2004 LSBC 32
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The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

PETER WALLACE HAMMOND

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: August 19, 2004

Panel: Ralston S. Alexander, Q.C., Chair, Margaret Ostrowski, Q.C., June Preston (Lay Bencher)

Counsel for the Law Society: Maureen E. Baird, Grace Lai (Articled Student)
Counsel for the Respondent: Christopher E. Hinkson, Q.C.

Background

[1] On June 2, 2004, this Panel found that the Respondent had professionally misconducted himself in respect of 15 counts of a 20 count citation issued by the Law Society on October 1, 2003. Of the 15 counts upon which a finding of professional misconduct was made, six counts related to the failure of the member to respond to inquiries from the Law Society, four counts dealt with breaches of undertaking by the Respondent, one count was in respect of the Respondent's failure to report a Judgment against him to the Law Society, one count was in respect of the unauthorized practice of law by the Respondent, one count was in respect of the failure of the Respondent to remit tax withholdings deducted from employees, and two counts of the citation were in respect of the member's misappropriation of client funds.

[2] The facts upon which these findings were made are set out in our decision on Facts and Verdict. We will not repeat the facts in this decision as they are fully canvassed in our earlier Reasons on Facts and Verdict.

Submission of the Law Society

[3] The Law Society urged that the two findings of misappropriation were enough by themselves, to warrant a disbarment of this Respondent. The Law Society argued in the alternative that the totality of findings against the member, including the misappropriations, the breaches of undertaking, and the failure to remit tax " trust" funds demonstrated a pattern of behaviour such that the only proper penalty to protect the public would be the disbarment of the member.

[4] The Law Society outlined three categories of cases in which misappropriation occurs in the practice of a member: firstly, where a member misappropriates funds, but replaces them; the second where a member misappropriates funds, but tenders an admission of professional misconduct in respect of that misappropriation. Neither of those first two circumstances are before us. The third situation in which a

member misappropriates funds, according to the Law Society's analysis, is where the funds are misappropriated and used for the member's personal use.

[5] The Law Society noted that in the first two instances of misappropriation, members are generally subjected to lengthy periods of suspension, but that in the third category, absent " very compelling mitigating circumstances," the misappropriating member is generally disbarred. The Law Society argues that no mitigating circumstances are present in the case of this Respondent.

[6] The Law Society relied upon the cases of *LSBC v. Peter*, 1999 LSBC 38, and *LSBC v. Kierans*, 2001 LSBC 6, in support of its argument for a disbarment of this member.

[7] The Law Society noted that it was not an isolated instance of misappropriation, with the first event occurring in June of 2001, while the second occurred in or about February of 2002. The Law Society relied upon the case of *Bolton v. The Law Society,* 1994, 2 All ER, 486 (CA).

[8] The Law Society argued that the four counts of breaches of undertaking were a serious matter and again, noted that they were not isolated incidents. The Law Society argued that the Respondent's regular breaches of undertaking indicated a disregard by him for the ethical principles which govern the conduct of lawyers. The Law Society observed that undertakings are sacred, must be protected and that breaches of the same must be treated with significant penalty.

[9] The Law Society argued that the member's failure to respond to communications from the Law Society suggested a total disregard for that Society's authority as a regulator of the Respondent in his practice.

[10] The Law Society noted that the Respondent had undergone three Conduct Reviews. The first of these Conduct Reviews dealt with a breach of undertaking and a failure of the Respondent to reply promptly to communications from the Law Society. The second Conduct Review noted the Respondent's failure to report a Judgment to the Law Society, and the third Conduct Review was in respect of a breach of undertaking in a real estate transaction. The Law Society drew a parallel between the subjects of the three Conduct Reviews and the matters which are before this Hearing Panel.

Submission of the Respondent

[11] Counsel for the Respondent began by providing an historical overview of the circumstances leading to the lapse of the Respondent's membership in the Law Society which occurred with effect from December 31, 2002. He described the difficult circumstances in which the Respondent found himself in the fall of 2002. His practice had been the subject of an extensive audit by the Law Society and, in the words of Counsel, the Respondent " was barraged with inquiry after inquiry from the Law Society, some of which he responded to for a period of time, until the burden of the inquiries became overwhelming for him."

[12] With respect to the six findings of the Respondent's failure to respond to the Law Society, his Counsel submitted that the Respondent had co-operated and not required the Law Society to the prove the circumstances underlying those failures. He suggested that the Respondent's failure to reply to the Law Society was demonstrative of his unconditional surrender to a situation that had overwhelmed him in the face of his disintegrating practice.

[13] With respect to the breaches of undertaking, he suggested that his failure to deal with the matters, as the undertaking required him to do, was indicative of the state of his practice and the level of assistance he was receiving.

[14] With respect to the failures to report and pay the Judgment to which he was subject, and the failure to remit employee tax withholdings, he argued that they were merely a manifestation of the Respondent's failing practice.

[15] Counsel referred to a number of previous decisions where members who had failed to respond to the Law Society had received modest penalties, including fines and costs. In particular Counsel referred us to the cases of *Carol Fay Bennett* (89/7), *Douglas Steven Cunliffe* (94/6), *Jonathan Bruce Paine* (94/14), and *Leon Thomas Finkelstein* (99/03).

[16] Counsel for the Respondent described the two misappropriation findings in language of " Mr. Hammond taking his fees, funds which this Panel has found he was not entitled to take" . He then suggested that the magnitude of financial difficulties facing the Respondent reduced to a minimum nature the approximately $5,000.00 of funds misappropriated, as those funds " could not possibly have made any significant impact on Mr. Hammond's financial circumstances" . He suggested that the misappropriations are not the deliberate and egregious types of misappropriation that lead inexorably to the penalty sought by the Law Society.

[17] Counsel for the Respondent referred this Panel to cases involving *Ralph Harry Long* (89/2), *Thomas Leslie Spraggs* (94/2), *Renate Andres-Auger* (94/11), *Michael Murphy Ranspot* (97/9), and a second decision involving *Jonathan Bruce Payne* (99/31). In each of these cases, argued the Respondent, there was an element of either misappropriation, or questionable fee billing practices, and in any event, various breaches of Law Society rules.

[18] Counsel for the Respondent sought to characterize the various circumstances of professional misconduct as being, at least in part, the result of the Law Society's intense scrutiny of the Respondent and noted that the unrelenting nature of the audit inquiries added to the enormous stress under which the Respondent was practicing. He finally argued that the Respondent should be provided a period of suspension and be given credit for " time served" , representative of the fact that the member has been out of practice since January 1, 2003.

[19] The Respondent introduced several letters of reference which were provided in support of the member.

Discussion

[20] The Panel has considered all of the submissions of the Law Society and of Counsel for the Respondent. We have carefully reviewed the various decisions of previous panels of Benchers to which we have been referred.

[21] The Panel has considered letters of support provided by former colleagues of the Respondent. Theses correspondences must be accorded a relatively modest weight in these proceedings as they are from colleagues who worked with Mr. Hammond in the early 1990's. No letters of reference were provided in respect of members of the Bar who were working with the Respondent or in his same community at the time he ceased his practice.

[22] Additionally, the letters of support must be read in the context of the facts that were provided to the parties providing the letters. While they did receive a precis of the circumstances and outcome of the Respondent's citation, the 37 page Judgment of this Panel was reduced to a summary of a single page for the purposes of informing the referees of the relevant facts. It is likely that recipients of the correspondence did not develop a complete appreciation of the circumstances surrounding the findings of professional misconduct.

[23] We are mindful of the requirement imposed upon the Benchers of the Law Society by Section 3 of the *Legal Professional Act* which requires that the legal profession be governed in the best interests of the public. We note in Gavin MacKenzie's publication " Lawyers and Ethics: Professional Responsibility and Discipline" (Carswell, 1993) under the general heading Purposes of Discipline Proceedings, the following

appears:

> " The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. In cases which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. If a lawyer has committed a criminal offence, it is for the criminal courts, not the legal profession, to inflict punishment. All sanctions necessary have punitive effects, which are tolerable results of the protective and deterrent functions of the discipline process. The goals of the process are, nevertheless, non-punitive.
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> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practice will be terminated regardless of extenuating circumstances and the probability of reoccurrence. If the lawyer misappropriates a substantial sum of client's money, that lawyer's right to practice will almost certainly be determined, for the profession must protect the public against the possibility of a reoccurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.
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> Thus, in a 1985 decision of (Re Millrod) a Discipline Hearing Panel in Ontario recommended that a lawyer who had been found guilty of misappropriation be disbarred notwithstanding evidence that he satisfied the panel that he was a man who for 17 years had an unblemished record, who placed service to his clients ahead of personal gain, who was a good father and a respected member of his community, and who acted at a time when he was under considerable financial and emotional stress." The panel's reason:
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> > " The Society cannot countenance theft and fraud by its members, and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities; experience shows that the penalty attends the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career."

[24] We note that the references to cases dealing with a member's failure to respond, when examined in isolation, are not particularly helpful as it is likely that the penalty for failure to respond to the Law Society will be a lesser penalty than the penalty exacted for a breach of undertaking. Similarly, the decisions with respect to a penalty for a breach of undertaking as a stand alone matter will not be helpful in guiding a Panel's penalty determination when that breach of undertaking is combined with misappropriations.

[25] A careful review of the authorities with respect to instances of misappropriation which did not lead to disbarment indicates that in each such case there were exceptional circumstances. In *Long*, the Hearing Panel determined that the misappropriation was not a theft, but was instead another instance of the member's pattern of conflict of interest in dealing with his client's affairs and should be placed in context as such for the purpose of imposing a proper penalty. The Panel appeared to be swayed in its determination by the member's impressive record of public service as testified to by character witnesses and in letters of reference.

[26] The case of *Andres-Auger* is difficult to reconcile, save for a finding by the Panel that the member did not act dishonestly or fraudulently. It is also to be noted that the case is 10 years old, occurring during what might be characterized as " kinder gentler days" . The member appeared to be acting with aggressive disregard of the accounting rules of the Law Society and the Panel found that her neglect and inattention constituted a sufficient demonstration of negligence to justify a finding of misappropriation.

[27] Mr. Ranspot was found to have rendered fraudulent accounts to the Legal Services Society, but it was noted in his circumstances that his conduct over the period of time in question was aberrant behaviour for him, that he was undergoing depression and was suffering extreme psychological stress due to the breakdown of his marriage.

[28] With respect to Mr. Payne's misappropriations, the Panel found he was suffering from depression, that he had failed to direct his mind sufficiently to his trust obligations, that he had a belief that he was entitled to the funds, and that he was subsequently hospitalized for his depression. The impugned matters took place in the latter part of 1994, the citation was not issued until February 1997, and Mr. Payne was in any event, throughout this entire period of time, living in Ontario and not practicing Law.

[29] In each of the cases to which we have been referred by Counsel for the Respondent where a misappropriation did not lead to a disbarment there was an explanation from the Panel as to why disbarment was not the appropriate penalty. In each such case an unusual characteristic of the circumstances was highlighted and relied upon by the Panel. In the circumstances of this Citation we have no evidence of depression and no substance abuse issues of which we are aware have arisen.

[30] The Respondent seeks to affix responsibility for his difficulties, at least in part, upon the fact of an aggressive Law Society audit of his practice that was under way during part of the material time. It was acknowledged that the audit by the Law Society was both necessary and justified. The other target for the difficulties suffered by the Member is the poor staffing complement that was available to the Respondent at the end of his practice days. These explanations do not address the underlying moral deficiencies that have been identified in our decision on Facts and Verdict and are not in any way a meaningful answer to the breach of undertaking circumstances, the multiple failures to respond to Law Society inquiries, and the misappropriation events.

[31] There are two characteristics of the findings we have made in this matter which are not replicated in any of the authorities to which we were referred by Counsel.

[32] The first distinguishing characteristic is that in the case of this Respondent, there are no mitigating circumstances. We are properly cautioned by Counsel for the Respondent that we can draw no negative inference from the fact that the Respondent did not testify in his own defence. We have taken care to ensure that no negative inference is drawn by us from that fact.

[33] It is, however, obvious that in the absence of evidence from the Respondent or from others on his behalf, that we can have no evidence of mitigating circumstances to explain the troubled behaviour of the Respondent. We have no mitigating facts before this Panel and we accordingly must analyze the facts of this case without any ameliorating considerations as to what might have caused this conduct by the Respondent, including that we have no information as to his intent in the circumstances.

[34] The second circumstance of this case which is not seen in any of the authorities, is the sheer volume of circumstances. While the two misappropriation findings are significant and persuasive by themselves, the four separate counts of breach of undertaking are equally significant, as is the finding that the member steadfastly, repeatedly, and habitually refused to respond to inquiries from the Law Society when that Society was seeking to determine answers with respect to particular complaints before the Law Society.

[35] It cannot be overlooked that the Respondent used for his own purposes monies that were held by him in trust for the Federal Crown in the nature of deductions from employees for income tax and other withholdings. This is a serious breach of trust and it may be more than that. There are criminal sanctions for converting public funds to private uses. This count of the Citation was neither controverted nor explained. It is not appropriate for a member of the Law Society to be seen to be using tax withholdings for private

purposes and we must respond aggressively whenever such conduct comes to light.

[36] The fact of the previous Conduct Reviews in respect of breaches of undertaking and failures to respond to the Law Society reinforces the view that this Respondent appears to be incapable of regulating his affairs in such a way as to be a responsible and appropriate member of the Law Society. In each of the Conduct Reviews, the seriousness of the behaviour was noted, regretted, and promises of remediation were made by the Respondent. To the contrary, however, the behaviour did not improve, but instead deteriorated dramatically to the point where, in the words of his own Counsel, the practice of the member was disintegrating.

[37] There is no public interest served in restoring this member to a position where his practice can again disintegrate to the detriment of the various clients he would be serving at that time. The public's perception of the Law Society's role as a self-regulating profession can only be preserved if we are seen to treat appropriately with members who conduct their affairs in such a way as to exhibit disrespect for the regulatory authority of the Law Society. The totality of the correspondence to which there have been no responses is in the dozens. We have no reasonable belief that this approach to Law Society communications will change.

[38] As to the misappropriations, we take pains to distinguish the language used by Counsel for the Respondent in his characterization of the events. We found that the Respondent had misappropriated to his own use funds which belonged to his clients. We specifically noted in our reasons on Facts and Verdict that the Respondent had no entitlement to the money on account of fees for legal services provided. We found that no legal services had been provided to justify the payment to the Member of the monies that he held in trust. The moneys taken by this device amounted to a direct misappropriation of client's money and for those acts, there is but one penalty outcome, absent extraordinary extenuating circumstances. We have noted above the absence of extenuating circumstances. We particularly note that the argument " that the magnitude of the misappropriation could not have a meaningful impact on the financial difficulties facing the member" is of no persuasive value. It is surely the case that the test of whether a misappropriation is worthy of sanction is not based upon the extent to which the outcome of the theft will improve the plight of the thief.

[39] We are taken by the cumulative totality of these events. There is a cascading accumulation of professional misconduct and we are satisfied that the public interest can only be protected if this member is disbarred, and we order accordingly.

Costs

[40] The issue of costs is one of some difficulty, as the Law Society was not entirely successful in its prosecution of this Citation. While we were urged to consider the contrasting hourly rates of Ms. Gossen who appeared for the Law Society at the initial hearing and of Mr. Hinkson who appeared throughout, this Panel declined that invitation. We will instead take Mr. Hinkson's point, that some part of the attention spent by Counsel and the Panel was devoted to matters which were not ultimately proven to the satisfaction of this Panel.

[41] We find all of the proposed costs with respect to the August 19, 2004 hearing to be appropriately charged. We find the inclusion in the Bill of Costs of the audit report, Court Reporter's attendance and transcript, both to be properly included. We will reduce the Law Society Counsel fee at the initial hearing by approximately one-third to reflect the fact that some of that energy was misdirected. Accordingly, we fix that Counsel fee in the sum of $8,000.00, reduced from $12,375.00. The total costs which are therefore ordered to be paid to the Law Society by the Respondent are the sum of $ 22,429.70.