

2012 LSBC 10

Report issued: February 23, 2012

Citation issued: December 21, 2010

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

## **Roger Roy Plested**

Respondent

### **Decision of the Hearing Panel**

Hearing date: November 16, 2011

Panel: Thelma O'Grady, Chair, David Crossin, QC, Nancy Merrill

Counsel for the Law Society: Carolyn Gulabsingh

Counsel for the Respondent: Roger Plested

## **Background**

[1] A citation was issued against Roger Roy Plested (the "Respondent") on December 21, 2010. The Respondent has admitted that he was served with the citation.

[2] The Law Society and the Respondent have reached an Agreed Statement of Facts, which was admitted into evidence as Exhibit 2.

[3] This matter arises out of allegations that:

- (a) The Respondent breached a trust condition imposed by opposing counsel in failing to obtain discharges of a Strata Property Act lien and a mortgage; and
- (b) The Respondent failed to respond to another member of the Law Society reasonably and in a timely manner.

[4] The amended citation alleges:

1. In the course of representing the estate of DP in connection with the sale of real property owned by the Estate, the Respondent breached a trust condition imposed by opposing counsel, E. John Becker, in his letter dated July 10, 2009 by:

- (a) failing to use diligent and commercially reasonable efforts to obtain a discharge of a Strata Property Act Lien registered against the property;
- (b) failing to use diligent and commercially reasonable efforts to obtain a discharge of a mortgage in favour of the Bank registered against the property;
- (c) failing to provide to Mr. Becker, within five business days of his payment to the Respondent of the sale proceeds, copies of the documentation specified by Mr. Becker in his letter dated July 10, 2009 concerning payments necessary to discharge a Strata Property Act Lien

registered against the property.

(d) failing to provide to Mr. Becker within five business days of his payment to you of the sale proceeds, copies of the documents specified in his letter dated July 10, 2009 concerning payments necessary to discharge a mortgage in favour of the Bank registered against the property.

2. In the course of representing the estate of DP in connection with the sale of real property owned by the Estate, the Respondent failed to respond reasonably promptly, or at all to communications from opposing counsel concerning the status of payments necessary to discharge a Strata Property Act Lien and Mortgage in favour of the Bank registered against the property, during the period September 2009 through November 2009.

The citation alleges that this conduct constitutes professional misconduct.

[5] The Respondent has admitted the evidence in the agreed Statement of Facts.

[6] The Respondent agrees that he did not provide Mr. Becker with the documents and information as requested and that such conduct constitutes professional misconduct.

## **AGREED STATEMENT OF FACTS**

[7] An Agreed Statement of Facts was tendered as Exhibit 3. The essential facts are as follows:

1. Roger Roy Plested was admitted as a member of the Law Society of British Columbia on May 15, 1974. He is 64 years of age.
2. The Law Society was appointed as custodian of Mr. Plested's practice by order of the Supreme Court on July 9, 2010.
3. In or about 2009, Mr. Plested acted on behalf of the executor of the estate of DP (the "Seller") in the sale of real property (the "Property") in Kamloops, British Columbia. E. John Becker acted on behalf of the purchaser of the property.
4. The Property was subject to encumbrances including a mortgage and a Strata Property Act lien. (the "Lien").
5. On or about February 27, 2009 Mr. Plested sent Mr. Becker the executed documents required for completion of the sale of the Property along with a letter imposing certain undertakings upon Mr. Becker respecting those documents. He also gave an undertaking to Mr. Becker that upon receipt of sale proceeds he would provide clear title to the Property for the purchaser.
6. On May 21, 2009 Mr. Becker sent a fax to Mr. Plested advising him of the amount required to pay out the Lien and requested that Mr. Plested either pay out and discharge the Lien or authorize Mr. Becker to do so.
7. On June 3, 2009 Mr. Becker re-sent his fax dated May 21, 2009 to Mr. Plested with an additional notation stating that as there had been no response from Mr. Plested regarding the Lien, Mr. Becker would pay out and discharge the Lien and had amended the Vendor's Statement of Adjustments accordingly.
8. On June 23, 2009 Mr. Plested wrote to Mr. Becker advising he was making arrangements to discharge the Lien and clear the title to the Property. Mr. Plested also contacted the Property Management Company to confirm the amount needed to discharge the Lien.

9. On or about June 29, 2009 Mr. Becker sent a fax to Mr. Plested advising that he had not received undertakings from Mr. Plested to pay the outstanding property taxes, to pay out and discharge the mortgage and the Lien. Mr. Becker also confirmed that the Property Management Company had not received an undertaking from Mr. Plested to pay out the Lien, and the transaction could not proceed until both Mr. Becker and the Property Management Company had received the required undertakings.

10. The closing date for the transaction was set for July 10, 2009.

11. On July 8, 2009 Mr. Plested wrote to Mr. Becker to confirm and clarify the terms of his February 27, 2009 letter. He wrote:

Further to my letter dated February 27, 2009 wherein I undertook to clear title to the property upon receipt of the sale proceeds, I would confirm that this means: payment of all outstanding strata fees and removal of lien; payment of outstanding taxes to the City of Kamloops and arranging for the discharge of mortgage [mortgage number]. Within five clear business days from the receipt of the proceeds of sale I will forward to you the letters and payments to discharge those matters. Upon receipt of the discharge of mortgage I will forward to you the particulars of discharge and a copy of the instrument.

12. On July 10, 2009 (the closing date) Mr. Becker wrote to Mr. Plested imposing the following trust conditions on him:

(a) To pay to each of the Seller's existing chargeholders the amount required by its payout statement to pay out and legally obligate the lender to provide a discharge of the mortgage and the Lien.

(b) On its trust condition that the lender will provide the discharge within a reasonable period of time.

(c) To provide us within 5 business days of our payment of the sale proceeds to you, copies of the following:

i. our letter paying out the existing chargeholder with the payout monies;

ii. the chargeholder's payout statement;

iii. your cheque paying the payout monies to the chargeholder;

iv. evidence of delivery or receipt of the payout cheque at the chargeholder's place of business;

(d) Use diligent and commercially reasonable efforts to obtain the discharge in a timely manner.

(e) Upon your receipt of the discharge, you will promptly attend to the registration of the discharge in the appropriate registry and provide us with registration particulars in due course.

(f) To pay the balance of the sale proceeds to the Seller or as the Seller may direct.

In addition to any undertakings set out above, the proceeds of sale will be provided to you on your undertaking to attend to payment of the outstanding property taxes, including any penalties and accrued interest, and provide us with proof of payment in a timely manner.

13. The transfer of the Property occurred on July 10, 2009.

14. On July 21, 2009, upon receiving notification that sale proceeds had been deposited into his trust account, Mr. Plested understood he had received the proceeds on his undertaking to:

(a) provide Mr. Becker, within five business days a copy of the payout statement for the mortgage and use diligent and commercially reasonable efforts to obtain the discharge of the mortgage in a timely manner;

(b) pay the existing chargeholder of the Lien the amount required by its written statement to pay out and legally obligate the chargeholder to provide a discharge of the Lien;

(c) provide to Mr. Becker, within five business days: a copy of his letter enclosing payment to the Property Management Company regarding the Lien; a copy of the Property Management Company's payout statement regarding the Lien; a copy of the cheque used to pay the Property Management Company; and evidence of delivery or receipt of the payout cheque at the Property Management Company's place of business; and

(d) use diligent and commercially reasonable efforts to obtain the discharge of the Lien in a timely manner.

Mr. Plested knew and understood that he was bound by these undertakings.

15. On July 22, 2009, Mr. Becker advised Mr. Plested by fax that the strata manager had not received any funds to pay out the Lien and consequently Mr. Becker had made arrangements to pay the outstanding amount and was seeking reimbursement from Mr. Plested. Mr. Becker received no response from Mr. Plested.

16. On July 23, 2009 Mr. Plested wrote a letter to the Property Management Company enclosing the funds to pay the Lien. He did not provide Mr. Becker with a copy of the covering letter.

17. On July 24, 2009 Mr. Plested contacted Mr. Becker's office and inquired if Mr. Becker had paid the Lien. He was advised that Mr. Becker's office had paid the Lien. Mr. Plested then stated that he had intended to pay the Lien that same day. Mr. Plested was then asked to pay the Lien so the Property Management Company could reimburse Mr. Becker for the payment already made.

18. Later on July 24, 2009 Mr. Plested delivered by hand the cheque for payment of the Lien and his letter dated July 23, 2009 to the Property Management Company. He then telephoned Mr. Becker's office to confirm he had hand-delivered the funds.

19. On September 25, 2009 Mr. Becker wrote to Mr. Plested to advise that the Lien and mortgage still appeared on title and asked when the "overdue discharge particulars" could be expected.

20. Having received no reply from Mr. Plested, Mr. Becker wrote to him again on October 30, 2009 noting that a title search still showed the Lien and mortgage remained on title and that Mr. Plested had still not provided confirmation that the mortgage had been discharged. Mr. Plested did not reply to this letter.

21. On November 9, 2009 Mr. Becker wrote to Mr. Plested advising his client was selling the Property, the closing date was November 20, 2009 and Mr. Plested's immediate attention to outstanding undertakings was required.

22. Mr. Plested did not reply to this letter.

23. Between November 20, 2009 and January 6, 2010 Mr. Plested attended to the outstanding undertakings including discharge of the Lien and the mortgage. He did not provide Mr. Becker with any

evidence the mortgage had been paid out or discharged.

## ADMISSIONS

[8] The Respondent admits that he breached the trust conditions imposed by Mr. Becker in failing to:

- (a) use diligent and commercially reasonable efforts to obtain the discharge of the Lien;
- (b) use diligent and commercially reasonable efforts to obtain the discharge of mortgage;
- (c) provide Mr. Becker, within five business days of receipt of the sale proceeds, copies of the documents specified in his letter of July 10, 2009 regarding payment of the Lien and mortgage.

[9] The Respondent admits that this constitutes professional misconduct.

[10] The Respondent admits that he failed to respond reasonably promptly or at all to communications from Mr. Becker and admits this constitutes professional misconduct.

## Determination

[11] The Panel accepts The Respondent's admissions and determines that he has committed professional misconduct.

## Disciplinary Action

[12] The Law Society seeks a fine of \$5,000 and costs of \$2,500, both payable by April 12, 2012. The Respondent states that he is unable to pay anything at this time and requires a significant amount of time to pay any fine or costs.

[13] The Respondent states that he was diagnosed with a major depressive disorder in April, 2009. He is under the care of a psychiatrist who has prescribed ever-increasing doses of anti-depressant medication.

[14] The Respondent entered into evidence the decision of the Practice Standards Committee dated July 8, 2010. The Respondent had been referred to the Practice Standards Committee as part of penalty conditions ordered by a hearing panel on October 11, 2007. That hearing panel found that the Respondent repeatedly failed to respond to clients and the Law Society.

[15] The Practice Standards Committee received medical reports from the Respondent's psychiatrist. Over three practice reviews, the Committee found that the state of the Respondent's practice had worsened, as had his depressive disorder.

[16] Effective July 9, 2010 the Respondent is subject to an undertaking to the Law Society that he will not practise as a sole practitioner, that he will not operate a trust account and that he will provide a satisfactory cognitive function assessment by a psychologist approved by the Practice Standards Committee.

[17] The Respondent also entered into evidence the follow-up practice review report dated November 19, 2009. Currently, the Respondent is on an undertaking not to practise law until his psychiatrist certifies that he is capable of functioning adequately to meet basic competency levels.

[18] The Respondent advised the Panel that he has experienced substantial improvement in his condition in 2010 and 2011. He stated that he is doing things today he could not have done before. He went on to say

that he should have stopped practising three years before this happened, and that “you do not know how bad you are until you recover.”

[19] The Respondent attributes the onset of his illness to a number of factors, including an inability to say “no” and set boundaries, taking little or no time off, the loss of a long-time secretary due to medical reasons, the death of one of his best friends, ongoing problems with the downsizing of his office and associated renovation difficulties, absence of support staff in a real estate boom, the fact that his office expenses were greater than his income, and that he slept only two to three hours each night.

[20] The Respondent testified that he has not yet had the psychiatric assessment completed, as required by the Practice Standards Committee, for two reasons: he does not feel he is ready to return to the practice of law (although he is hopeful he can at some point), and he cannot afford the cost of approximately \$2,000 to complete the assessment.

[21] The Respondent stated that he has had no income for 2010 and 2011 and has no prospects of any income for at least another year. He resides with his wife and 16 year old daughter. His wife is 57 years old. She is a nurse and is the sole source of their household income.

[22] The Respondent stated that he will be required to pay the bill for the Law Society’s custodianship of his law practice. He estimates this will be approximately \$30,000 to \$40,000.

[23] The Law Society did not provide any case law dealing with the issue of professional misconduct where an underlying mental disorder was present. Nevertheless, the Law Society takes the position that:

- (a) the concept of general deterrence takes precedence over an underlying mental disorder;
- (b) breaches of professional conduct cannot be tolerated regardless of their cause;
- (c) these considerations override any impecuniosity on the part of the Respondent;
- (d) any costs payable by the Respondent for the custodianship of his law practice have not yet crystallized and as such remain a potential liability only.

[24] The Panel finds that an historical and underlying mental disorder is a factor that should be given some weight in determining the appropriate disciplinary action in this matter.

[25] In determining whether costs should be awarded we have considered the factors set out in *Law Society of BC v. Racette*, 2006 LSBC 29 including:

- (a) the seriousness of the offence;
- (b) the financial circumstances of the respondent;
- (c) the total effect of the disciplinary action; and
- (d) the extent to which the conduct of each of the parties has resulted in costs accumulating or conversely being saved.

[26] In making its decision on disciplinary action, we considered the seriousness of the offences, including the fact that giving and fulfilling undertakings are the cornerstone of the legal profession and that the breach of an undertaking is a very serious matter requiring both specific and general deterrence.

[27] We also considered the Respondent’s ongoing medical condition, the fact that he gained no advantage by his conduct, his financial circumstances, his age, his limited professional prospects, and his admissions of facts and of professional misconduct, which abbreviated the hearing.

[28] In making its decision on costs, for the reasons stated in paragraphs [26] and [27] above respecting disciplinary action, and having regard to all of the circumstances in this case and the principles enunciated in *Law Society of BC v. Racette* and, in particular, the financial circumstances of the Respondent, the Panel exercises its discretion and declines to make an order for costs.

## **ORDER**

[29] The Panel orders that the Respondent pay a fine of \$3,500.

[30] The Panel further orders that the Respondent has 18 months from the date of this decision in which to pay the fine.

[31] The Panel makes no order as to costs.