2006 LSBC 05
Report issued: January 24, 2006
Citation issued: August 24, 2005

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

Elmer Vernon Epp

Respondent

Decision of the Hearing Panel on Facts and Verdict

Hearing date: November 17, 2005

Panel: Ralston S. Alexander, Q.C., Chair, Dirk Sigalet, Q.C., G. Glen Ridgway, Q.C.

Counsel for the Law Society: Brian McKinley
Counsel for the Respondent: Jerome Ziskrout

Background

[1] The Citation in this matter was issued August 24, 2005. The Schedule to the Citation provides as follows:

> "You were bound by an undertaking contained in paragraph 3(j) of a Settlement Agreement executed by your client, J.M.J. on March 30, 2004, which required you to forward funds forthwith to S.P. Law Corporation "in trust" upon the occurrence of certain triggering events. You breached the undertaking in that the triggering events were completed on or about June 15, 2004 and you failed to forward the funds forthwith as required, contrary to Chapter 11, Rule 7 of the *Professional Conduct Handbook*."

[2] The Respondent was called to the bar of British Columbia in 1981 and has conducted a solicitor's practice since that time in Kamloops, British Columbia. The Respondent and the Law Society agreed upon a statement of facts with respect to the events which give rise to this citation.

[3] The Respondent represented the owner of a home in a dispute respecting its construction, while Lawyer C represented the contractor. On behalf of their clients, the Respondent and Lawyer C negotiated a settlement of the dispute. The agreement included the following provision:

> "3. The funds will be held in trust on the following conditions and undertakings:
>
> …
>
> (c) The Contractor will agree that, upon installation of the siding and gutters, it will provide all necessary documents for the Five Year (Water Penetration) and Ten Year (Structural) Warranties, as agreed. As noted, however, the Contractor does not take responsibility for water damage arising from damage to the "Big O" and membrane that was caused by the septic subcontractor.
>
> …

(f) Upon receipt of items 3a to 3d, Taylor, Epp & Dolder undertakes to forthwith forward $41,543.70 (payments 1a, 1b and 1c less amounts owing to Interior Plumbing and Heating), to Springford Patrick Law Corporation "In trust", for immediate release to the Contractor"

…

(g) Upon hook up of the in-floor heating and forced air furnace by Interior Plumbing and Heating, Taylor, Epp & Dolder undertakes to forthwith forward $5,946.79 to Springford Patrick Law Corporation "in trust", for immediate release to the Contractor;

…

(j) Upon installation of the siding and gutters, and receipt of proof of payment by the Contractor of $5,516.92 to Artic Renovations and $2,235.77 to Continuous Gutters, Taylor, Epp & Dolder undertakes to forthwith forward $9,452.94 to Springford Patrick Law Corporation "in trust", for immediate release to the Contractor."

These provisions were initially contained in lawyer C's letter to the Respondent of March 15, 2004.

[4] These Minutes of Settlement were executed by the clients of the Respondent and Lawyer C.

[5] By letter dated March 31, 2004, the Respondent forwarded to Lawyer C a trust cheque in the amount of $41,543.70 pursuant to paragraph 3(f) of the Minutes of Settlement, and did likewise, on April 27, 2004 with a cheque in the amount of $5,946.76 pursuant to paragraph 3(g).

[6] With respect to paragraph 3(j), Lawyer C informed the Respondent by e-mail and letter dated May 31, 2004, that Artic Renovations had been paid for the siding and by letter dated June 15, 2004 that the invoice from Continuous Gutters had been paid. Lawyer C requested that the Respondent fulfill his undertaking under that paragraph of the Minutes of Settlement by forwarding to her his trust cheque in the amount of $9,452.94.

[7] The Respondent replied the following day by indicating that his client was insisting the funds not be paid out until the new home warranty was in place and pointing out to Lawyer C that the Minutes of Settlement containing the undertaking were signed only by the clients.

[8] Lawyer C and the Respondent exchanged correspondence, the Respondent insisting that the payment of funds was conditional upon Lawyer C's clients providing the necessary warranty document and indicating further that it was not clear whether or not he was bound by the undertakings set out in the Minutes of Settlement.

[9] In his letter to Lawyer C dated June 16, 2004, the Respondent also indicated "we suggest that we submit all materials to the Law Society for a determination of whether or not the Respondent's law firm is bound by the undertakings contained in the Minutes of Settlement. If it is determined that those undertakings are binding we will, of course, comply."

[10] By letter dated June 17, 2004, the Respondent contacted the Law Society practice advisor to determine whether undertakings set out in the Minutes of Settlement signed between two parties constituted undertakings of a law firm, where those Minutes of Settlement are not signed by the lawyer.

[11] In this letter, the Respondent added a further inquiry not referenced in his letter to Lawyer C. He asked the practice advisor to determine if the undertaking has been "triggered" .

[12] The Law Society practice advisor indicated to the Respondent that he was in fact bound by the

undertaking contained in the Minutes of Settlement signed by his client and negotiated by the Respondent. He indicated to the Respondent that he would not advise as to whether or not the undertaking had been triggered.

[13] The Respondent responded to an inquiry by Lawyer C as to payment pursuant to the position taken by the Law Society practice advisor by saying "my client is taking the position that the undertakings have not been triggered. In my opinion, that is a defensible position."

[14] Lawyer C reported to the Law Society that it was her view that the Respondent was in breach of an undertaking. There followed an exchange of correspondence between the Respondent, Lawyer C and the Law Society with respect to the status of this undertaking. By letter dated March 10, 2005 the Respondent indicated "by way of further explanation, we have been instructed by our client not to send the money until the warranty is in place. While this may be inconsistent with what Lawyer C believes to be our undertakings, we are, nonetheless, required in this context, to advance any and all legitimate arguments which our client may have against my forwarding the monies."

[15] Law Society staff indicated to the Respondent on March 17, 2005 that they did not agree with the Respondent's interpretation of the settlement, and in particular, that the provision of the warranties were a precondition to the payment of the funds set out in paragraph 3(j). By letter dated May 25, 2005, Law Society staff indicated to the Respondent that the matter had been referred to the Discipline Committee.

[16] The citation which is the subject of this hearing was issued on August 24, 2005.

[17] The Respondent now admits that he was bound by the undertaking contained in the Minutes of Settlement paragraph 3(j) and that he breached his undertaking by failing to forward the funds forthwith upon receiving proof of payment, as set out in that undertaking.

Law Society Submission

[18] It is the position of the Law Society that the Respondent's conduct in breaching the undertaking in the circumstances set out above, amounts to professional misconduct.

Respondent's Submission

[19] It is the Respondent's position that his conduct does not amount to professional misconduct as he had an honest, albeit mistaken, belief in the propriety of his actions.

[20] The Respondent recognizes he was in error with respect to this matter. He now recognizes he is bound by an undertaking even though that undertaking is contained in a document which he did not sign, but which he negotiated. He also recognizes that the undertaking was triggered by the express terms of the Minutes of Settlement, namely the proof of payment of the two renovation accounts.

[21] He acknowledges that he was too close to his client and too focussed on arguments that he developed to absolve himself from fulfilling the undertaking. He advises that his client was not pressuring or pressing him on the issue.

[22] He now recognizes his reasons for not paying out were not rational, but he believed in them and emphasized his responsibility to his client as opposed to his obligations pursuant to an undertaking.

[23] It is the position advanced on his behalf that although he now recognizes he was wrong with respect to his obligations relating to this undertaking, this is nevertheless not professional misconduct, as his initial

belief that he was not bound by the undertaking, and that the undertaking had not been triggered were honestly held beliefs.

[24] The Respondent is a busy solicitor with a very successful practice in Kamloops. He has no record of misconduct history with the Law Society of British Columbia. He is very active in community affairs and is a positive contributor to life in Kamloops.

[25] His conduct was not deliberate, not negligent, and as such, is not discreditable so as to amount to professional misconduct. He wanted this matter sorted out and believed that Law Society staff were playing that role. When the citation was authorized, the Respondent immediately paid the funds to Lawyer C. He thought he was doing the right thing in seeking advice from Law Society staff, although he now recognizes he should have perhaps sought the advice of independent counsel.

[26] The Respondent concludes his submission by saying that despite his conduct being unacceptable, his conduct does not amount to professional misconduct. Instead the Respondent submits that his conduct is deserving of a different resolution, as is authorized under section 38(4)(c) of the Act, namely that he be required to attend a Conduct Review.

Decision

[27] The *Professional Conduct Handbook*, Chapter 11, respecting the responsibility to other lawyers, provides at Rule 7 the following:

> "7. A lawyer must:
>
> a) not give an undertaking that cannot be fulfilled;
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> b) fulfill every undertaking given; and
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> c) scrupulously honor any trust condition once accepted.
>
> 7.1 Undertakings and trust conditions should be:
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> a) written, or confirmed in writing; and
>
> b) unambiguous in their terms."

[28] This Panel is mindful of the reasons for Judgment of J. A. Hollinrake in *Law Society of British Columbia v. Heringa* (2004) B.CJ. No. 377, 2004 B.CCA. 97 in approving this reasoning of the hearing panel's comments and in particular, these words:

> "Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertakings; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> The trust and confidence vested in lawyer's undertakings will be eroded in the circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and the trust in lawyers."

[29] When asked to provide the funds pursuant to the undertakings, the Respondent's initial response was to take the position, or imply the position, that he was not bound by the undertakings, as he had not signed the document containing the undertakings, even though he had negotiated and prepared the terms of that document with Lawyer C.

[30] He then indicated to Lawyer C, in his letter of June 16, 2004, that the matter should be forwarded to the Law Society for determination as to whether he was bound by the undertakings contained in the Minutes of Settlement. He indicated that should it be determined that those undertakings were binding, he would comply. In that same letter he suggested to Lawyer C that her clients expedite the warranty documents, and that the client had agreed to do that forthwith, and that forthwith should have the same context with respect to the provision of documents as it would with respect to his payment of funds.

[31] It should be noted that the Respondent previously paid out funds pursuant to paragraph 3 of the Minutes of Settlement without the warranty documents being a condition precedent to that payment.

[32] In his letter of June 17, 2004 to the Law Society, the Respondent asked for direction as to whether the undertaking is binding, but also asked for direction as to whether or not the undertakings have been "triggered" . He has added another dimension to his initial position with respect to the binding nature of the undertakings.

[33] The Respondent was told on or about June 16 or 17, 2004, that the undertaking in the Minutes of Settlement was in fact binding upon him, and that the Law Society would not determine whether the undertaking has been "triggered" .

[34] We note that in his letter of August 11, 2004, in response to Lawyer C's complaint of breach of undertaking that the Respondent still raises the issue of the binding nature of an undertaking which is contained in Minutes of Settlement not signed by the lawyer. In that letter, under issues, he comments:

> "When Minutes of Settlement set out the undertakings by a lawyer, are those undertakings binding upon the lawyer when the lawyer has not executed those Minutes of Settlement?
>
> This question must be answered in the context of all the communications between the respective solicitors. In the context of the communications between myself and (Lawyer C), it would appear that the undertakings contained in the Minutes of Settlement could be binding upon me, notwithstanding that I have not signed those Minutes of Settlement. I myself have not done any research on this matter" .

He then goes on to question if indeed those undertakings are binding upon him and have they been triggered.

[35] In the context of the exchange of correspondence, the Panel cannot accept that the Respondent held an honest belief that his actions were appropriate conduct in light of the undertakings. His conduct did not measure up to the conduct necessary for lawyers in observing undertakings.

[36] The Respondent's actions first in holding that he was not bound by the undertaking and second that the undertaking had not been "triggered", appear naturally to be the conduct of a lawyer in advancing arguments on behalf of a client in an attempt to avoid the obligations set out in Chapter 11, Rule 7 respecting the observance of undertakings. The clear appearance of the Respondent's conduct is the use of technical arguments to avoid or attempt to avoid the requirements of the undertaking. This is far different than the obligation to scrupulously honor an undertaking.

[37] The Respondent's conduct in these circumstances amounts to professional misconduct.