

representation of Companies B and C, the lawyer confirmed that he had not been aware of the requirements and it did not occur to him that his clients needed protection. He now recognized that the clients should have been independently represented. The subcommittee noted that it was especially important to ensure that clients are protected where lawyers and clients (or their principals) are friends and where, naturally, the clients' sense of comfort is heightened. The lawyer stated that his financial interest in the companies did not affect his professional judgment because the interest was so small. The subcommittee stated that whether his judgment would be affected should be determined by reference to the expected value of his interest were the clients to succeed with their venture. Nevertheless, the important question was not whether the lawyer owned small percentage interests in the clients but, rather, whether he would be seen to be an objective advisor.

The lawyer confirmed that this experience had caused him to pay more attention, that he was now moving a little slower in his practice and that he recognized he could not make snap decisions. He confirmed that he belonged to a group of lawyers who meet to fulfill their CPD requirements and that he would continue as a member of that group. He said he was reading more Law Society publications than he previously did and that he called on his counsel for advice when required. The subcommittee was satisfied that the lawyer knew he could not deal cavalierly with his professional responsibilities in the future. (CR 2016-18)

BREACH OF CLIENT CONFIDENTIALITY

A lawyer breached the confidentiality owed to his client by disclosing in a filed affidavit the legal advice that he had provided his client, contrary to rules 3.3-1 and 3.3-2 of the *Code of Professional Conduct for British Columbia*. The lawyer was representing the client in a medical malpractice claim and brought an application to withdraw as counsel. In his application materials he disclosed portions of legal advice that he had given the client on the merits of the case and, in doing so, compromised the client's case and left it in a shambles. The lawyer admitted professional misconduct and recognized that his actions had compromised the client's case and caused the client real harm. A conduct review subcommittee reminded the lawyer about the fundamental trust clients place in their lawyers not to betray their confidential information. Clients expect and are entitled to protection and should never be "thrown under the bus," as this client was. This trust goes to the heart of the lawyer-client relationship, and his conduct fell well below the standard expected of lawyers. The lawyer acknowledged his error and felt sympathy for the client. He recognized that he was not as familiar with this area of law as he needed to be to have properly taken on this case. He agreed to reach out to other lawyers if he found himself in similar circumstances, and he agreed to read the Supreme Court of Canada decision in *R. v. Cunningham*, which speaks to counsel's obligations on an application to withdraw. The subcommittee encouraged the lawyer to consider succession

planning and to identify a plan for his practice and his clients in the event of his retirement or some unexpected event. (CR 2016-19)

LAND TITLE ACT ELECTRONIC FILINGS

A lawyer provided his Juricert password to his assistant to affix the lawyer's digital signature on electronic documents filed in the Land Title Office, contrary to the lawyer's Juricert Agreement and Part 10.1 of the *Land Title Act*, and in breach of Law Society Rule 3-64(8) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*. The conduct came to light during a compliance audit. The lawyer admitted the breaches and admitted it happened no more than 20 times. The lawyer had a busy real estate practice and, at the time of the breaches, he had not fully comprehended that he was prohibited from sharing his password with his assistant. A conduct review subcommittee advised the lawyer that his conduct was inappropriate because the electronic filing system is dependent upon lawyers using their passwords themselves and not sharing them with non-lawyers. The lawyer admitted that he was now fully aware of his obligations and had instituted procedures within his office to prevent this happening again. He has circulated a *Benchers' Bulletin* directive on the use of Juricert passwords to all lawyers and staff in his office. He understood that, if this happened again, it may lead to a citation and hearing. (CR 2016-20)

BREACH OF TRUST ACCOUNTING RULES

A compliance audit of a lawyer's practice revealed that the lawyer had:

1. improperly withdrawn client trust funds over a three-year period when the trust accounting records were not current and when there were insufficient funds on deposit to the credit of the clients, contrary to one or both of Law Society Rules 3-63 and 3-64(3);
2. failed to prepare monthly trust reconciliations for the lawyer's pooled trust account within 30 days of the effective date of the reconciliations for one or more of the months in a six-month period, contrary to Law Society Rule 3-73;
3. failed to remit the trust administration fee to the Law Society within 30 days, contrary to Law Society Rule 2-110; and
4. permitted conveyancers to use the lawyer's Juricert password and affix her personal digital signature to property transfer tax returns and to Forms A, B and C transfers in real estate conveyances over a 17-month period, contrary to Part 10.1 of the *Land Title Act* and in breach of Law Society Rule 3-64(8) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia*.

The lawyer was poorly prepared for sole practice and had financial and personal problems early into the practice. The practice was not properly supervised, resulting in trust shortages. The problematic issues

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Discipline digest

BELOW ARE SUMMARIES with respect to:

- Ian David Reith
- Martin Drew Johnson
- Diep Thanh Hoang Nguyen
- Joseph Harry McCarthy
- Michael Saul Menkes
- Kerri Margaret Farion
- Tracey Lynn Jackson
- Lawyer 15
- Shirley Chu

For the full text of discipline decisions, visit the [Hearing decisions](#) section of the Law Society website.

IAN DAVID REITH

Whistler, BC

Called to the Bar: May 19, 1989

Discipline hearing: March 2, 2016

Panel: Phil Riddell, Chair, Donald Amos and Richard Lindsay, QC

Decision issued: May 30, 2016 ([2016 LSBC 19](#))

Counsel: Patrick McGowan for the Law Society; Ian David Reith on his own behalf

FACTS

Between January and September 2013, Ian David Reith provided legal services in the transfer of shares of a company between two registered shareholders and the purchaser. The two vendors saw Reith listed on the company's website in January and contacted him to provide legal services, to which he agreed. The company's director had previously advised Reith in October 2012 that the company was to change counsel to another law firm. Reith did not discuss the change in counsel with the two vendors or the purchaser.

Reith acted for both the vendors and the purchaser and both parties knew this. Reith failed to comply with rule 3.4-5 of the *Code of Professional Conduct for British Columbia* by not advising the parties that the information could not be treated as confidential and, if a conflict developed, Reith could not continue to act for both parties and may have to withdraw completely. A conflict almost did develop when the vendors threatened to withdraw due to delays in closing the transaction.

Reith failed to explain to his clients the nature of his retainer, including the tasks he would perform and the fees he would charge. Reith also agreed on his clients' behalf to pay the transfer fee of \$504 to the company's new counsel without discussing the fee with the clients. Reith left it to his clients to determine the purchaser's share of the property tax and the company's assessment.

Reith failed to advise the clients he was taking vacation in the summer of 2013 and how this might affect his ability to complete the transaction. He was aware the clients wished the transaction to complete that summer.

Reith prepared for his clients statements of adjustments that were incomplete and inaccurate. In August 2013, Reith sent the purchaser the Purchaser's Statement of Adjustments. The purchaser expressed concerns, including the inaccurate completion, possession and adjustment dates, a higher transfer fee and legal fees payable to Reith that had not previously been discussed. He did not sign the statement, and as a result, there is no signed Purchaser's Statement of Adjustments in respect of the transaction.

The vendors signed the Vendors' Statement of Adjustments and returned it to Reith. The statement referenced legal fees and disbursements payable to Reith and the same completion, possession and adjustment dates as the Purchaser's Statement of Adjustments. The closing date had passed, and the statements did not reflect the clients' agreement as to who would pay the transfer fees. Reith's legal fees were not as agreed between the clients.

ADMISSION AND DISCIPLINARY ACTION

Reith admitted to committing professional misconduct by failing to provide a quality of service that would be expected of a competent lawyer. The panel accepted his admission.

The panel considered Reith's professional conduct record. Reith had previously committed similar professional misconduct when he acted for multiple parties without complying with the rules and failed to serve his clients in a conscientious, diligent and efficient manner. He was the subject of another conduct review for failing to provide his clients notice of his holiday plans and failing to make provisions to allow his clients to complete their real estate transaction.

The panel ordered Reith to pay:

1. a fine of \$7,500; and
2. \$5,636.25 in costs.

Reith has applied for a review of the hearing panel's decision.

MARTIN DREW JOHNSON

Kelowna, BC

Called to the Bar: May 10, 1977

Bencher review: March 3, 2016

Benchers: Lynam E. Doerksen, Chair, Satwinder Bains, J.S. (Woody) Hayes, Dean P.J. Lawton, C.E. Lee Ongman, Carolyn Ryan and Jamie Maclaren

Decision issued: May 31, 2016 ([2016 LSBC 20](#))

Counsel: Alison Kirby for the Law Society; Tony S. Paisana for Martin Drew Johnson

BACKGROUND

In March 2011, Martin Drew Johnson was involved in an altercation outside a courtroom with a police officer, who had previously arrested Johnson's client and was a potential witness. Johnson asked him a question related to the charge, and the exchange between them became heated and volatile. They were reportedly "nose to nose," and Johnson responded to some remarks by saying "f*** you" to him. The officer then told Johnson he was under arrest, placed him in handcuffs and took him down the hallway. The officer sought to have charges laid against him for assault, but charges were ultimately not laid against Johnson for assault or any other offence.

A hearing panel determined that Johnson's behaviour was a marked departure from the standard of conduct that the Law Society expects of lawyers and constituted professional misconduct. Johnson was ordered suspended for 30 days and to pay costs of \$10,503.05 (facts and determination: [2014 LSBC 08](#); disciplinary action: [2014 LSBC 50](#); [Winter 2014 discipline digest](#)).

DECISION OF THE BENCHERS ON REVIEW

Johnson applied for and was granted an extension of the time to apply for a review ([2015 LSBC 40](#)). He sought a review of the hearing panel's decisions, arguing that the panel erred in concluding that provocation is "irrelevant" and should not be a defence to professional misconduct, in concluding that his actions constituted professional misconduct, and in overemphasizing his previous disciplinary record and giving little weight to letters of reference.

The defence of provocation is not recognized in the *Legal Profession Act* or the Law Society Rules. It is a partial defence in criminal law. The review board declined to apply it in this case, although it would be an error to say that it may never be a factor in a hearing panel's decision. The majority of Benchers (Doerksen, Bains, Hayes, Lawton, Ongman and Ryan) upheld the finding of professional misconduct by the hearing panel.

One Bencher (Maclaren) disagreed with the finding of professional misconduct. Maclaren stated that Johnson's comment was provoked

by the officer and was a "one-off" comment that was reflexive and that had no ulterior motive. While the conduct was wrongful, Maclaren did not find it a "marked departure" from the standards set by the Law Society.

In regards to Johnson's claim that the hearing panel overemphasized his disciplinary record, the Benchers determined that it was within the panel's discretion to give more weight to his past conduct as opposed to the positive letters of reference. Putting too much weight on letters from colleagues and friends of Johnson would detract from the Law Society's duty to protect the public interest. The Benchers upheld the penalty imposed by the hearing panel.

Johnson has appealed the decision of the Bencher review to the Court of Appeal.

DIEP THANH HOANG NGUYEN

Vancouver, BC

Called to the Bar: May 15, 1992

Review: April 7, 2016

Review board: Lee Ongman, Chair, Paula Cayley, Lynam Doerksen, Carol Gibson, David Layton, Sharon Matthews, QC and William Sundhu

Decision issued: June 9, 2016 ([2016 LSBC 21](#))

Counsel: Carolyn Gulabsingh for the Law Society; Henry Wood, QC for Diep Thanh Hoang Nguyen

BACKGROUND

A hearing panel concluded that Diep Thanh Hoang Nguyen had committed professional misconduct by fabricating a disbursement on a client's account and by falsely representing to the Law Society that the disbursement was genuine. The panel suspended Nguyen for 60 days, fined her \$10,000 and ordered her to pay costs of \$2,925 (hearing decision: [2015 LSBC 32](#); [Fall 2015 discipline digest](#)).

Nguyen sought a review of the panel's decision on disciplinary action. She took no issue with the 60-day suspension, but she argued that the imposition of both a suspension and a fine was excessive in the circumstances and wrong in principle, and that the fine should therefore be overturned.

DECISION OF THE REVIEW BOARD

The review board concluded that the hearing panel erred in application of legal principles and imposed an excessive penalty in fining Nguyen in addition to suspending her for 60 days. The board decided that the appropriate disciplinary action was a 60-day suspension and costs only, and no fine.

JOSEPH HARRY MCCARTHY

Smithers, BC

Called to the Bar: May 17, 2000

Discipline hearing: April 14, 2016

Panel: Nancy Merrill, QC, Chair, James Dorsey, QC and Lois Serwa

Decision issued: June 14, 2016 ([2016 LSBC 23](#))

Counsel: Carolyn Gulabsingh for the Law Society; Terence La Liberté, QC for Joseph Harry McCarthy

BACKGROUND

On July 15, 2015, a citation was issued. Joseph Harry McCarthy admitted the allegations contained in the citation were proven and that they constituted professional misconduct, and accepted the proposed disciplinary action. The hearing panel accepted his admission.

AGREED FACTS

McCarthy was retained by the Legal Services Society to represent a client who had been charged with assaulting his brother, uttering threats and assaulting a peace officer. After McCarthy was retained, the client gave him the disclosure package and Crown Counsel Disclosure Notice he had previously been given while representing himself.

During a meeting in the Prince Rupert courthouse, McCarthy argued with his client and challenged him to a physical fight.

On May 9, 2013, McCarthy filed a Notice of Withdrawal of Designated Counsel form, and on May 15 the client asked McCarthy to return to him all documents that had been supplied by the RCMP, Crown Counsel or himself.

McCarthy mailed the disclosure documents he had received from the client to Crown Counsel in Prince Rupert.

McCarthy admits he should have returned the documents to the client, and that he did not consider that the client's handwritten notes on those documents may be subject to solicitor-client privilege.

McCarthy admits that he challenged the client to a fight, that he disclosed confidential information of the client, and that both actions constitute professional misconduct.

DISCIPLINARY ACTION

The panel ordered that McCarthy pay:

1. a fine of \$6,000; and
2. costs of \$1,236.25.

MICHAEL SAUL MENKES

New Westminster, BC

Called to the Bar: May 17, 1996

Discipline hearing: May 10, 2016

Panel: Pinder Cheema, QC, Chair, Shona Moore, QC and Graeme Roberts

Decision issued: June 20, 2016 ([2016 LSBC 24](#))

Counsel: Carolyn Gulabsingh for the Law Society; Michael Saul Menkes on his own behalf

AGREED FACTS

In April 2009, Michael Saul Menkes's client was attacked by a police dog, and in November 2009 the client and her father retained Menkes to handle a personal injury claim.

In November 2009 Menkes filed a notice of claim with the Vancouver small claims registry. He did not at the time serve the notice of claim on the City of Vancouver or the Vancouver Police Board.

Between 2012 and 2013 the client's father contacted Menkes's office several times. Menkes admits he did not return the phone calls. The two met once or twice when the father visited Menkes's office without an appointment.

In or around November 2013, Menkes checked the status of the file at the Vancouver small claims registry and found only the notice of claim. He had not served the defendants with the notice of claim nor prepared and filed the required certificate of readiness.

Between May 2011 and April 2014 Menkes failed to include the client's file in monthly file status reports to the Practice Standards department, as required.

ADMISSION AND DETERMINATION

The panel found that Menkes had failed to meet his responsibility to provide quality and appropriate legal services to his client. The panel approved Menkes's conditional admission of professional misconduct and proposed disciplinary action, both of which had been accepted by the Discipline Committee.

DISCIPLINARY ACTION

The panel ordered that Menkes pay:

1. a fine of \$7,500; and
2. costs of \$1,259.39.