



DISCIPLINE CASE *DIGEST*

Case 10-05 (AMENDED)

Member:	Donald Joel Mackinnon
Jurisdiction:	Winnipeg, Manitoba
Called to the Bar:	June 25, 1987
Particulars of Charges:	Professional Misconduct (6 counts) <ul style="list-style-type: none">▪ Breach of Chapter 1 of the <i>Code of Professional Conduct</i> [misappropriation, misleading the client, fabricating reporting letters and statements of account, misleading the Law Society, misleading other counsel] – x5▪ Breach of Chapter 2 of the Code [failing to serve the client] – x1
Plea:	Not Guilty
Date of Hearing:	October 13, 14, 15, 16, 19 and 20, 2009 and March 15, 2010
Panel:	<ul style="list-style-type: none">▪ Heather S. Leonoff, Q.C. (Chair)▪ Roger B. King, Q.C.▪ Lawrence R. McInnes, Q.C.
Counsel:	<ul style="list-style-type: none">▪ Darcia A.C. Senft for The Law Society of Manitoba▪ Member Unrepresented
Disposition:	<ul style="list-style-type: none">▪ Disbarred (member has filed a Notice of Appeal)▪ Costs of \$34,178.32
Appeal:	Appeal to the Manitoba Court of Appeal dismissed with costs on April 12, 2011.

Breach of Integrity and Failure to Serve

Facts

In the fall of 1998, a corporation became aware that a general contractor it had employed to build a retail store and to do some paving work at another store was being placed into receivership. As a result, the client received a number of builder's liens and trust claims from sub-contractors. The corporation retained Mr. Mackinnon to act on the claims arising out of the paving and construction projects, to take conduct of some litigation and to deal with a Requirement to Pay that was served by Revenue Canada. Shortly thereafter, the client forwarded funds in excess of \$146,000.00 to Mr. Mackinnon which represented the statutory holdback on the retail project and the unpaid contract amount on the paving contract less approximately \$2,000.00 which Mr. Mackinnon had advised should be retained by the client for legal fees. The client instructed Mr. Mackinnon to pay the money into court and sought confirmation that this had been done. Subsequently, Mr. Mackinnon asked the client for additional sums such that the total amount forwarded was

approximately \$162,000.00. None of the funds sent to Mr. Mackinnon were ever earmarked for legal fees.

In February 2006, Mr. Mackinnon provided the client with a Judgment of the Court of Queen's Bench requiring the client to pay approximately \$72,000.00 into court plus interest of approximately \$34,000.00. The client had understood that the monies previously paid to Mr. Mackinnon had been paid into court years earlier and instructed Mr. Mackinnon to immediately pay the funds into court. When this did not occur, the client retained new counsel in an effort to resolve the outstanding issues. Ultimately it was determined that Mr. Mackinnon no longer had any funds in trust to the credit of the client. He had deposited the money into his trust account and had properly used almost \$90,000.00 of it to discharge outstanding claims. However, from the remaining funds Mr. Mackinnon appropriated to himself--ostensibly for fees and disbursements—a sum in excess of \$68,000.00.

Once the file was received by new counsel, it was noted there were 14 reporting letters to the client and statements of account on the file. During the course of the investigation into his conduct, the Society noticed an unexplained figure on the client trust ledger card and when asked for an explanation Mr. Mackinnon produced one further statement of account for a sum in excess of \$4,500.00. Together, all of the statements of account totalled in excess of \$68,000.00. The trust records showed that Mr. Mackinnon withdrew the last of the trust funds in June, 2003 bringing the client's trust balance to zero.

The client advised that they had never received any of the statements of account or reporting letters nor had authorization been given for any fees to be taken. The first two accounts bore the client's correct mailing address. Thereafter, all of the accounts had an incorrect address and postal code. Mr. Mackinnon advised that he did not get back any of the misaddressed envelopes, that he had some difficulty with his mail, and that he had complained to Canada Post.

Plea

Mr. Mackinnon entered a plea of not guilty to 6 counts of professional misconduct.

Decision and Comments

Although Mr. Mackinnon asserted that he had indeed mailed the accounts, the panel found that it defied logic that 15 separate statements of account had all gone missing, particularly since the first two were properly addressed. At least some would have reached the client or been returned to Mr. Mackinnon. As well, the panel accepted the evidence of a representative of the client who testified that in December 2002 he contacted Mr. Mackinnon after noticing that no bill had been sent yet for legal fees. He was advised by Mr. Mackinnon that very little work had been done to that point.

The panel also took into consideration the judgment issued by the Court of Queen's Bench in 2006. It was very critical of the client and Mr. Mackinnon for the delay that had occurred in bringing the matter to a conclusion. The client was criticized for its failure to act in a reasonable manner and for its repeated failure to respond to requests made by counsel and to directions of the court. Mr. Mackinnon delayed faxing the judgment to his client for two weeks and, when he did, he failed to ask the client to forthwith send the principle of approximately \$72,000.00. Accordingly, the panel found that if Mr. Mackinnon honestly believed that the client was aware that the monies had been used up in legal fees, it would have been reasonable for him to have asked the client to quickly forward a cheque to him so as to stop the interest accruing. The panel found that the client was never informed that money was regularly withdrawn from the trust account, that the statements of account were not mailed out and that Mr. Mackinnon therefore had fabricated the reporting letters and accounts.

With respect to the misappropriation allegations, the panel found that the funds under consideration were paid to Mr. Mackinnon for one purpose only and were calculated to meet statutory and contractual obligations. The retainer letter and letters accompanying the cheques were precise in their instructions that the money was to be paid into court. Mr. Mackinnon did not pay the money into court as instructed and did not respond to the client's correspondence around

the time when the instructions were given. The failure to send the accounts strongly suggested that Mr. Mackinnon was well aware that the money was to be used for a specific purpose and he deliberately used it without authorization. Accordingly, the panel found Mr. Mackinnon guilty of misappropriation of trust funds.

With respect to the allegation that Mr. Mackinnon misled his client, upon learning that the funds had not been paid into court, General Counsel for the client spoke with Mr. Mackinnon on more than one occasion and wrote to him, seeking advice as to the status of the funds and whether interest had been earned on the sum. Based on the advice given to the client, the panel found that Mr. Mackinnon attempted to cover up the misappropriation for a few more weeks.

With respect to the allegation that Mr. Mackinnon misled new counsel, the panel considered that once the client discharged Mr. Mackinnon, he was told to forward the file and funds to the new law firm. When the funds did not arrive, a lawyer with the new firm spoke to Mr. Mackinnon to demand payment of the trust funds. The next day Mr. Mackinnon indicated that the bank needed 48 hours to process the release of the funds. One week later, Mr. Mackinnon attended a meeting at the new law firm and for the first time indicated that the money had been used up in legal fees and that the statements of account had been misaddressed. The panel found that Mr. Mackinnon had deliberately misled new counsel when he implied that the funds were in his trust account and that the bank was processing the cheque.

In considering the allegation that Mr. Mackinnon also misled the Law Society, the panel noted that during the investigation Mr. Mackinnon produced an account that was not on the original file provided to the Law Society. As well, in response to some questions from the Society about a costs order that had been made against the client in February 2004 (after the trust funds were depleted), he produced a reporting letter to the client from June, 2004, even though this letter was also not on the original file provided to the Society. Mr. Mackinnon testified that these documents were on his computer and through oversight had not been placed on the file. However, the panel did not find his explanation to be credible. The panel found that Mr. Mackinnon deliberately misled the Law Society by producing false documents.

With respect to the quality of service charge, Mr. Mackinnon testified that he was of the opinion that he could not simply interplead the funds that the client had provided. He indicated it was his belief that certain issues concerning priorities had to be resolved before the funds could be forwarded to the court. The panel noted that if his approach was correct, then he had an obligation to carry out that approach in a conscientious manner. On the contrary, after considering the evidence of a lawyer who represented Revenue Canada, the panel found that there was no explanation offered as to why it took Mr. Mackinnon approximately two years to provide Revenue Canada with the details it required. The panel also considered the evidence of the lawyer for the sub-contractor who advised of the difficulties he had in getting his client's matter completed. His client had filed a lien in August, 1999, and it was not until the judgment was delivered in February 2006 that the claim was finally resolved. A review of the file showed that several actions taken by Mr. Mackinnon prejudiced his client. The only inference that the panel could draw from the testimony of the client and from reviewing Mr. Mackinnon's own correspondence file was that the client was not kept informed as to what was going on. The client did not know about motions, appeals or costs orders. The panel found that Mr. Mackinnon ran the file without any input from his client and purposely avoided telling the client about all of the negative events, including the peril the client was in from Revenue Canada.

Penalty

The panel ordered that Mr. Mackinnon be disbarred, finding that his conduct in the case was reprehensible and that it showed a pattern of deceit. Although Mr. Mackinnon asked that he be allowed to resign, the panel determined that this was not an appropriate remedy since resignation ought to be permitted in situations where there are strong mitigating factors that explained the conduct and there were no such factors in this case. The panel also ordered that Mr. Mackinnon pay costs to the Society in the amount of \$34,178.32.

The member appealed the conviction and sentence to the Manitoba Court of Appeal. The appeal was dismissed with costs pursuant to a decision rendered April 12, 2011.