008 the Respondent wrote to JG attaching the executed release and requested that he be provided with reimbursement for certain disbursements, which disbursements by his calculation totalled $5,585.55. On January 24, 2008, JG wrote to the Respondent enclosing a settlement cheque. The letter indicated that the settlement of $32,000 and reimbursement totalling $2,316 were enclosed. However, the cheque received by the Respondent was in the amount of $45,264. There were no relevant particulars showing a breakdown of how the amount was calculated.
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> 3. On January 28, 2008 the Respondent deposited the cheque into his trust account and credited a quarter of the total ($11,316) to each of his clients in trust. The Respondent met with the clients on January 30, 2008, and he issued invoices to each client to show the amount of $8,000 deposited into trust for each of them and not $11,316.
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> 4. In early July the Law Society auditor in the Trust Assurance Department conducted a compliance audit for the Respondent's law practice. The findings included that the amount received from ICBC differed from the amount reported and disbursed to the clients. The Respondent, on July 3, 2008, as a result of a discussion with the auditor, wrote to the clients in order to comply with Rule 3-48(1) confirming to the clients that he still held $10,948 in his trust account.
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> 5. The Respondent's handwritten notes of his discussion with his clients on January 30 indicated that the funds were to be kept until an apparent limitation date expired.
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> 6. A member of the Professional Conduct Department of the Law Society wrote to the Respondent asking questions about the discrepancy between trust account deposit advice to the client and the trust ledger deposit. At the same time questions were asked with respect to why he did not communicate with ICBC.
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> 7. The Respondent's reply to the questions, in part stated as follows:
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> > … That which we knew belonged to the clients was designated to the clients. That amount which was in question was designated as being received by ICBC … There is every reason to believe that ICBC knows it is sending that amount [$45,264] to me and meant to send it … It was believed that the money in excess was in relation to a payout for a child/ren [sic] and

for disbursements. It was also believed that a duty to the client was owed, not to cause a review that would result in the clients receiving less money than they otherwise would have received.

8. On October 16, the Respondent wrote to JG enclosing a copy of the cheque statement for $45,264. He requested a breakdown of the payout and asked to be advised if there was an error.

9. Ultimately the Respondent communicated by email with JG, receiving a reply from her dated November 21, 2008 wherein she confirmed that the cheque was $45,264.

[5] In addition to the Agreed Statement of Facts, the Law Society submitted three affidavits and called oral evidence. The affidavits were submitted with the consent of the Respondent who indicated that he did not wish to cross-examine the deponents. The affidavits of JG established that the cheque in the amount of $45,264 was sent as a result of errors made initially by JG and then by her office assistant.

[6] The Law Society called two witnesses, RP and Krista Adamek. RP was one of the four clients of the Respondent and Ms. Adamek was the trust assurance auditor of the Law Society who conducted the trust investigation in July.

[7] It was clear from the examination of RP that the four clients were aware of the funds in trust; however, there was no agreement amongst the four clients as to whether ICBC should be contacted with respect to the discrepancy between the amounts agreed to in the settlement and the amount paid. One of the clients felt the funds should be immediately paid, whereas RP was of the view that ICBC should be contacted to clarify the discrepancy.

[8] Ms. Adamek indicated that, as a result of her investigation of the trust account, she was concerned about the discrepancy between the statements on the invoices to the clients with respect to the funds held in trust in the amount of $8,000 for each client and the ledger which indicated that, in fact, the funds held in trust was $11,316 for each client. She was also concerned that there was no compliance with Rule 3-48(1) as there was no written confirmation of the full amounts received and held in trust on behalf of the clients.

[9] The subsequent referral of this discrepancy to the Professional Conduct Department focused largely on why ICBC was not contacted to ascertain whether or not the payment was a mistake.

[10] After the Law Society closed its case, the Respondent testified that the difference between the cheque received in the amount of $45,264 and settlement agreed upon in the amount of $32,000 plus disbursements that ICBC agreed to pay in the amount of $2,316, was paid for bad faith. He further testified that he discussed the bad faith payment with JG, who indicated that ICBC would not “go on the record for paying money out for bad faith,” but that he assumed they would be receiving a cheque that included money for bad faith but not be designated as such.

[11] As indicated above, the Law Society sought to call rebuttal evidence, which application was granted. JG then gave evidence and was cross-examined with respect to whether or not there was a discussion with respect to bad faith and denied that there was.

ISSUES

[12] The Panel must decide whether or not the failure of the Respondent to clarify the apparent error with ICBC constituted professional misconduct and particularly whether it was either sharp practice or dishonourable or questionable conduct, casting doubt on his professional integrity or competence, or reflecting adversely on the integrity of the legal profession or the administration of justice. For the reasons expressed below the Panel has concluded that the Respondent engaged in questionable conduct casting

doubt on his competence which also reflected adversely on the integrity of the legal profession.

ANALYSIS

[13] It is well established that the onus is on the Law Society to prove the allegations on the balance of probabilities. The allegation made by the Law Society is that the Respondent received a cheque from ICBC that he knew or believed to be in excess of the settlement amount to which his clients were entitled and that he did not take the appropriate steps to clarify an apparent error, but instead advised the clients that the apparent excess should be held in his trust account until an applicable limitation period had passed.

[14] The Respondent, in his evidence and his argument, submitted that the excess funds were a payment for bad faith on the part of ICBC. We do not accept that evidence and submission for the reasons that follow.

[15] In a letter sent by the Respondent to ICBC in May 2006, he advised that he was acting for his clients with respect to the motor vehicle accident and made reference to “possible bad faith of ICBC”. No further references were made to bad faith in any of the further correspondence to and from ICBC. The Respondent was advised that, in January 2007, JG was the adjuster now handling the file. The Respondent communicated with JG in September 2007 and forwarded various physio and medical reports to her. The Respondent and JG spoke on December 20, 2007 by telephone and JG made an offer of settlement of $32,000 and reasonable disbursements. On December 21, JG received a voicemail message from the Respondent advising that the offer of $32,000 and disbursements was accepted. JG communicated by email with the Respondent outlining the basis of her breakdown of the settlement of $32,000 and enclosing a release to be executed by the Respondent’s clients in the amount of $32,000. By way of a letter dated December 27, 2007, the Respondent confirmed the acceptance of the sum of $32,000 plus disbursements. The Release referred to a payment of $32,000 in settlement of the tort claims. The executed release was forwarded by the Respondent in January 2008, along with a claim for disbursements in the amount of $5,585.55. JG, in a letter dated January 24, 2008, forwarded a cheque payable to the Respondent. The letter makes reference to the settlement of $32,000 and outlines the disbursements that ICBC was prepared to pay for, which totalled $2,316. However, the cheque enclosed with the letter was for the amount of $45,264.

[16] Upon receipt of the letter dated January 24, 2008 and the cheque, the Respondent deposited the funds in trust. He then met with his clients on January 30, 2008. It is clear that he identified for his clients that he received a cheque in the amount of $45,264 but that he was only disbursing the $32,000, less his fee, to his clients. The cryptic notes kept of his meeting and initialled by his clients indicate the excess dollars were to be kept until a limitation date had expired.

[17] The Law Society conducted its compliance audit on July 2 and 3, 2008. Rule 3-48(1) was discussed with the compliance auditor, Ms. Adamek, and the Respondent. On July 3, 2008 the Respondent wrote to his clients confirming that ICBC had provided a settlement cheque for $45,264, that $34,316 had been paid out and $10,948 was being held in the Respondent’s trust account. The only logical reason for not dispersing all the funds was that he thought an error had been made by ICBC.

[18] On December 10, 2008, the Respondent paid out the balance of the funds to the clients, less his fees.

[19] No steps were taken by the Respondent with respect to communicating with ICBC concerning the payment of the additional $10,948 until October of 2008. That communication was not received by JG. However, she did receive and responded to the Respondent’s email inquiry in November of 2008 confirming that the cheque was for $45,264. In her affidavit she explained that she did not review the sum. In her evidence and in her affidavit she testified that the payment of $45,264 was an error created by her and her

assistant. The error occurred as she miscalculated the amount of disbursements that she agreed to pay and her assistant then assumed that that amount was for each of the four clients of the Respondent as a result of which, the assistant multiplied the amount by four, resulting in an overpayment of $10,948. JG denied that there was ever a discussion with respect to a bad faith payment.

[20] With the exception of the initial letter to ICBC, there was no reference to bad faith in the exchange of correspondence with ICBC or between the Respondent and the Law Society. Initially, the Trust Assurance Department wrote to the Respondent with respect to their compliance audit and indicated that Rule 3-48(1) required a lawyer to account in writing for all funds received on behalf of the client and that the matter had been referred to the Professional Conduct Department. In response to that letter, the Respondent, in a letter dated July 30, 2008 stated as follows:

> Rule 3-48: In settling with ICBC we expected to receive a certain amount. Instead, we received a much larger amount. Our clients advised us not to return the money to ICBC but to pay out the money to them. I contacted a senior counsel who advised I could be liable if I paid the money out and then ICBC wanted the money back. I advised the clients that I should advise ICBC, the clients refused. I suggested that I keep the money until such time as the limitation period ran out and then distribute the funds to the clients. The clients agreed and initialled interview notes to that affect.
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> A letter has now been sent to the clients advising of the money held on their behalf.

[21] This response, along with the other responses to the inquiries from the Law Society, does not suggest in any way that the excess funds were paid as a result of a bad faith claim. In addition, and as set out in paragraph [7] above, RP thought ICBC should be contacted while another of the clients did not agree. In any event, the Respondent did not contact ICBC until the fall of 2008 and not until he received a number of inquiries from the Law Society as to why he had not inquired about the apparent error.

[22] The overpayment was again raised in a letter dated September 23, 2008 from a staff lawyer in the Professional Conduct Department of the Law Society. Specifically, the Respondent was asked why he did not follow up with ICBC to sort out what appeared to be a mistake. His response in a letter dated October 8, 2008, in part, reads as follows:

> WARPING OF THE INITIAL COMPLAINT:
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> I am responding to your letter of September 23, 2008. It has made me very upset.
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> First allow me to set out for the record that the initial issue was an allegation of a technical breach in that a written correspondence confirming trust money held for clients was not sent. The clients know of the money held for them and have known from the outset. The only initial issue is that there was no written notice. …
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> BACKGROUND OF THE FILE:
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> The clients involved in this file are very well informed and happy with my work. The clients were denied any compensation as ICBC had deemed their accident to be a low velocity impact (LVI) and therefore not deserving of compensation. My instructions were to try to achieve $2,000 of compensation per adult individual. …
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> That which we knew belonged to the clients was designated to the clients. That amount which was in question was designated as being received by ICBC. …
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> It was believed that the money in excess was in relation to a payout for a child/ren [sic] and for disbursements. It was also believed that a duty to the client was owed, not to cause a review that

> would result in the clients receiving less money than they otherwise would have received. It was believed that these instructions do not put into question the lawyer's integrity or honesty. It is believed due to telephone conversations with the adjuster that the ICBC adjuster was at year end and wanted to get rid of her pay out money so that it could be fully replenished. …

[23] Subsequently, the Respondent wrote to ICBC on October 16, 2008 seeking clarification of the payment. There was no reference to bad faith in that letter. He further responded to the Law Society by way of a letter dated October 22, 2008, which in part reads as follows:

> My clients have demonstrated a financial need such that I formed the opinion that their financial need would force them to request me to speak with ICBC inevitably (there were 2 phone calls from the clients in which they were to get back to me concerning getting in contact with ICBC and getting a payout). I believe that this has simply accelerated that process.
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> Please find enclosed, a copy of the letter I then sent to ICBC inquiring about the alleged overpayment. It is likely that this particular letter will not be received warmly as it probably brings up a problem that the adjuster would rather not have had arise. We have not received the slightest response to our letter yet. We will keep you posted.

[24] The letter to ICBC apparently was not received by the adjuster JG.

[25] The Law Society again wrote to the Respondent on October 30, 2008, again asking questions as to why there had been no earlier communication with ICBC given the uncertainty with respect to the excess payment.

[26] The Respondent again wrote a letter to the Law Society on November 12, 2008, which in part reads as follows:

> That which was not known: who was entitled to what portion of the left over was not recorded. That which was known: there was an unexpended balance was recorded. [sic] I respectfully submit that "all trust funds received" and "the unexpended balance" were recorded. As such there was no breach of accounting rules. …
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> I was acting without the benefit of a practice advisor. I instinctively knew not to release a windfall to the clients. I had a plan for a review eventually: to wait out the clients and make the proper inquiries.

[27] On November 18, 2008, the Law Society again communicated with the Respondent indicating that their concern was why he did not immediately communicate with ICBC in order to ascertain whether or not a mistake had been made and what actions he took following the decision not to communicate. The Respondent, in his reply of November 21, 2008, in addition to advising that ICBC had confirmed that the $45,264 was the correct amount, again in that correspondence made no reference to bad faith. The confirmation came from JG and came in response to an email from the Respondent on November 20, 2008 in which email the Respondent made reference to his October 16, 2008 letter and asked if there was a mistake when a cheque for $45,264 was sent. JG confirmed that the cheque was for $45,264. She testified that in responding she did not go back to her original file, which was in storage, to confirm the amount of the settlement but instead thought the inquiry pertained to a potential reopening of the claim.

[28] It is in view of that exchange and the responses of the Respondent in his evidence with respect to that exchange that the Panel has concluded that the reason for holding back the funds was not related to bad faith. Instead, the clients had provided conflicting instructions and at the same time the Respondent did not want to return funds which ultimately might be for the clients benefit. The Panel has concluded that the

Respondent should have immediately communicated with ICBC with respect to what was obviously a mistake with respect to the payment.

[29] Chapter 2 of the *Professional Conduct Handbook*, entitled Integrity, provides in paragraph 1 as follows:

> Dishonourable conduct
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> 1. 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.

[30] In *Law Society of BC v. Martin*, 2005 LSBC 16, the panel discussed professional misconduct and concluded in paragraph [171] that the test is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct." The panel in *Martin* also stated at paragraph [154] that "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."

[31] This Panel has concluded that the Respondent, when he received the cheque from ICBC, knew the sum received was in excess of the settlement and, as a result, he should have taken an appropriate step to clarify what appeared to be an error. Instead, it was not until well after the receipt of the funds that he communicated with ICBC. That communication was substantially later than it should have been. While it appears that the Respondent may have had conflicting instructions from his clients with respect to whether or not to communicate with ICBC, he should have simply and clearly posed the question to ICBC as to whether or not they had made an error in calculating the amount of money paid. If he felt that he was acting contrary to his clients' instructions, he should have advised them to obtain separate counsel. Instead, he did not act until the Law Society commenced its investigation following the audit. While he promptly communicated with the clients on July 3, 2008 with respect to the fact that the funds were held in trust as required by the Law Society Rules, he did not communicate with ICBC until well after the Law Society questioned him on several occasions about why he had not contacted ICBC. At the same time, when he did contact ICBC, he did not explain in a clear and unequivocal way what the issue was, which further compounded the problems.

[32] In this Panel's view, the failure of the Respondent to make the obviously necessary inquiry was questionable conduct casting doubt on the Respondent's competence and also reflecting adversely on the integrity of the legal profession. Given the foregoing, the Panel has concluded that the Respondent committed professional misconduct as this is a marked departure from the conduct expected of a lawyer in such circumstances.