

2004 LSBC 08

Report issued: April 26, 2004

Citation issued: January 12, 2004

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

PHILIP RICHARD DERKSEN

Respondent

**Decision of the Hearing Panel
on Penalty**

Hearing date: April 14, 2004

Panel: Grant C. Taylor, Single Bencher Panel

Counsel for the Law Society: Luisa Hlus

Counsel for the Respondent: G. Jack Harris, Q.C.

[1] A citation dated January 12, 2004 was heard by this Panel on April 14, 2004.

[2] This Panel found the Respondent to have failed to hold and remit funds collected in payment of Goods and Services Tax as required by the *Excise Tax Act* and failed to hold and remit funds collected in payment of Social Services Tax as required by the *Social Services Tax Act* and having practiced law between July 1 and September 24, 2003 without having paid his professional liability insurance fee due June 30, 2003 contrary to s. 30(7) of the *Legal Profession Act* such that the Respondent professionally misconducted himself.

[3] Count 2 of the amended Schedule alleging that the Respondent failed to hold funds deducted from employee wages as source deductions pursuant to the *Income Tax Act* and to remit such funds as required to the Government of Canada was dismissed as the Panel determined that there is not sufficient evidence to warrant a finding otherwise.

[4] While a joint submission as to penalty was not made by counsel, it became a joint submission as both counsel essentially made the same submissions regarding penalty.

[5] By consent of both counsel a finding was made on the day of the hearing in order that the penalty stage could then be dealt with so as not to inconvenience the Respondent and counsel by having to return after written reasons were rendered on the verdict.

[6] The Respondent was called in 1988. He is 46 years old. This is the first and only citation issued against the Respondent since his call to the Bar.

[7] The Respondent's professional conduct record was submitted to the Panel for consideration. He had an initial practice review on July 10, 1992 during which time it was noted that the Respondent had developed a pattern of avoidance with regard to matters he did not want to deal with. He apparently was unhappy and wanted to leave the firm with whom he was associated.

[8] There was a follow-up practice review on March 1, 1993. The Respondent was no longer practicing with his former firm and was now in an office sharing arrangement. A number of recommendations were made at that time, including counselling for procrastination, all of which were agreed to by the Respondent.

[9] Another follow-up practice review was conducted on March 30, 1994. It was noted that the Respondent had lost his father the month before. He disliked all of the paperwork and administration work associated with running his own practice. The Respondent acknowledged delay and said it was his own doing. Recommendations at that time included limiting his practice to areas he was competent in and avoiding areas that he was not familiar with, such as real estate.

[10] In July 1996, the Respondent again came to the attention of the Competency Committee (now the Practice Standards Committee). The concern at that time was the delay seen in his files and the possible untreated problems causing the delay. The Respondent confirmed that he was attending counselling and finding it beneficial. One of the recommendations accepted by the Competency Committee was that the Respondent continue counselling to deal with problems concerning motivation, time management, procrastination, avoidance and delay as long as necessary.

[11] On September 10, 2003, the Respondent was one of the agenda items on the Practice Standards Committee agenda after a LOMAS review had been conducted of the Respondent's practice by a staff lawyer on July 25, 2003. The Practice Standards Committee agreed to accept all of the recommendations contained in the report including the need for a practice supervisor and acceptance of the Respondent's undertaking to only practice in the area of criminal law.

[12] Some of the recommendations set out in the LOMAS report dated July 25, 2003 relevant to these proceedings were:

1. Continue with counselling with Dr. Ancill and Keith Saunders to assist you with motivation, time management, procrastination, avoidance and delay.
2. Undertake to restrict your practice to criminal law only. For the reasons stated in this Report, you should be getting rid of your 2 other files (1 each of family and personal injury).
4. Arrange for a Practice Supervisor acceptable to the Law Society to assist you with setting up and maintaining systems, setting appropriate set fees for your work and collecting them ahead of time, billing in a timely way and keeping your files on track.
11. There should be a Follow-up Practice Review after the 4th quarterly report from your Practice Supervisor.

[13] Both counsel suggested that a reprimand plus a fine and other conditions would be an appropriate penalty in the circumstances. It was suggested that a fine in the \$2,000.00 to \$2,500.00 range would be appropriate.

[14] Tab 14 of the Agreed Statement of Facts is a letter dated January 12, 2004 addressed to the Law Society of British Columbia from Dr. Raymond D. Ancill, a psychiatrist, with whom the Respondent has been consulting. Portions of Dr. Ancill's letter read as follows:

" I did receive a referral from Mr. Derksen's GP (Dr. Gary Heffner) and first assessed Mr. Derksen on the 15th of October 2002. I have seen him on 6 subsequent occasions, most recently on the 6th of November 2003 and will be continuing to see him on a regular basis. He is also seeing a psychologist, Dr. Keith Sanders.

I am please (sic) to inform you that Mr. Derksen has been diligent and compliant with treatment. Inasmuch as his procrastination behavior was mediated by anxiety, this has responded well to treatment.

I should point out that his level of procrastination and lack of decisiveness, at least from my psychiatric perspective, does not represent a significant psychiatric or personality disorder and is within the expected range of many professionals that I treat."

[15] At or about the time that the Respondent failed to pay his professional liability insurance fee due June 30, 2003, he was being garnished by the provincial and federal governments for GST, employee remittances, and PST.

[16] Apparently, not knowing how the regulation of the practice of law works, Canada Customs & Revenue Agency sent a demand for payment to the Law Society of British Columbia regarding the Respondent for the amount of \$19,478.12. This was received by the Law Society of British Columbia on April 11, 2003.

[17] The Respondent received a letter dated May 7, 2003 from the Department of Audit and Investigations of the Law Society indicating that they had received three letters from Canada Customs & Revenue Agency dated April 9, 2003 advising of the Respondent's Requirements to Pay in the amounts of \$19,478.12; \$7,430.11 and \$13,939.88 which were referred to as judgments against the Respondent.

[18] After receiving correspondence from the Law Society on May 29, 2003, July 18, 2003, July 31, 2003, and August 27, 2003, the Respondent forwarded a cheque to the Law Society dated August 31, 2003 payable to the Law Society in the amount of \$1,016.50 representing the second insurance instalment in the amount of \$802.50 and his late filing fee for his Form 47 report in the amount of \$214.00, both of which were due by June 30, 2003. The Respondent's cheque was subsequently returned without being cleared by the bank.

[19] On September 24, 2003, the Law Society wrote to the Respondent advising him that he must immediately cease the practice of law and surrender his practicing certificate as the second insurance instalment payment was still outstanding. On September 26, 2003, the Respondent obtained a bank draft payable to the Law Society in the amount of \$1,100.00 and delivered it to the Law Society officers on September 26, 2003.

[20] The Respondent's rationale for not paying his insurance was that all of his fee accounts to the Legal Services Society had been garnished by the government and, accordingly, he had no money to pay his practice fee insurance.

[21] Mr. Harris, on behalf of the Respondent, wisely indicated that there is no excuse for not paying one's professional liability insurance. Mr. Harris suggested that the money could have been found by taking an advance on a credit card, borrowing the money in another fashion, or scraping the money together some how in order to continue one's insurance. This Panel respectfully agrees with the comments made by Mr. Harris on behalf of the Respondent and sees this as a militating circumstance against the Respondent rather than a mitigating one.

[22] The Panel in *Brian Maurice Legge*, [2004] LSBC 02, characterized the failure to remit PST and GST as a breach of trust. This Panel agrees with that characterization. Mr. Legge was also found guilty of breach of Law Society Rules and professional misconduct in all counts in two citations which involved:

- Allowing substantial trust shortages to occur in client files and to continue for long periods of time
- Failure to report trust shortages to the Law Society
- Many breaches of Law Society Rules relating to trust and general accounts

- Failure to serve clients in a conscientious, diligent and efficient manner
- Failure to acquire and maintain adequate knowledge to conduct a real estate practice
- Failure to remit collected GST and PST
- Failure to remit employee income tax source deductions

[23] While the facts in the instant case are not nearly as egregious as the facts in the case of *Legge*, it should be noted that the Panel in *Legge* thought the appropriate penalty an eight month suspension.

[24] Cases provided to the Panel for a suggested range of fines evidence a range between \$0.00 and \$2,500.00. This Panel would agree that a fine on the high end of this range would be appropriate were it only meant to cover counts 1 and 3, and were it not for the fact that the Respondent was so deliberate about not paying his professional liability insurance over the course of months and then when he did attempt to pay it the first time it was with a cheque that did not clear the bank. This Panel views the conduct of not paying for his professional liability insurance when required and continuing to practice law without insurance as egregious. This conduct was aggravated by providing a cheque that would not clear the bank.

[25] The Respondent wrote a letter to the Law Society on September 16, 2003 part of which is set out as follows:

" You will have noted that the CCRA have been taking 100% of my Legal Aid billings since April 9, 2003. To date, they have taken over \$30,000.00. This has made it very difficult to obtain services of accounting professionals, pay various dues and premiums, pay rent and pay phone bills, etc. I have not dealt with CCRA in a timely fashion. On the other hand, the CCRA, through Mr. Stewart, have not even been able to tell me how much I am supposed to pay before they will release or vary the Requirement to Pay."

[26] The Panel was advised that the Respondent tried to find out exactly how much money was payable but was never provided an exact amount. Appended at Tab 18 of the Agreed Statement of Facts is an Examiner's Statement of Account from Canada Customs & Revenue Agency which shows after various debits for client's obligations, total arrears disclosed during examination, and monies received, there is a credit owing to the Respondent in the amount of \$6,971.38. Apparently CCRA will not return this credit to the Respondent.

[27] Both counsel were questioned as to the exact amount owing to the Government of Canada and to the Consumer Taxation branch of the Government of British Columbia but neither were able to provide exact amounts as none have been obtained, although they have been requested.

[28] Taking into account all of the mitigating and militating factors set out herein and the need for general and specific deterrence, this Panel orders as follows:

1. The Respondent be reprimanded.
2. The Respondent pay a fine totaling \$4,000.00 represented as follows: \$2,000.00 for Counts 1 and 3, \$2,000.00 for Count 4.
3. The Respondent will provide quarterly statutory declarations to the Law Society to coincide with his quarterly remittances of GST dated on the due date of his quarterly GST remittances commencing June 2004 to be received by the Law Society offices no later than ten days following the due date of the GST remittance reporting on monthly PST remittances, quarterly GST remittances and employee source deduction remittances; any practice debts incurred and the status of those practice debts from one report to the next up to and including the quarterly GST remittance for the month of March 2006. Also to

be included in the quarterly statutory declaration are the number of visits the Respondent has had with his psychiatrist or psychologist during that quarterly period with a final reporting letter from the Respondent's psychiatrist to the Law Society with the last statutory declaration advising as to the Respondent's progress through treatment for procrastination and anxiety.

[29] While the Panel is not making it a condition of the penalty, this Panel would strongly recommend and suggest that the Respondent remain in contact with the Lawyers' Assistance Program and seek assistance of the Lawyers' Assistance Program when any concerns arise regarding the Respondent's ability to stay focused on his practice.

[30] Lastly, the Panel was provided with a Bill of Costs on behalf of the Law Society totaling \$2,685.50 as follows:

Court Reporters' fees (one-half day) \$ 160.50

Panel fee (1 day or part) \$ 750.00

Counsel's fee for preparation and attendance

(14.2 hrs. @ \$125.00 per hour) \$1,775.00

[31] Costs are sought pursuant to Rule 5-9(0.1) which reads:

" A Panel may order that an Applicant or Respondent pay the costs of a hearing.and may set a time for payment."

[32] Pertinent to the Bill of Costs tendered by the Law Society is subsection 1 of Rule 5-9 which reads:

" (1) In calculating the costs payable by an Applicant or Respondent, the Panel or the Benchers may include part or all of one or more of the following:

(e) the Court Reporter's fee for attendance at the hearing;

(g) a fee of \$750.00 for each part or full day of hearing;

(h) reasonable fees and disbursements of counsel appointed under Rule 2-63 or 4-20;

(2) If the legal assistance used by the Society is provided by an employee of the Society, costs may be awarded for that legal assistance in the amount that would have been payable if the Society had retained outside counsel."

[33] The Rule regarding costs is completely discretionary.

[34] In response to the Bill of Costs tendered by the Law Society, Mr. Harris submits that no expenses regarding a multi-member Panel or multiple days of hearing were incurred as the Respondent consented to a one member Panel and the hearing took one-half day.

[35] This Panel has reviewed the Society's Bill of Costs and reduced same to \$1,410.50. The Respondent is to have the costs in the amount of \$1,410.50 plus the fine of \$4,000.00 paid no later than October 30, 2004.

[36] The Executive Director is instructed to record the finding of professional misconduct on the Respondent's professional conduct record. Publication is to be made to the profession in the normal course.