

2004 LSBC 23

Report issued: July 7, 2004

Oral reasons: June 17, 2004

Citation issued: February 12, 2003

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

TIMOTHY JOHN HORDAL

Respondent

**Decision of the Hearing Panel
on Penalty**

Hearing date: June 17, 2004

Panel: Patricia Schmit, Q.C., Chair, Gavin Hume, Q.C., Terence La Liberte, Q.C.

Counsel for the Law Society: Jean Whittow, Q.C.

Counsel for the Respondent: Jerome Ziskrout

[1] A hearing was held on June 17, 2004, in which an Agreed Statement of Facts was filed and upon which this Panel made a finding that the Respondent had professionally misconducted himself, in that he breached an undertaking and made certain false representations to another member of the Law Society.

[2] In this decision we will not repeat the details of the citation except to note this. The Respondent could have avoided the present consequences by waiting until he had confirmed he was released from the undertaking, before registering a Release. He compounded the problem by making false representations to the lawyer who had placed him on the undertaking, which representations were intended to leave that lawyer with the impression that he could still fulfil the undertaking, while he waited for his client to fix the problem.

[3] The Respondent is an experienced member of the Law Society of British Columbia, having been called to the Bar on June 30, 1976.

[4] At all material times the Respondent practiced in a solicitor's practice with the firm Wilson & Co. in Abbotsford, B.C.

[5] The Panel was directed by counsel for the Law Society to one other matter involving the Respondent with the Law Society. That matter is a Conduct Review conducted January 10, 2001. The Conduct Review involved an incident where the Respondent, acting for the vendor of property, received purchase monies and accepted an undertaking from another member, to pay out and discharge among other items, a number of claims of Builders' Lien and related Certificates of Pending Litigation. At the time the Respondent accepted the undertaking, he did not have in his possession or control the means to fulfil the undertaking. Instead, he was relying on his client's undocumented assertion that the client had delivered a 21 day notice to the lien claimant and that no Certificate of Pending Litigation had been registered within the 21 days. As it turned out, the client had attempted to use the 21 day notice procedure but had incorrectly delivered the 21 day notice to the wrong address.

[6] Notwithstanding his lack of control, the Respondent paid the net sale proceeds to his vendor client the same day he received them, retaining insufficient funds to pay the potential Builders' Lien claims.

[7] Once this happened, the Respondent had no means to compel his client to deal with the matter and so the matter dragged on. The solicitor for the purchaser made frequent requests for information but the Respondent did not respond or did not do so properly, until the solicitor for the purchaser reported the matter to the Law Society. The members of the Conduct Review Subcommittee found that while there were options open to the Respondent to deal with the matter, he chose to temporize while encouraging his client to make a settlement with the Builders' Lien claimant.

[8] Among other things, the Conduct Review Subcommittee noted the following:

- a) the Respondent had been able, after a one year delay, to fulfil the undertaking;
- b) that the Respondent, when asked if he thought that he might find himself in the same difficulty, asserted that he would not again accept an undertaking in similar circumstances but would ensure that he had the power to carry out the undertaking before accepting it;
- c) the Respondent appeared to properly understand the extent to which he had failed to comply with Chapter 11 of the Professional Conduct Handbook.

[9] The Conduct Review Subcommittee recommended that no further action be taken against the Respondent.

[10] The Panel finds a disturbing similarity between the facts of the Conduct Review and the matter before us.

[11] Both illustrate the classic case of a lawyer making a mistake and then trying to cover it up and delay while he tries to fix the mistake.

[12] It appears that despite his assertion to the Conduct Review Subcommittee, the Respondent did not learn his lesson.

[13] To his credit, and to the credit of the Abbotsford area Bar, the Respondent has obtained and filed numerous letters of support from the lawyers practising in the same geographical area. The Panel found these letters very useful because:

- a) they are from practising members who deal with the Respondent in varying degrees;
- b) all the writers had received and reviewed the citation materials and Agreed Statement of Facts;
- c) many confirmed that they are confident in the good character of the Respondent and would rely on his undertakings in their dealings with him.

[14] The Panel notes that reference letters from persons who are not made fully aware of the circumstances that bring the member before it, are not very useful. That is decidedly not the case with this Respondent who has fulsome support from his colleagues.

[15] Section 38(5) of the *Legal Profession Act* mandates the range of penalty available to this Panel. The Panel must do one or more of the following:

- a) reprimand the Respondent;

- b) fine the Respondent an amount not exceeding \$20,000.00;
- c) impose conditions on the Respondent's practice;
- d) suspend the Respondent from the practice of law or from practice in one or more fields of law for specified periods of time, with or without conditions as set out in section 38(5)(f);
- e) disbar the Respondent.

[16] Counsel for the Law Society urged this Panel to impose a penalty as follows:

- eight month suspension
- costs of \$7,500.00 based on the hearing day fee of \$750.00 and a ½ contribution to the Law Society's costs, with some discount due to the difference between outside counsel's rate and in-house counsel's rate

[17] Counsel for the Respondent urged this Panel to impose a penalty as follows:

- 1½ month suspension to commence August 7, 2004
- fine of \$10,000.00
- costs of \$5,000.00

[18] Both counsel directed the Panel to *In Re: Ogilvie* (Discipline Case Digest 99/25) and the factors set out therein relating to penalty.

[19] Counsel for the Law Society also cited cases involving circumstances where the member behaved in a misleading fashion. These cases included the following:

1. *In Re: Strandberg* - Discipline Case Digest 01/22, where the member had fabricated Small Claims pleadings and misled his client and the Law Society.
2. *In Re: Botting* - [2000] LSBC 30, where the member misled a Master and the Law Society.
3. *Samuels* - Discipline Case Digest 99/23, where the member made inaccurate statements to the Provincial Court Judge.
4. *Jamieson* - Discipline Case Digest 99/21, where the member misled the Law Society and then fabricated letters, presenting them to the Law Society as if they were genuine copies of client correspondence.
5. *Martin* - [2003]LSBC 16, where the member lied and misled his client regarding the sale of property and issued trust cheques that he knew could not be honoured.
6. *Heringa* - [2003] LSBC 10, where the member breached his undertaking to discharge a mortgage and failed to acknowledge his misconduct.
7. *MacAdams* - Discipline Case Digest 83/8, where the member breached his undertaking by paying funds to his client when he was not in a position to obtain a release of a mortgage.

[20] The last two cases resulted respectively, in a penalty of a one month and three month suspension and costs.

[21] The first five cases resulted in penalties combining suspensions and costs. The suspensions ranged from one month to eighteen months.

[22] The Panel was unable to find a clear pattern in the cases of the appropriate range of penalty to be imposed in fact patterns involving breaches of undertaking and misleading. What is clear is that there is no pattern to be discerned, and that each case must be analyzed on its own merits, and compared and balanced according to the *Ogilvie* factors and any other relevant factors.

[23] The Panel turned to the factors cited in *Ogilvie* for guidance in determining the appropriate penalty. While these factors are not an exhaustive list, they provide a template for the Panel to assess the seriousness of the case and bring some order to the penalty precedents.

[24] The factors the Panel considers of greatest weight in the case before us are:

1. Nature and gravity of the proven conduct - the Panel finds this to be the single most important factor in this case. In this case, the Respondent received the Release on his undertaking not to register it until he fulfilled certain conditions, but deliberately breached that undertaking and then deceived other counsel for a further two months. Honesty, integrity and trustworthiness are fundamental values of the legal profession. They form the underpinning and *raison d'être* of the profession. If a lawyer's word cannot be trusted, what is the point of hiring him or her? Therefore the Panel finds that the violation of the duty of honesty and a breach of undertaking amount to grave misconduct.
2. Age and experience - the Respondent is mature and experienced in solicitors' practice. This weighs against him as he should have known better.
3. Previous character including details of prior discipline - as noted above, there is a remarked similarity between the behaviour which was the subject of the Conduct Review in January, 2001, and the instant case. On the other hand, the Respondent is well respected in his legal community, as evidenced by the numerous letters of support from other lawyers practising in his geographical area.
4. Impact on the victim - the creditor was ultimately paid, suffering only increased fees.
5. Advantage gained or to be gained - there was no personal financial advantage gained by the Respondent.
6. Number of times the offending conduct occurred - the deception occurred over a course of 3 ½ months and then a breach of undertaking which was followed by a further two month period during which the breach was not rectified. This time period, coupled with the similarity to the behaviour the subject of the Conduct Review, compels the Panel to consider this factor to be of significant weight.
7. Acknowledge of misconduct and steps to disclose and redress the wrong, and other mitigating factors - the Respondent did not acknowledge the misconduct to the other lawyer until he was found out. However, he has fully and with dispatch, acknowledged the misconduct to the Law Society and cooperated fully in this proceeding. He has set out in his letter to the Law Society the facts that occurred and acknowledged that what he did was wrong.
8. Possibility of remediation or rehabilitation - the Respondent has one prior Conduct Review of a similar nature. He told the Conduct Review Subcommittee that he had learned his lesson. It appears that he had not. He told this Panel again that he had learned his lesson but this time, in addition, he said that he would reach out for help from his legal community if he found himself in difficulties again. His colleagues seem ready to step up to the plate for him. We note that part of the problem seems to be that the Respondent relies on his clients when he should, instead, be ensuring that what he promises to

do, he can actually accomplish, and does. We think the Respondent really has learned this time, and is now ready to reach out when and if he needs help again. We think we can trust him to do so. It would be very grave indeed, if it turns out that our trust in the Respondent is misplaced. We also note that the support the Respondent has received and that is being offered from and by the legal community should be lauded, fostered and recognized.

9. Impact of other sanctions or penalties - there are no other proceedings.

10. Impact of proposed penalty - the impact of an extended suspension on the Respondent will be severe. He is a person of modest means in a small town practice in what amounts to a sole practice. He does not appear to have any other means of support but his practice. The facts of the citation appear to be well known in the general community. They certainly are well known in the legal community in Abbotsford.

11. Need for specific and general deterrence - the Respondent's conduct before us is similar to the behaviour which is the subject of the Conduct Review. This emphasizes the need for specific deterrence, as the Respondent did not learn his lesson. The need for specific deterrence supports a penalty of a significant suspension. Balanced against that is the situation of the Respondent personally, his modest income of some \$3,900 gross income per month, small practice, support from the legal community, complete acknowledgement of the Agreed Statement of Facts and remorse.

Balanced against this is the need for the regulator of the profession to deliver the message to the profession and the public that cases involving breaches of undertaking and misleading are grave, as they damage and undermine the very structures of our society, of which the legal profession is one of the pillars.

[25] Each case must be decided on its facts, in the context of stare decisis and the principle of imposing penalty in a regulatory process.

[26] This Panel therefore imposes the following penalty upon the Respondent:

- a) the Respondent will be reprimanded and that reprimand will be placed on his Professional Conduct Record;
- b) the Respondent will pay a fine in the amount of \$12,500.00, payable by June 17, 2006;
- c) the Respondent will be suspended from the practice of law for a period of two months, commencing August 7, 2004; and
- d) the Respondent will pay costs of \$5,000.00, payable by June 17, 2006.

[27] This decision will be published in the normal manner.