

2005 LSBC 25

Report issued: June 2, 2005

Citation issued: May 3, 2004

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

Richard Hendery

Respondent

Decision of the Hearing Panel

Hearing date: April 5, 2005

Panel: Gordon Turriff, Q.C., Single Bencher Panel

Counsel for the Law Society: Brian McKinley

Counsel for the Respondent: David Fredricksen

[1] Mr. Hendery admits:

- (a) to having failed to register as a provincial " vendor" as required by the *Social Service Tax Act*;
- (b) to having failed to charge, collect and remit provincial Social Service tax and federal Goods and Services tax at various times from June 1992 until October 2003; and
- (c) to having failed in 2003 to maintain his books, records and accounts in accordance with the Law Society Rules.

[2] As a single bencher, and by consent, I presided over the hearing of the citation dated May 3, 2004. At the hearing, the schedule to the citation was amended by consent to delete the phrase " and thereby breached a statutory trust" in the two places in which the phrase had appeared in the citation as originally drafted. An Agreed Statement of Facts was introduced and marked as Exhibit 1. The text of that statement, without the attachments (which are part of the record), is appended to these reasons.

[3] After counsel for the Law Society outlined the Agreed Facts, I heard the evidence adduced for Mr. Hendery, including his own testimony, and had the benefit of short submissions by counsel. I determined that all the allegations made against the Respondent had been proved and that he had committed professional misconduct. I then heard submissions on penalty and reserved judgment, saying that counsel had left me with an interesting problem, which was to fix a penalty which would encourage lawyers to register and remit taxes as required and at the same time encourage them to fall on their swords as Mr. Hendery had done.

[4] I am not going to try to reconcile the penalty decisions that counsel brought to my attention because they are not obviously reconcilable, as one would expect when varying circumstances must be taken into account. After consideration of helpful submissions from counsel on both sides, after consideration of the authorities and after reflection, I am satisfied that the appropriate omnibus penalty is:

- (a) that Mr. Hendery pay a fine of \$2,000.00, the amount to be paid within 18 months of June 1, 2005;

(b) that Mr. Hendery pay costs of \$2,500.00, the amount to be paid within 24 months of June 1, 2005;

(c) that Mr. Hendery provide two years of quarterly reports, as proposed by Mr. Fredricksen in his written argument, the first such report to be provided by June 30, 2005 or by such other date before August 31, 2005 as may be agreed by counsel; and

(d) that Mr. Hendery provide a report on each of April 1, 2006 and April 1, 2007, again as proposed by Mr. Fredricksen, confirming that Mr. Hendery is abiding by all Law Society accounting rules.

[5] The fine I have fixed is more than Mr. Hendery hoped to have to pay and the costs are, perhaps, less than the Law Society would want him to pay. The fine is higher because the misconduct persisted over a long period of time. Fortunately Mr. Hendery did the right thing in the end by making a clean breast of it but he ought to have done so much sooner than he did. The costs are lower because Mr. Hendery has admitted his guilt, thereby lessening to some extent the burden of the work required to complete the prosecution. But it must also be remembered that the Law Society had to incur the expense of the audit about which Ms. Fairburn reported on October 30, 2003 (Tab 2 of the Agreed Statement of Facts). Plainly, on the evidence of his practice circumstances, Mr. Hendery needs the time to pay I have given him.

AGREED STATEMENT OF FACTS

1. Richard Roy Hendery was called to the Bar in Nova Scotia on January 10, 1975. He was later called to the Bar in British Columbia on January 9, 1987.

2. Mr. Hendery has continually practiced law as a sole practitioner in British Columbia from 1987 until the present. From 1998, he has practiced law on a part-time basis.

3. By letter to the Ministry of Finance and Corporate Relations, Consumer Taxation Branch dated October 1, 2003, Mr. Hendery disclosed that he had not registered as a vendor under the *Social Service Tax Act*, since June 1, 1992. Mr. Hendery sent a copy of that letter to The Law Society of British Columbia on October 2, 2003. [Attachment 1]

4. In his letter to the Ministry of Finance, Mr. Hendery admitted that he had opened 115 private client files which were not exempt from provincial sales tax (PST) between June 1, 1992 and the date of his letter. He admitted that on those files he had either not collected PST, he had collected PST but used the funds for other purposes, or he had collected PST and he was still holding the funds. Mr. Hendery also disclosed that he had failed to remit some goods and services tax (GST) to the federal government.

5. On October 2, 2003, Mr. Everett, Q.C., Chair of the Discipline Committee, made an Order pursuant to Rule 4-43 of the *Law Society Rules* authorizing an investigation of the books, records and accounts of Mr. Hendery. On October 16, 2003, Ms. Adrienne Fairburn, a Certified General Accountant, conducted an investigation of Mr. Hendery's books, records and accounts. She provided an Audit Report on October 30, 2003. [Attachment 2]

6. Mr. Hendery wrote to the Ministry of Finance on October 23, 2003 with a copy to the Law Society of B.C. He attached a spreadsheet to his letter detailing all revenue earned by him from June 1992 to October 2003. In that letter, he acknowledged that he was responsible to pay GST and PST which he had collected but failed to remit. [Attachment 3]

7. The Law Society forwarded a copy of the Audit to Mr. Hendery on November 25, 2003 for his

comment. In a letter dated December 21, 2003, Mr. Hendery agreed with many of the findings in the Audit Report [Attachment 4]. In his letter, Mr. Hendery admitted:

“ There was a time when I used tax money for my own expenses. I breached a statutory trust. I also breached a duty to my clients to pay the tax as required by law. ... ”

8. Mr. Hendery registered as a vendor pursuant to the *Social Service Tax Act* on October 10, 2003. He provided a copy of his registration certificate to the Law Society of British Columbia with the letter dated December 21, 2003. [Attachment 5]

9. By letter dated January 31, 2004, Mr. Hendery provided the Law Society with copies of an assessment of the Minister of Provincial Revenue. That assessment indicated that he was required to pay \$6,439.35 to cover PST collected during the period from November 1, 1997 to July 31, 2003. In his letter, Mr. Hendery indicated that he had made a payment of \$500 on January 31, 2004 and that he had a reasonable expectation to eliminate the PST arrears and refund all clients by the end of 2004. [Attachment 6]

10. By letter dated October 1, 2004, Mr. Hendery provided the Law Society with correspondence between the Canada Customs and Revenue Agency and himself over the GST arrears. He stated in his letter that he calculated that he should owe CCRA \$4,142.49, but they have indicated that he owes them \$20,682.35. In his letter, Mr. Hendery indicated that he would confirm with CCRA the correct amount owing and would try to work out a schedule of payments with them. [Attachment 7]

11. In October of 2002, Mr. Hendery collected \$974 in fees from a client (S.S.) on a criminal matter, but failed to charge and collect GST and PST from the client. This oversight was pointed out to Mr. Hendery by Adrienne Fairburn during her investigation into Mr. Hendery's books and records. Mr. Hendery acknowledged that he had failed to charge and collect both PST and GST on those billings and agreed to immediately rectify the oversight.

12. Between June 1, 1992 and October 1, 2003, Mr. Hendery did not register as a vendor with the Consumer Taxation Branch of the Ministry of Finance, as required by the *Social Service Tax Act*.

13. Between June 1, 1992 and October 1, 2003, Mr. Hendery collected funds from clients for the payment of PST. He failed to hold some of those funds for remittance, and he failed to remit those funds in payment of PST as required by the *Social Service Tax Act*. Between December 31, 1997 and July 31, 2003, the funds collected by Mr. Hendery for PST which he did not remit totaled \$5,046.45.

14. Between May 1, 1996 and October 31, 2003, Mr. Hendery collected funds from clients for the payment of GST. He failed to hold some of those funds for remittance, and he failed to remit some of those funds in payment of GST as required by the *Excise Tax Act*. For that time period, the total amount of GST collected but not remitted by Mr. Hendery is not certain. Mr. Hendery has calculated a total of \$4,142.49.

15. In 2003, Mr. Hendery failed to maintain his books, records and accounts in accordance with part 3, division 7 of the *Law Society Rules*. In particular:

(a) Mr. Hendery failed to add and balance each Trust and General cash book at least monthly, as required then by Rule 3-64. On October 16, 2003, his Trust cash book covering the period from April 9, 2003 to October 9, 2003 had not been added and balanced, and his General cash book covering the period August 15, 2003 to October 3, 2003 had not been added and balanced;

(b) Mr. Hendery did not maintain an accounts receivable ledger or any other suitable system to

record statements of accounts issued, transfers from the Trust account, receipts from or on behalf of a client and the balance owing, as required by Rule 3-61(1)(b);

(c) Mr. Hendery did not prepare Trust reconciliations for June, July and August 2003 within 30 days after the effective date of the reconciliations, as required by Rule 3-65(4). Those Trust reconciliations were prepared in October 2003.

16. Mr. Hendery admits that his conduct in:

- a. failing to register as a vendor under the *Social Service Tax Act*,
- b. failing to charge and collect PST and GST on a client' s billings,
- c. failing to hold and remit funds collected for PST and GST, and
- d. failing to maintain his books, records and accounts in accordance with the *Law Society Rules*,

all constitute professional misconduct.