

2019 LSBC 09
Decision issued: March 19, 2019
Citation issued: April 19, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

KEVIN JOHN GROVES

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: February 13, 2019

Panel: Sarah Westwood, Chair
Ralston S. Alexander, QC, Lawyer
Darlene Hammell, Public representative

Discipline Counsel: Kathleen M. Bradley
Counsel for the Respondent: David Taylor

BACKGROUND

[1] On April 19, 2018, a citation was issued against Kevin John Groves (the “Respondent”) pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Chief Legal Officer of the Law Society of British Columbia on the direction of the Chair of the Discipline Committee.

[2] The citation contains a single allegation, as follows:

On or about January 24, 2017, in the course of representing your client JR in a family law matter, you engaged in an activity that you knew or ought to have known assisted in or encouraged dishonesty, crime or fraud, when you obtained from a reporting agency a report respecting credit information of your client’s spouse without her written consent, contrary to one or more of

rules 2.2-1, 3.2-7 and 5.1-2 of the *Code of Professional Conduct for British Columbia*.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

- [3] The parties submitted to the Panel an Agreed Statement of Facts (“ASF”) in which the Respondent acknowledged the conduct alleged in the citation. The Respondent acknowledged that the service of the citation upon him complied with Rule 4-15 of the Law Society Rules.
- [4] Counsel for the Law Society provided a submission outlining the facts as described in the ASF and an analysis of the application of law regarding professional misconduct to the facts.
- [5] Counsel for the Respondent provided a responding submission where the Respondent acknowledged that, while the facts as admitted did constitute professional misconduct, the Respondent did not acknowledge the accuracy of the assertion in the citation that the Respondent “engaged in activity that [the Respondent] *knew* assisted in or encouraged dishonesty, crime or fraud ...” [emphasis added]. It is the position of the Respondent that he was not aware of the provisions of the statute that rendered the impugned behaviour unlawful.

FACTS

- [6] The Respondent was retained by JR in relation to a family law matter. His wife, NR, was represented by another lawyer.
- [7] On or about January 24, 2017 JR attended at the offices of the Respondent for the purpose of completing some documents with respect to the matrimonial matter. In the course of that meeting, the Respondent enquired of JR whether he would be interested in obtaining a Credit Report on his wife as verification of some of the financial information that had been provided to the Respondent to that point in the proceedings.
- [8] JR agreed that a Credit Report on his wife should be obtained, and the Respondent then logged onto the website of Equifax, a Credit Reporting service.
- [9] With the assistance of JR, the Respondent completed a request for a Credit Report on NR by impersonating NR while responding to various questions posed on the interactive Equifax website. JR had the necessary familiarity with the financial affairs of NR to facilitate the impersonation of NR by the Respondent.

- [10] The Credit Report was duly provided in this process on that day and almost immediately upon its release to the Respondent, JR received a telephone call from NR advising that she had become aware of the fact of the unauthorized Credit Report request and that she intended to report JR to the RCMP and the Respondent to the Law Society. She did so.
- [11] The protection of private credit information is found in the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2. Section 108 of that statute requires that credit reporting information must only be provided with the written consent of the party to whom the information relates. The statute provides a penalty punishable by fine of not more than \$10,000 or imprisonment for not more than twelve (12) months or to both.
- [12] Upon its receipt of the complaint by NR, the Law Society contacted the Respondent to seek his explanation for the behaviour alleged in the complaint of NR.
- [13] In responding to the Law Society on several occasions, the Respondent freely acknowledged the behaviour but expressed his belief that there was no wrongdoing engaged with that behaviour, he being of the view that a Credit Report request was similar to a search of the Personal Property Security Registry or the Land Title Office.
- [14] While a party is seeking to obtain a Credit Report from the Equifax website, the applicant must first indicate agreement with the following:
- I accept and agree to the terms of use and privacy policy.
- [15] Equifax's terms of use include the following paragraphs:
2. **ACCESS TO SITE, USE AND GOVERNING LAW.** Access to, and use of, this Site are subject to all laws and regulations applicable in your Province or Territory of residence ... it is your responsibility to determine if you can legally use the Site in compliance with all applicable laws.
 3. **REGISTRATIONS; USE OF PRODUCTS.** In order to purchase products, you must complete the registration process and become a member. You will also be required to provide valid credit card information, unless you are activating a promotional code, you may register to purchase products from this Site only on behalf of yourself.

The Respondent advised that he had accepted the Terms of Use and Privacy Policy but did not believe that he had ever read them.

- [16] In the course of completing an application for a Credit Report, a third step (after providing certain preliminary information) is called “Identity Verification”. In the course of completing an application for a Credit Report, when an applicant reaches the third stage, the following response is provided by Equifax:

Excellent! We found your file. Now we just need to make sure you are who you say you are. It’s easy, all you need to do is answer a few questions.

The website then poses questions that only an applicant or someone familiar with the financial affairs of the applicant will be able to answer. As indicated above, the Respondent was able to answer the questions posed by the Equifax website with assistance from JR. Immediately upon being advised by NR of her plan to report the Respondent to the Law Society, he notified opposing counsel of the fact of his obtaining the Credit Report and confirmed his intention to provide a copy of that Report to opposing counsel with the next tranche of documents provided.

- [17] In response to a question from the Law Society regarding the reason why the Respondent did not seek the permission of NR to obtain a Credit Report for her, the Respondent noted that he did not believe that NR would agree to provide her consent, and accordingly, a further application to Court would be required to obtain that information.

BURDEN OF PROOF

- [18] We consider the burden of proof in these circumstances to be moot given the admission of professional misconduct from the Respondent. We adjourned the proceedings briefly to consider our position on Facts and Determination and returned to render a finding that the Respondent had committed professional misconduct.

DISCIPLINARY ACTION

- [19] Following the submissions of the parties and the Panel’s decision on the Facts and Determination phase of the hearing and with the consent of all parties, it was agreed that we would then proceed to the Disciplinary Action phase of the hearing, with a view to completing the hearing in a single day. The Law Society provided a written and oral submission on the Disciplinary Action phase of the proceeding.

- [20] Following the submissions of the Law Society on Disciplinary Action, the Respondent was sworn and testified. He provided his affirmation of the ASF. He

spoke with some emotion on the extent to which he regretted his actions and of the impact that these events have had on his practice and more generally, on his life.

- [21] At the time material to this event, the Respondent was in an unhappy marriage. It has since dissolved and a divorce is in process. There are children of the marriage, and there are stresses on the Respondent as a result. In all, the testimony of the Respondent demonstrated a considerably remorseful individual still not fully recovered from the variety of traumatic events that accompanied these circumstances, which followed the onset of this disciplinary process. There was no cross-examination of the Respondent on his evidence.
- [22] Following the testimony of the Respondent, counsel for the Respondent provided a submission on the Disciplinary Action phase of the hearing.

POSITION OF THE PARTIES

- [23] The Law Society urged a period of suspension of two months.
- [24] The Law Society referenced several of the *Ogilvie* Factors (*Law Society of BC v. Ogilvie*, 1999 LSBC 17). In restricting the consideration to only some of the *Ogilvie* Factors, the Law Society acknowledged an emerging trend to more selective analysis of the relevant *Ogilvie* Factors. This trend is described in *Law Society of BC v. Lessing*, 2013 LSBC 29, and *Law Society of BC v. Dent*, 2016 LSBC 05.
- [25] The Law Society argued that the most significant *Ogilvie* Factors are:
- (a) the nature and gravity of the misconduct;
 - (b) the character of the Respondent and his professional conduct record;
 - (c) presence or absence of other mitigating or aggravating factors;
 - (d) public confidence in the legal profession; and
 - (e) the range of sanctions in prior similar relevant cases.

Nature and gravity

- [26] The Law Society argues that the misbehaviour is very serious as it engages elements of deceit and lack of integrity. As indicated in the recitation of the facts above, it is clear that, in order to obtain a Credit Report for another party, it is necessary for the applicant to impersonate the subject of the application and to

assume that subject's identity. The Law Society suggests that that requirement should have alerted the Respondent to the impropriety of his actions in seeking this Report in this manner.

- [27] The Law Society characterizes the behaviour as criminal or quasi-criminal based on the nature of the penalties that are available under the legislation.
- [28] Finally, the Law Society suggests that this misbehaviour by the Respondent also exposed his client to criminal prosecution, although no such criminal prosecution was undertaken by the police despite the complaint from NR.

Character and conduct record

- [29] The Law Society notes that the Respondent was at the time of the impugned behaviour a seven-year call and, at that level of experience, should have been aware that seeking a Credit Report for his client's spouse as he did, was wrong.
- [30] The Law Society references a professional conduct record that contains only a referral of the Respondent to the Practice Standards Committee in 2017. Referrals to that Committee are generally of a remedial nature, and lawyers are urged to modify practice behaviour so as to generally practise in a more efficient and appropriate manner. There is no indication in the record of the cause of the referral to practice standards, but the recommendations contained in the referral suggest that the Respondent was suffering depression and needed to continue treatment for that condition as recommended by his doctor. The referral also suggests that the Respondent was feeling isolated in his practice and had insufficient resources available to him on difficult ethical or practical issues.
- [31] The Practice Standards Committee recommended that the Respondent join one or more sections of the Canadian Bar Association and suggested that he should consult with Law Society Practice Advisors when facing difficult ethical issues.
- [32] The Committee also required the Respondent to undertake the Communication Tool Kit course and to ensure that, in his paperless office, all documents are properly stored and marked for ready retrieval. The Panel was advised that, following several mandated reports of compliance from the Respondent, the Practice Standards Committee closed his file.
- [33] The Law Society suggested that this referral to the Practice Standards Committee should engage progressive discipline for the Respondent, despite the fact that the referral occurred following the events which are the subject of this hearing.

Other mitigating or aggravating factors

[34] The Law Society acknowledges that, since these events have occurred, the Respondent has undertaken several webinars on privacy issues and confirms his intention to continue that learning. The Respondent has also confirmed to the Law Society a change in his practice that requires a client's written consent to any Credit Reports obtained on behalf of those clients. In the oral testimony provided by the Respondent, he confirmed that he has abandoned altogether the practice of obtaining Credit Reports. The Law Society acknowledges that this work by the Respondent and his change of practice are mitigating factors.

Public confidence in the legal profession

[35] The Law Society suggests that the lack of integrity demonstrated by this Respondent's behaviour has an impact on the manner in which the public views the legal profession. The Law Society argues that the loss of public confidence in the integrity of lawyers does irreparable harm to the profession. It argues that the legal system will be weakened because the public is not confident in its ability to trust lawyers. One of the objects and duties of the Law Society is to uphold and protect the public interest in the administration of justice, and therefore, it submits, a strong sanction for this misbehaviour is required to communicate to the public the extent to which this behaviour is condemned.

[36] The Law Society was not able to identify a similar discipline decision where an impersonation of the nature described in this case was demonstrated. The closest similar case to that before us was an Ontario decision in the *Law Society of Upper Canada v. Sabourin*, 2016 ONLSTH 13, where a three-year call was disciplined for impersonating her client online in a Facebook chat with a complainant in a domestic criminal matter. The circumstances of that case were sufficiently dissimilar to this one that the Law Society did not specifically seek to rely upon the decision, and in fact, that case resulted in an oral reprimand and costs pursuant to a joint submission from the Law Society and the respondent.

[37] Instead, the Law Society sought to rely upon cases where dishonesty and lack of integrity was evidenced, and in those cases the Law Society noted that, generally speaking, where dishonesty appears, a suspension will be warranted.

[38] The Law Society referenced *Law Society of BC v. Wong*, 2012 LSBC 15, where a lawyer counselled an articled student to swear an affidavit improperly. In that circumstance a fine was ordered.

[39] In *Law Society of BC v. Kirkhope*, 2013 LSBC 35, the Respondent knowingly participated in a strategy that resulted in the breach of a Court Order. In that case there was a prior conduct record with two previous citations, and the respondent had over 20 years of experience. The principle of progressive discipline was engaged. A 45-day suspension was ordered.

[40] In *Law Society of BC v. Berge*, 2005 LSBC 28, the Respondent was suspended for an attempt to dispose of an open can of beer and to use mouthwash in a conscious effort to thwart a demand for a breathalyzer test. In that case a suspension of one month was ordered.

Sanctions in similar cases

[41] The Law Society referenced the *Law Society of BC v. Martin*, 2007 LSBC 20, on the factors relating to the appropriateness of a suspension. Those factors include;

- (a) elements of dishonesty;
- (b) repetitive acts of deceit or negligence; and
- (c) significant personal or professional conduct issues.

POSITION OF THE RESPONDENT

[42] The Respondent argues that the case is to be distinguished from all of those cases involving dishonesty or lack of integrity because there was an absence of intentional dishonesty on the part of the Respondent in these circumstances. This argument is developed on the basis that the evidence of the Respondent is that he did not know of the prohibition contained in the *Business Practices and Consumer Protection Act*.

[43] The Respondent further argues that, immediately upon becoming aware of the prohibition, he advised opposing counsel of the fact that the Credit Report had been obtained without the consent of NR.

[44] The Respondent notes that he had obtained Credit Reports in this manner on five previous occasions, and in all but one of those cases, neither the opposing party nor opposing counsel had made any objection. He suggests that that validates his mistaken belief that there was nothing inappropriate about acting in this manner. On the one such credit report obtained where counsel neither objected nor approved of the methodology, there was a change in counsel that rendered the credit report issue no longer relevant.

- [45] The Respondent does not suggest that his lack of knowledge of the provisions of the Consumer Protection legislation is an excuse for the misbehaviour, and on that basis, he has admitted the professional misconduct. The Respondent objects to the characterization of that conduct as being knowingly dishonest and fraudulent.
- [46] On the consideration of the *Ogilvie* Factors, the Respondent argues that two factors should primarily receive attention, being the protection of the public interest and the rehabilitation of the Respondent.
- [47] The Respondent cites *Law Society of BC v. Faminoff*, 2015 LSBC 20. In that circumstance, Mr. Faminoff was found to have committed professional misconduct in a variety of ways by fabricating documents to mislead the Law Society, by mishandling trust funds in breach of Law Society Rules, by withdrawing funds from trust when there were insufficient funds to cover the account paid, by a failure to maintain proper accounting records and finally, by breaching an undertaking.
- [48] The hearing panel found Mr. Faminoff to have committed professional misconduct in respect of all allegations of the citation. While the Law Society argued for a suspension of five to six months, the panel determined that a suspension of two months was appropriate, and a review panel of Benchers upheld that determination despite the fact that Mr. Faminoff had had a previous citation that resulted in a reprimand and a fine of \$10,000 in addition to costs of \$15,000. The Respondent argued that the misdeeds of Mr. Faminoff significantly eclipse those of which the Respondent stands charged.
- [49] In *Law Society of BC v. Nguyen*, 2016 LSBC 21, the respondent was given a fine and a two-month suspension where the Respondent was found to have fabricated a disbursement on an account and falsely represented to the Law Society that the disbursement was genuine. On review, a review board upheld the two-month suspension but determined that the fine was inappropriate and removed it from the disciplinary action outcome.
- [50] The Respondent submits that his behaviour is significantly less serious than demonstrated in *Faminoff* and *Nguyen*.
- [51] The Respondent analyzes the *Ogilvie* Factors as follows:

Nature and gravity

- [52] The wrongful conduct is of a serious nature, but the Respondent argues, the conduct must be considered in the context of the circumstances. In particular, the information the Respondent obtained through the impersonation produced nothing

more than the opposing party would have been required to provide in the normal course of the litigation.

Age and experience

- [53] The Respondent is said to be at a mid-level of experience with a seven-year call. His practice has been restricted to matrimonial law, and he has no previous exposure to the *Business Practices and Consumer Protection* legislation.

Previous character and prior discipline record

- [54] The Respondent acknowledges his professional conduct record and notes that he has complied fully with the recommendations of the Practice Standards Committee.

Impact on the victim

- [55] The Respondent notes that there was a breach of the victim's privacy; however, in view of her obligation to provide the information obtained, the Respondent suggests that the impact is of lesser moment.

Advantage gained or to be gained

- [56] The Respondent notes that no significant advantage was gained save that he obtained certain disclosable information sooner than he would have had a Court application been required.

Number of times the offending conduct occurred

- [57] As noted above, the offending conduct occurred on five separate previous occasions, on four of which no comment was made by opposing party or counsel. For the fifth occasion there was a change of counsel before that material was disclosed.

Acknowledgement by the Respondent

- [58] Under this heading the Respondent argues that he made prompt and complete disclosure of his misbehaviour, that he has expressed regret and remorse, both in testimony before this Panel and to the Law Society, and that he has taken steps to improve his education.

The possibility of remediation or rehabilitation

- [59] The Respondent requests that the penalty imposed include a requirement for attendance at Continuing Professional Development Course Work involving components of ethics.

Impact of the proposed penalty

- [60] The Respondent notes here that his precarious financial circumstances secondary to a marriage breakdown and an expensive combination of daycare for his children and maintenance obligations for those children, together with a modest level of income from his practice suggests that a two-month suspension as requested by the Law Society would have a devastating impact on him. He argues that he would be unlikely to recover immediately from clients lost as the result of the suspension and his income would accordingly suffer.

Specific and general deterrence

- [61] The Respondent suggests that he has considerably amended his practice as a result of learning the nature of the statute he offended and that general deterrence will be accomplished by a publication of the circumstances of this citation.

Public confidence in the legal profession

- [62] The Respondent finally argues that the public confidence in the integrity of the profession will not be impacted negatively by a significant fine and period of professional development required with particular emphasis on an ethical component.

DISCUSSION

- [63] We do not find the Respondent's behaviour to rise to the level of misconduct that is described in either of *Kirkhope*, *Lessing* or *Faminoff*. In each of those cases there was a clear indication of fraudulent behaviour with intent to have others, including the Law Society, rely on the fabricated evidence. There is nothing of that nature in the facts of this case, and the cases cited are of no use to this Panel in establishing an appropriate penalty.
- [64] The Law Society has suggested that there were red flags on the Equifax website that should have alerted the Respondent to the improper nature of his conduct where he was required to impersonate a party whose Credit Report he was seeking

to receive. There is no question that the questions posed on the Equifax website should have alerted an enquiring mind to the fact that this impersonation behaviour was inappropriate.

- [65] We do not accept the characterization by the Respondent that these searches were similar in nature to that of a Personal Property Registry search or a Land Title search. It is self-evident that it is not necessary to impersonate an enquiring party to obtain the results of a Personal Property or Land Title search. However, the Respondent practises law in what is described as high conflict matrimonial work. It is the essence of high conflict matrimonial work that tensions are high and pressures are regularly imposed on parties and their counsel. The Respondent did acknowledge that the behaviour was “edgy” and “aggressive”, and those characterizations are indisputable.
- [66] The fact that the Respondent had conducted Credit Report searches in this manner in five other instances where counsel for respondents had no apparent complaint permitted the Respondent to develop a sense that the behaviour, though edgy and aggressive, crossed no legal boundaries.
- [67] The Law Society suggested that the referral to the Practice Standards Committee should engage the notion of progressive discipline for the Respondent. This request was made despite the fact that the referral occurred following the events that are the subject of this hearing. Moreover, the referral did not result from a citation or referral from the Discipline Committee; this citation is the Respondent’s first.
- [68] The Panel specifically declines to consider any element of progressive discipline in these circumstances and does not adopt the request of the Law Society to suggest that, while a lawyer is engaged with the Practice Standards Committee in its remedial work, any misbehaviour that occurs in that time frame will engage progressive discipline when later revealed. The request from the Law Society is temporally unsound.
- [69] The circumstances surrounding the request for the Credit Report suggest that the Respondent was unaware of the criminal nature of his conduct. This view is supported by the fact that he provided an email address for the target of his investigation that he knew would result in that individual becoming aware of the fact of the Credit Report search. He also disclosed, and we accept his evidence, that it was his intention to provide a copy of the Credit Report with the next following disclosure of documents.

- [70] We do not accept as helpful for the Respondent the fact that he contacted counsel for NR upon his client hearing from NR that she intended to report JR to the police and the Respondent to the Law Society. The fact that the Respondent then immediately contacted counsel for NR provides no help for him. It was by then clear that NR was very upset with the unauthorized credit report and that her counsel was going to learn of these events from his client, sooner rather than later.
- [71] As to the *Ogilvie* Factors, we find that the majority of the factors are either neutral or mitigating for the Respondent. The nature of the conduct is clearly important, and the primary negative characteristic of the *Ogilvie* analysis. We have accorded that factor significance, but our finding of a lack of criminal intent mitigates the seriousness of the finding.
- [72] In terms of penalties imposed in similar cases, there are two issues. First, it must be acknowledged that the facts of this case are unique and the only approximately similar decision (from Ontario) is not on point or helpful. Our analysis of recent penalty decisions assists with a finding that the penalty sought by the Law Society is not consistent with Law Society precedential history of penalty decisions. That analysis is discussed above.
- [73] The impact on the victim was modest at best given that the breach resulted in the disclosure of information that would have been required in the litigation in any event. Similarly, the advantage gained by the Respondent was nominal. The experience of the Respondent is not helpful, both because his practice area did not expose him to the statute offended by him, and to be clear, a seven-year call in most circumstances will still be in the formative stages of professional development.
- [74] His conduct record is essentially clean in that the referral to Practice Standards had not reported out, and it is in his favour that, despite seven years' practice in high conflict family law files, his conduct record is free from discipline arising from client and opposing party complaints.
- [75] The evidence provided suggests that the rehabilitation of the Respondent is under way given his undertaking CPD learning on his own and that learning will be expanded with our decision on disciplinary action.
- [76] The impact of a two-month suspension on the Respondent would be significant. By itself that is not a reason that, in appropriate circumstances a suspension should not be imposed. It is, however, our clear determination that, in the circumstances of this case, the existing penalty jurisprudence does not support a suspension of any duration.

[77] The final *Ogilvie* Factor deserves comment. We believe that a properly informed member of the public, on reviewing the analysis provided in this decision, will be satisfied that the profession has responded appropriately with this discipline outcome. The troubled financial circumstances of the Respondent suggest that a fine of any magnitude, when added to the costs that we are directing to be paid, will impose a hardship of significance. The consequence of these events will endure in the memory of the Respondent for a very long time.

DECISION

- [78] We have earlier confirmed that the Respondent has committed professional misconduct. We impose as a penalty for that misconduct, a fine in the amount of \$8,000. The Respondent will have until December 31, 2019 to pay the fine.
- [79] We order that the Respondent enrol in, and complete in the 2019 calendar year, four hours of Continuing Professional Development (CPD) course material with a specific focus on ethical considerations. The required four hours are to be in addition to the 12 total hours of CPD credits and the included two hours of ethics or practice management CPD that all lawyers are required to complete annually. This additional CPD must be as directed by and verified by the Respondent to the Practice Standards Committee. The Respondent may not rely on these extra four hours as part of the new “carry-over” provisions regarding CPD to reduce his CPD obligations in 2020.
- [80] We order that the Respondent pay costs in the amount of \$3,607.70. The Respondent will have until September 30, 2019 to pay the costs.
- [81] The Law Society requests, and the Respondent consents to, a non-disclosure order pursuant to Rule 5-8(2)(a) of the Law Society Rule. Accordingly, we order under Rule 5-8(2)(a) of the Law Society Rules that, if any person other than a party, seeks to obtain a copy of a transcript of the proceedings or any exhibit filed in these proceedings, client names, identifying information, and any information protected by solicitor-client privilege be redacted from the exhibit or transcript before it is disclosed to that person.