

2012 LSBC 19

Report issued: May 28, 2012

Citations issued: March 23, 2011 and July 28, 2011

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

**AARON MURRAY LESSING**

Respondent

Corrected decision: Paragraph [45] of the decision was amended on May 31, 2012

**Decision of the Hearing Panel**

Hearing date: March 29, 2012

Panel: David Renwick, QC, Chair, Graeme Roberts, Donald Silversides, QC

Counsel for the Law Society: Alison Kirby

Counsel for the Respondent: Henry Wood, QC

## **Background**

### **The Citation**

[1] Two citations were issued to Aaron Murray Lessing in 2011. On March 21, 2012, the President of the Law Society of British Columbia (the "Law Society"), after considering an application pursuant to Rule 4-16.2(1)(b) that the two citations be determined in one hearing, allowed the application pursuant to Rule 4-16.2(4)(a).

[2] One of the citations in this matter (the "First Citation") was authorized by the Discipline Committee on March 3, 2011 and issued on March 23, 2011. The First Citation was amended on June 1, 2011 and September 8, 2011. Mr. Lessing has admitted that he was properly served with the First Citation and the two amended First Citations.

[3] The First Citation, as amended, sets out the nature of the conduct to be inquired into as follows:

You failed to notify the Executive Director of the Law Society in writing of the circumstances of the following unsatisfied monetary judgments against you and/or your proposal for satisfying such judgments, contrary to Rule 3-44 of the Law Society Rules:

- (a) an order made September 23, 2002 in an action in British Columbia Supreme Court, New Westminster Registry Action No. [number];
- (b) a Crown debt owing under the Medicare Protection Act registered against property owned by you (under Land Title Office Charge No. [number]) on October 3, 2005 in the amount of approximately \$5,748;
- (c) an income tax certificate filed in the Federal Court of Canada on January 26, 2006 under number [number] in the amount of approximately \$13,983.27;
- (d) an income tax certificate filed in the Federal Court of Canada on August 22, 2008 under number [number] in the amount of approximately \$62,490.96;
- (e) a judgment granted on October 15, 2008 in an action in British Columbia Supreme Court, New Westminster Registry Action No. [number], in the amount of approximately \$60,000;
- (f) a Crown debt owing under the Medicare Protection Act registered against property owned by you on January 13, 2009 (under Land Title Office Charge No. [number]) in the amount of

approximately \$1,204;

(g) a judgment granted on March 5, 2009 in an action in Provincial Court of British Columbia, Surrey Registry Action No. [number], in the amount of approximately \$7,319.84;

(h) a judgment granted on March 19, 2009 in an action in British Columbia Supreme Court, Vancouver Registry Action No. [number], in the amount of approximately \$42,536.18;

(i) an order made December 2, 2010 in an action in British Columbia Supreme Court, New Westminster Registry No. [number] for costs in the amount of \$1,000 payable forthwith;

(j) an order made February 9, 2011 in an action in British Columbia Supreme Court, New Westminster Registry No. [number] for costs in the amount of \$500 payable forthwith.

This conduct constitutes professional misconduct or a breach of the [Legal Profession] Act or [Law Society] Rules.

[4] The second citation in this matter (the “Second Citation”) was authorized by the Discipline Committee on July 14, 2011 and issued on July 28, 2011. The Respondent has admitted that he was properly served with the Second Citation.

[5] The Second Citation sets out the nature of the conduct to be inquired into as follows:

In 2008 and 2009, in the course of representing yourself in matrimonial proceedings in B.C. Supreme Court between yourself and your former spouse [TL], you failed to comply with the following orders, which resulted in an order pronounced on June 4, 2009 finding you in contempt of court:

(a) Order of Madam Justice Smith pronounced August 25, 2008, paragraph 7, requiring you to produce specified documents by August 29, 2008,

(b) Order of Master Scarth pronounced April 14, 2009 requiring you to provide a list of documents and produce specified documents on or before May 7, 2009, and

(c) Order of Master Tokarek pronounced May 20, 2009 requiring you to produce specified documents on or before May 27, 2009.

This conduct constitutes professional misconduct or conduct unbecoming.

## **ADMISSIONS**

[6] The Law Society, through counsel, and the Respondent agreed to a statement of facts with respect to the First Citation (the “First Agreed Statement of Facts”) which was marked as Exhibit 1 in these proceedings.

[7] The Law Society, through counsel, and the Respondent agreed to a statement of facts with respect to the Second Citation (the “Second Agreed Statement of Facts”) which was marked as Exhibit 2 in these proceedings.

[8] Both the First Agreed Statement of Facts and the Second Agreed Statement of Facts set out several facts that were agreed to by the Law Society and the Respondent, some of which are set out below. The Law Society and the Respondent agree that several documents included in the Agreed Statements of Facts are true copies of originals, that they were sent or delivered on the date borne on their face, that they were subsequently received by the intended recipient and that they were admitted into evidence to prove that statements contained in them were made and not for the proof the truth of the matters recorded by them.

## **Facts**

[9] The Respondent was called and admitted as a member of the Law Society on May 17, 1991 and practises mainly in the area of family law.

### **First Citation**

[10] Mr. Lessing and a former spouse owned property located at Surrey, British Columbia (the “Matrimonial Home”).

[11] On September 23, 2002, another former spouse of Mr. Lessing, LC, obtained a judgment for a payment of child support in the amount of \$900 per month (the "First Judgment"). The First Judgment was registered as a charge against the one-half interest of Mr. Lessing in the Matrimonial Home on November 20, 2003. This judgment was a non-expiring charge.

[12] On January 26, 2006, a certificate was issued by the Minister of National Revenue for Canada pursuant to the Income Tax Act for the amount of \$13,983.27 plus interest and filed in the Federal Court of Canada (the "Second Judgment"). This judgment was registered as a charge against Mr. Lessing's one-half interest in the Matrimonial Home on February 27, 2006.

[13] On August 22, 2008, a further certificate was issued by the Minister of National Revenue for Canada pursuant to the Income Tax Act for the amount of \$62,490.96 plus interest and filed in the Federal Court of Canada (the "Third Judgment"). This judgment was also registered as a charge against Mr. Lessing's one-half interest in the Matrimonial Home on October 6, 2008.

[14] Mr. Lessing purchased a condominium with DK. DK sued Mr. Lessing for unpaid contributions consisting of strata fees and property taxes in a Supreme Court action. On October 15, 2008, Mr. Justice Rice granted judgment against Mr. Lessing in the amount of \$60,000, inclusive of costs and interest payments, payable in monthly installments of \$5,000 per month, commencing November 1, 2008 for 12 consecutive months (the "Fourth Judgment"). The Fourth Judgment was registered against the one-half interest of Mr. Lessing in the Matrimonial Home on March 5, 2009.

[15] On March 5, 2009, S Ltd. obtained judgment against Mr. Lessing in the amount of \$7,319.84 in the Provincial Court of British Columbia (the "Fifth Judgment"). This judgment was registered against the one-half interest of Mr. Lessing in the Matrimonial Home on March 19, 2009.

[16] On March 19, 2009, Mr. Justice Groves ordered that Mr. Lessing pay Stikeman Elliott LLP the sum of \$42,536.18 plus pre-judgment interest in the amount of \$221.40 (the "Sixth Judgment"). The Sixth Judgment was registered against the one-half interest of Mr. Lessing in the Matrimonial Home on March 23, 2009.

[17] By way of a letter to the Law Society dated March 10, 2009, DK complained that, although Mr. Lessing had paid her the first instalment of \$5,000 in November, 2008, he had not made any of the other payments required by the Fourth Judgment.

[18] After receiving this complaint, the Law Society conducted an investigation and during that investigation determined the existence of the First Judgment, the Second Judgment, the Third Judgment, the Fifth Judgment and the Sixth Judgment, all of which had remained unsatisfied for more than seven days. Mr. Lessing had not notified the Executive Director of the Law Society of the existence of these judgments pursuant to Law Society Rule 3-44 (the full text of which is set out in paragraph [46]).

[19] On August 19, 2009, the Law Society wrote to Mr. Lessing informing him of his obligations to notify the Executive Director pursuant to Rule 3-44. In that letter, the Law Society listed the judgments that it had become aware of and asked Mr. Lessing to advise the Law Society why he had not reported the judgments as required, to describe the circumstances of the judgments, and to provide his proposal for satisfying the judgments, if any of them were still outstanding.

[20] By way of a letter to the Law Society dated October 26, 2009, Mr. Lessing provided the information requested by the Law Society in its letter dated August 19, 2009 and stated:

I was not aware of the Rules referred to in your letter. I have now been advised of these Rules and will be complying with these Rules. My former spouse and I own a substantial property that consists of ten acres of land with substantial improvements. The property is encumbered by a mortgage of approximately \$600,000 and is valued at least between \$1,500,000 to \$1,800,000 dollars. We will be entering into mediation when I receive documents from my former spouse's lawyer. Failing success at mediation, our trial will proceed.

[21] On December 2, 2010, Madam Justice Arnold-Bailey made an order in litigation between LC and Mr. Lessing that Mr. Lessing pay LC costs in the amount of \$1,000 forthwith for non-attendance and late notice (the "Seventh Judgment"). The Seventh Judgment was entered on December 7, 2010.

[22] On February 9, 2011, Madam Justice Arnold-Bailey made a further order in the litigation between LC and Mr. Lessing ordering Mr. Lessing to pay LC costs in the amount of \$500 forthwith (the Eighth Judgment). The Eighth Judgment was entered on February 21, 2011.

[23] By way of a letter dated February 10, 2011, counsel for LC sent a copy of the Seventh Judgment to the Law Society and stated that the \$1,000 that Mr. Lessing had been ordered to pay had not yet been paid.

[24] By way of a letter dated March 14, 2011, counsel for LC sent a copy of the Eighth Judgment to the Law Society and stated that the \$500 that Mr. Lessing had been ordered to pay had not yet been paid.

[25] Mr. Lessing knew of the existence of the Seventh Judgment on December 7, 2010 and the Eighth Judgment on February 21, 2011.

[26] Mr. Lessing satisfied both the Seventh Judgment and the Eighth Judgment on July 4, 2011.

[27] By way of a letter to Mr. Lessing dated March 11, 2011, the Law Society wrote to Mr. Lessing asking whether the Seventh Judgment had been satisfied and, if not, whether he had notified the Executive Director of the Law Society of the judgment pursuant to Rule 3-44 and, if not, why he had not done so.

[28] In response to the letter from the Law Society dated March 11, 2011, Mr. Lessing wrote to the Law Society and stated:

The Orders of Madam Justice Arnold-Bailey were made in my absence and I intended to apply to set both Orders aside including the Order for costs. It is for that reason that I did not report the same.

[29] Mr. Lessing did not satisfy any of the judgments within seven days after the date of their entry and in respect of each judgment, Mr. Lessing did not:

- (a) notify the Executive Director of the Law Society of his failure to satisfy the judgments;
- (b) notify the Executive Director of the circumstances of the judgments, including whether the judgment creditor was a client or former client; and,
- (c) provide a written proposal for satisfying the judgments.

#### **Second Citation**

[30] Mr. Lessing represented himself in a family law proceeding commenced by his spouse (the "Plaintiff") that involved claims for spousal support, child support and a division of assets (the "Matrimonial Proceedings").

[31] At a judicial case conference in the Matrimonial Proceedings, Mr. Lessing consented to an order being pronounced by Madam Justice Smith (the "First Order") and he approved the First Order as to form. The First Order contained an order that Mr. Lessing provide to counsel for the Plaintiff by August 29, 2008 the incorporation documents for a corporation ("A Ltd.")

[32] Mr. Lessing did not provide the incorporation documents for A Ltd. to counsel for the Plaintiff by August 29, 2008. Despite receiving letters from counsel for the Plaintiff dated September 10, September 11 and October 8, 2008 and February 11 and March 27, 2009 requesting production of them, he still did not produce them.

[33] In April, 2009, Mr. Lessing was served with a notice of motion for an order requiring him to provide a list of documents and to produce copies of documents specified in the notice of motion. On April 14, 2009, Master Scarth made an order (the "Second Order") that Mr. Lessing produce a list of documents on or before May 7, 2009 and that Mr. Lessing, on or before May 7, 2009, produce and deliver to the solicitor for the Plaintiff certain documents and information described in the Second Order.

[34] Mr. Lessing did not provide a list of documents or produce and deliver to the solicitor for the Plaintiff any of the documents described in the Second Order by May 7, 2009.

[35] On May 11, 2009, counsel for the Plaintiff wrote and faxed a letter to Mr. Lessing that confirmed the list of documents and the documents that Mr. Lessing was ordered to produce by the Second Order had not been received by May 7, 2009 and stated that, if the list of documents and the required documents were not received by the close of business on May 11, 2009, counsel for the Plaintiff would be bringing an application for an order that Mr. Lessing was in contempt of Court.

[36] Mr. Lessing did not provide the list of documents or any of the documents specified in the Second Order

by the close of business on May 11, 2009.

[37] At a hearing held on May 7, 2009, which was not attended by Mr. Lessing or his counsel, Master Tokarek made an order (the "Third Order") that, on or before May 27, 2009, Mr. Lessing produce and deliver to counsel for the Plaintiff the documents and information described in the Third Order.

[38] On or about May 20, 2009, Mr. Lessing received a copy of the Third Order.

[39] Mr. Lessing did not produce any of the documents described in the Third Order by May 27, 2009.

[40] On May 20, 2009, Mr. Lessing was served with a notice of motion for an order that he be found in contempt of court for failing to comply with the First Order and the Second Order. On or about May 28, 2009, Mr. Lessing was informed that his failure to comply with the Third Order would be brought to the attention of the court at the hearing of the notice of motion for a declaration that Mr. Lessing was in contempt of court.

[41] On June 4, 2009, at a hearing that was not attended by Mr. Lessing or his counsel, Mr. Justice Davies found Mr. Lessing in contempt of court for failing to comply with the First Order, the Second Order and the Third Order (the "Fourth Order"). Mr. Lessing was given until June 18, 2009 to cure his contempt.

[42] On June 4, 2009, Mr. Lessing received a copy of the Fourth Order.

[43] On June 9, 2009, Mr. Lessing produced the incorporation documents for A Ltd. as required by the First Order.

[44] On June 18, 2009, Mr. Lessing produced copies of those documents in his possession that he had been ordered to produce by the Second Order and the Third Order.

[45] Counsel for Mr. Lessing and the Law Society have informed the Panel in a joint submission that they intend, at the resumption of the hearing, to introduce evidence that Mr. Lessing did deliver the list of documents on June 18, 2009.

## Determination

### First Citation

[46] The relevant provisions of the Rules of the Law Society are the following:

#### Failure to satisfy judgment

3-44(1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of

- (a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and
- (b) his or her proposal for satisfying the judgment.

(2) Monetary judgments referred to in subrule (1) include

- (a) an order nisi of foreclosure,
- (b) any certificate, final order or other requirement under a statute that requires payment of money to any party, and
- (c) a garnishment order under the Income Tax Act (Canada) if a lawyer is the tax debtor.

(3) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.

(4) If a lawyer fails to deliver a proposal under subrule (1)(b) that is adequate in the discretion of the Executive Director, the Executive Director may refer the matter to the Discipline Committee or the Chair of the Discipline Committee.

[47] The relevant provisions of the *Legal Profession Act* are the following:

38(4) 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.

[48] We find that each of the First to Eighth Judgments were monetary judgments within the meaning of Rule 3-44(2), that each of those judgments had been entered, that the Respondent did not satisfy any of the judgments within seven days after the date of entry and that the Respondent did not notify the Executive Director as required by Rule 3-44(1) regarding any of the judgments.

[49] We are satisfied on the basis of the facts set out in the First Agreed Statement of Facts that the Law Society has discharged its onus of proving on a balance of probabilities the allegations set out in the First Citation.

[50] We find that the failure of the Respondent to notify the Executive Director of each of the judgments was a breach of the Rules. The issue is whether the failure to notify the Executive Director of any of the judgments constituted professional misconduct, which is more serious.

[51] Counsel for the Respondent submits that all of the failures amounted to no more than a breach of the Rules and did not constitute professional misconduct.

[52] Counsel for the Law Society submits that although it is open to make a determination of professional misconduct, the Panel should determine that all of the failures to notify the Executive Director were breaches of the Rules. She submits that, although there are aggravating factors, such as the length of time over which the breaches occurred (five years), the number of breaches (eight) and the Respondent's failure to report the last two monetary judgments when he knew he had an obligation to do so, all of which could justify a determination of professional misconduct, the Law Society is seeking only an adverse determination of a breach of the Rules because:

- (a) the First Citation is framed as a single allegation;
- (b) all judgment creditors have now been paid and therefore no harm has occurred; and,
- (c) a majority of the failures to notify the Executive Director may be more appropriately classified as being caused by the Respondent paying little attention to the administrative side of his practice.

[53] Professional conduct is not defined in the *Legal Profession Act* or the Rules of the Law Society. The currently accepted test for whether conduct constitutes professional misconduct was established by a hearing panel in *Law Society of BC v. Martin*, 2005 LSBC 16 where the panel stated the following at paragraph [171]:

The test that this Panel finds is appropriate 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.

[54] The Panel adopts that statement as the appropriate test for determining what constitutes professional misconduct.

[55] While every member of the Law Society should be familiar with the rules of the Law Society and know

what they are and is deemed to know of those rules whether in fact they do, we recognize that the rules are lengthy and complex and that some lawyers are, in fact, not aware of certain rules until they are drawn to their attention, particularly rules that rarely affect those lawyers' day to day practice.

[56] We accept that the Respondent was not aware of Rule 3-44 until he was informed of it by the Law Society on August 19, 2009.

[57] Rule 3-44 does not apply to the day to day practice of lawyers, and few lawyers will have unsatisfied judgments entered against them. Since we have accepted that the Respondent was not, in fact, aware of the existence of Rule 3-44 until he received the Law Society's August 19, 2009 letter and that no member of the public has been harmed because the judgments have been paid, we find that the failure of the Respondent to notify the Executive Director of the First Judgment, Second Judgment, Third Judgment, Fourth Judgment, Fifth Judgment and Sixth Judgment was not a marked departure from that conduct the Law Society expects of its members and therefore did not constitute professional misconduct.

[58] By December 7, 2010, the date of entry of the Seventh Judgment, the Respondent was clearly aware of the provisions of Rule 3-44 and his obligations under that rule. Just six weeks earlier, the Respondent had written to the Law Society acknowledging that he was aware of Rule 3-44 and confirming that he would comply with that rule. He also knew that he was still under an active investigation for his breach of Rule 3-44 in respect of the earlier judgments.

[59] The Respondent's explanation for not notifying the Executive Director of the Seventh Judgment and the Eighth Judgment was that he intended to set both orders aside. Rule 3-44(3) makes it clear that the duty to notify the Executive Director applies whether or not any party has commenced an appeal from the judgment. We find that, at the time the Seventh Judgment and Eighth Judgment were entered, the Respondent was aware of Rule 3-44(3). His explanation for not notifying the Executive Director of these judgments is not credible, and we do not accept it.

[60] Although Rule 3-44 does not apply to most lawyers' day to day practice, and most lawyers do not have unsatisfied monetary judgments against them, it is still a very important rule and an essential component in the financial requirements set out in Part 3, Division 6 of the Rules of the Law Society, which are necessary to fulfill the Law Society's mandate under Section 3 of the Legal Profession Act. The fact that a lawyer has not paid debts when due does not necessarily mean that the lawyer cannot properly perform his or her duties or that such failure poses a risk to the public, but it might. Often, unsatisfied monetary judgments are a sign of more severe underlying problems that will pose a danger to the public. In order to protect the public, the Law Society must be made aware of any unsatisfied monetary judgment and be provided with information about it and the lawyer's proposed course of action for dealing with it.

[61] We find that the Respondent was aware at the time the Seventh Judgment and Eighth Judgment were entered that he had an obligation to notify the Executive Director of them if he was unable to satisfy them within seven days and that his failure to do so constitutes a blatant disregard of his professional obligations.

[62] Even though the Seventh Judgment and Eighth Judgment were satisfied in less than a year and no substantial harm was caused to the judgment creditor, we find that the Respondent's failure to notify the Executive Director of these judgments constituted a marked departure from the conduct the Law Society expects of its members.

[63] We have determined that, by failing to notify the Executive Director of the First to Sixth Judgments, the Respondent committed breaches of the Rules of the Law Society.

[64] We have determined that by failing to notify the Executive Director of the Seventh and Eighth Judgments, the Respondent committed professional misconduct.

#### **Second Citation**

[65] In the Second Agreed Statement of Facts the Respondent admitted that his conduct was contrary to the best interest of the legal profession and constituted conduct unbecoming a lawyer.

[66] The relevant provisions of the *Legal Profession Act* are the following:

1(1) In this Act:

"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;

38(4), the text of which is quoted above in paragraph [47].

[67] The distinction between conduct unbecoming a lawyer and professional misconduct was considered by the Benchers in a review of the decision by the hearing panel in *Law Society of BC v. Watt*, [2001] LSBC 16, in which the Benchers stated in paragraph [5]:

We adopt, as a useful working distinction, 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.

[68] We adopt this statement as an accurate description of the distinction between conduct unbecoming a lawyer and professional misconduct.

[69] The Benchers, in a review of a decision of the hearing panel in *Law Society of BC v. Berge*, 2007 LSBC 07, stated the following test for what constitutes conduct unbecoming a lawyer at paragraph [38]:

The Benchers find that lawyers in their private lives must live up to a high standard of conduct. A lawyer does not get to leave his or her status as a lawyer at the office door when he or she leaves at the end of the day. The imposition of this high standard of social responsibility, with the consequent intrusion into the lawyer's private life, is the price that lawyers pay for the privilege of membership in a self-governing profession. Conduct unbecoming not only includes the obvious examples of criminal conduct and dishonesty, but it also includes "any act of any member that will seriously compromise the body of the profession in the public estimation." See *Hands v. Law Society of Upper Canada* (1889), 16 OR 625.

[70] The Law Society submits that the failure of the Respondent to comply with the three court orders does not constitute professional misconduct because the orders were made in the Matrimonial Proceedings, in which the Respondent was a party.

[71] The Law Society also submits that the breach of the three court orders for which Mr. Justice Davies found him to be in contempt of court constitutes conduct unbecoming a lawyer.

[72] The Respondent, through his counsel, agreed with the submissions made by the Law Society.

[73] We are satisfied on the basis of the facts set out in the Second Agreed Statement of Facts that the Law Society has discharged its onus of proving on a balance of probabilities the allegations set out in the Second Citation.

[74] We have determined that by breaching the First Order, the Second Order and the Third Order, the Respondent was in contempt of court and that, by doing so, he committed conduct unbecoming a lawyer.