

2011 LSBC 28

Report issued: September 14, 2011

Oral Reasons: July 28, 2011

Citation issued: June 10, 2011

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

Allan Edward Lester

Respondent

**Decision of the Hearing Panel
on Facts, Determination and Disciplinary Action**

Hearing date: July 28, 2011

Panel: Joost Blom, QC, Chair, Patricia Bond, Peter Lloyd

Counsel for the Law Society: Carolyn Gulabsingh

No-one appearing on behalf of the Respondent

introduction and preliminary matters

[1] The citation was authorized by the Discipline Committee on June 9, 2011 and issued on June 10, 2011.

[2] Rule 4-30 of the Law Society Rules provides that:

(1) Before hearing any evidence on the allegations set out in the citation, the panel must determine whether

(a) the citation was served in accordance with Rule 4-15, or

(b) the respondent waives any of the requirements of Rule 4-15.

[3] Rule 4-15 of the Law Society Rules provides that, unless the Discipline Committee or its Chair otherwise directs, a citation must be served personally or by registered mail on a Respondent no more than 45 days after the direction that it be issued.

[4] The Respondent was served a copy of the citation on June 10, 2011, one day after the direction that it be issued, and so within the time period stipulated by Rule 4-15.

[5] Rule 4-30(2) of the Law Society Rules provides:

(2) If the requirements of Rule 4-15 have been met, or have been waived by the respondent, the citation or a copy of it must be filed as an exhibit at the hearing, and the hearing may proceed.

[6] A copy of the citation was filed as an exhibit at the hearing.

[7] The Respondent was served with a copy of the Notice of Hearing on June 22, 2011, which was more than 30 days before the hearing date, as required by Rule 4-24(2). On the same date, the Respondent was served with the following documents that counsel for the Law Society advised she intended to rely on at the hearing scheduled for July 28, 2011:

- (a) Book of Affidavits;
- (b) Professional Conduct Record of the Respondent;
- (c) Book of Authorities of the Law Society;
- (d) FAQs about the hearing process.

[8] Although the Respondent was invited to respond regarding:

- (a) the date;
- (b) his intentions to cross-examine the affiants of the Affidavits;
- (c) his intention to call evidence;
- (d) any objections to the contents of his Professional Conduct Record; and,
- (e) any questions or concerns he might have,

he did not do so.

[9] Counsel for the Law Society advised the Panel that her office initiated a call to the Respondent on the morning of July 27, 2011, one day prior to the commencement of the hearing. The Respondent indicated that he would be attending the hearing. However, on the morning of July 28, 2011, the Respondent left a telephone message with counsel's office to the effect that he was ill and he would like a copy of the decision.

[10] Counsel for the Law Society submitted that it would be appropriate to proceed with the hearing in the absence of the Respondent for the following reasons:

- (a) the Respondent was served the citation with the proposed hearing date on June 10, 2011;
- (b) on June 22, 2011 when served with the Notice of Hearing, the Respondent was invited to contact counsel for the Law Society if he had any questions or concerns by July 15, 2011, and did not do so;
- (c) the Respondent was advised by letter dated June 22, 2011 that the hearing may proceed in his absence;
- (d) when the Respondent contacted counsel for the Law Society on the morning of the hearing, he did not request an adjournment of the hearing, but rather simply requested that the decision of the Hearing Panel be provided to him.

[11] This Panel commenced the hearing over 15 minutes late due to the delayed flight of one member of the Hearing Panel. The Panel then heard submissions from the Law Society as to the propriety of continuing with the hearing and adjourned for 20 minutes to consider those submissions. The hearing reconvened thereafter, and the Respondent still had not appeared.

[12] The Panel elected to proceed with the hearing, absent the Respondent for the reasons set out in paragraph [10] above.

CITATION AND ORDER

[13] The citation alleges that:

1. The Respondent operated a trust account when he was an insolvent lawyer without the permission of the Executive Director and without a second signatory to his trust account who was a practising lawyer and/or approved by the Executive Director, contrary to Rule 3-45 of the Law Society Rules; and
2. From June 1, 2010 to September 13, 2010, the Respondent signed approximately five trust cheques to withdraw funds from trust while he was not a practising lawyer, contrary to Rule 3-56(2)(c) of the Law Society Rules.

[14] At the date of the hearing, the Respondent was suspended from practice pursuant to Rule 3-74.1 for failing to file a trust report.

[15] At the conclusion of the hearing on July 28, 2011, the Panel issued an order as follows:

- (a) the Respondent be reprimanded;
- (b) the Respondent comply forthwith with Rules 3-45(4) and 3-56(2)(c) of the Law Society Rules;
- (c) on or before the 10 day of the month following the month in which the trust reconciliation is required to be made under Rule 3-65, the Respondent provide to the Law Society (to the attention of the Manager- Investigations, Monitoring and Enforcement):
 - (i) the trust reconciliation for each trust account that he operates, both pooled and separate interest bearing, (whether active or not),
 - (ii) the bank statement for each trust account for the period covered by the reconciliation,
 - (iii) the client trust liability listing for each trust account for the period covered by the reconciliation,
 - (iv) a copy of the front and back of each cheque for every withdrawal made from the trust account for the period covered by the reconciliation,
 - (v) the bank statement for the period covered by the reconciliation for every general account operated by his practice,
 - (vi) a copy of his trust account ledgers (book of original entry) for the same period, and
 - (vii) a copy of his general account ledgers (book of original entry) for the same period,

which condition will remain in effect until the Respondent is released from it by the Discipline Committee.

- (d) costs in the amount of \$1,500 payable by October 31, 2011.

[16] Our reasons for granting the Order follow.

ALLEGATION 1

[17] The Respondent made an assignment in bankruptcy on December 2, 2008.

[18] The Respondent advised the Law Society of the assignment by letter dated April 7, 2009.

[19] Rule 3-45(4) of the Law Society Rules provides that:

- (4) An insolvent lawyer must not operate a trust account except with

(a) the permission of the Executive Director, and

(b) a second signatory who is a practising lawyer, not an insolvent lawyer and approved by the Executor Director.

[20] At the hearing of this matter, counsel for the Law Society produced evidence of more than 200 transactions in the Respondent's pooled trust accounts between May 1, 2009 and September 2, 2010. All of the transactions were effected during the Respondent's insolvency, without the approval of the Executive Director, and without a second signatory approved by the Executive Director.

[21] Counsel for the Law Society produced substantial evidence of the Law Society's communication with the Respondent concerning his obligations pursuant to Rule 3-45(4) of the Law Society Rules, including nine letters, an email, a direct discussion between Mr. Leung and the Respondent upon completion of the compliance audit and the Compliance Audit Summary Report dated October 22, 2010, prepared by Mr. Leung.

[22] The Respondent has acknowledged in correspondence with Law Society staff that he operated a trust account while insolvent, contrary to the Law Society Rules and the evidence presented to the Panel shows that he continued to do so after being specifically informed by Law Society staff that it was in contravention of Rule 3-45(4) of the Law Society Rules.

ALLEGATION 2

[23] With respect to the second allegation, the Respondent was administratively suspended from practice pursuant to Rule 3-74.1 of the Law Society Rules, for failure to file a trust report for the period ending December 31, 2009.

[24] The Respondent was personally served with notice of the suspension on June 1, 2010.

[25] On June 8, 2010, the Respondent was advised by the Law Society that while suspended, he could not practise law and was precluded from dealing with any trust funds, pursuant to Rule 3-56(2)(c) of the Law Society Rules, which provides as follows:

(2) A lawyer who makes or authorizes the withdrawal of funds from a pooled or separate trust account by cheque must

(c) ensure that the cheque is signed by a practising lawyer.

[26] The Respondent was reinstated to membership on September 13, 2010; however, while suspended from practice (June 1, 2010 – September 13, 2010), he personally signed trust cheques on five occasions.

[27] The Respondent admitted to the Law Society that he signed trust cheques while he was not a practising member, and the evidence presented to the Panel shows that he was at all relevant times aware of Rule 3-56(2)(c) of the Law Society Rules .

REASONS

[28] While acknowledging that it is open to the Panel to find that the Respondent has committed any of the following: professional misconduct, conduct unbecoming a lawyer, a breach of the Act or Rules, or incompetent performance of duties undertaken in the capacity of a lawyer; we accept the Law Society's position that the appropriate finding in this case is one of professional misconduct.

[29] Our decision is based upon the test set out in *Law Society of BC v. Martin*, 2005 LSBC 16, and *Re:*

Lawyer 10, 2010 LSBC 02, which concluded that the test requires both “a marked departure from that conduct the Law Society expects of its members” and “blameworthy or culpable” conduct.

[30] We note that, in *Law Society of BC v. Lyons*, 2008 LSBC 09, the hearing panel was considering the distinction between a finding of professional misconduct and a finding of a breach of the Act or Rules. The panel observed at paragraph [32] that:

A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the Act or 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).

[31] The Panel in *Lyons* added 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.

[32] The Law Society has submitted to the Panel that a finding of professional misconduct is warranted because the Respondent’s breaches of Rules 3-45(4) and 3-56(2) are accompanied by the aggravating factor that his breaches continued over an extended period of time during which he was repeatedly reminded of the Rules. Indeed, in the Respondent’s own words, he commenced his belated report to the Law Society of his bankruptcy with the words “denial, fear and procrastination have further delayed me. None of these reasons justify my failure.”

[33] We accept that a finding of professional misconduct is warranted on these particular facts for the reasons submitted by the Law Society.

[34] Despite our finding of professional misconduct, the disciplinary action that we have directed as set out at paragraph [14] of our decision falls within the “light” category. In this regard, we have considered the non-exhaustive list of factors, which may be considered by a hearing panel in determining the appropriate disciplinary action, set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, as follows:

- (a) the nature and gravity of the conduct proven is a Rules breach that, because of the circumstances, amounts to professional misconduct;
- (b) we have taken note of the fact that no evidence of a client complaint resulting in disciplinary action against the Respondent was presented to us, although the Respondent has been in practice for almost 30 years. However, while the Respondent has no disciplinary record predating this matter, he has been suspended twice for failing to file his trust reports;
- (c) the breach of the Rules appears to have had no impact on the Respondent’s clients;
- (d) no advantage has been gained by the Respondent, other than that he has not incurred the complication of obtaining a second signatory to his trust account;
- (e) the offending conduct occurred over a protracted period of time;
- (f) the Respondent has freely acknowledged the misconduct;
- (g) we have considered the Respondent’s bankruptcy in assessing the disciplinary action;
- (h) we have fashioned the disciplinary action to ensure compliance with the Rules in the future, so

as to protect the public;

(i) in setting the disciplinary action and the order for costs, we take into account in the Respondent's favour, that he cooperated fully at all times with Law Society staff who sought information from him, while also taking into account, on the other side of the ledger, the protracted period of time in which the breaches occurred.

[35] In the result, and in the absence of any explanation by the Respondent that would mitigate his breach of the Rules, we accept the disciplinary action proposed by the Law Society, as set out at paragraph [15], above.