2019 LSBC 18
Decision issued: May 22, 2019
Citation issued: August 29, 2018

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**CRYSTAL IRENE BUCHAN**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION**

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| Hearing date: | April 24, 2019 |
| Panel: | Jennifer Chow, QC, Chair<br>John Lane, Public Representative<br>Bruce LeRose, QC, Lawyer |
| Discipline Counsel: | Tara McPhail |
| Counsel for the Respondent: | Peter Firestone |

## BACKGROUND

[1] Crystal Irene Buchan (the "Respondent") is alleged to have failed to promptly sign two court orders and to promptly answer certain communications from opposing counsel that required responses.

[2] The Respondent was called and admitted as a member of the Law Society of British Columbia (the "Law Society") in May 1992. At the material times, the Respondent practised with a law firm in Victoria. Her practice consisted of 90% family law, 5% wills and estates and 5% corporate law.

[3] At the hearing, the Respondent took no issue with the filing of a Notice to Admit dated December 21, 2018 prepared by the Law Society. Accordingly, pursuant to Rule 4-28 of the Law Society Rules, the Hearing Panel accepted the facts set out in the Notice to Admit to be proven and the attached documents to be admitted for the truth of their contents.

## DECISION

[4] Additionally, at the end of the hearing after submissions were made and materials were reviewed, the Hearing Panel gave a brief decision with reasons to follow. The Hearing Panel advised that we were satisfied that the Respondent had committed professional misconduct in regard to the three allegations set out in the Citation dated August 29, 2018 ("the Citation"). These are our reasons, which to a large extent adopt the admissions set out in the Notice to Admit and the helpful submissions of the Law Society.

[5] The Hearing Panel also took into consideration submissions made by counsel for the Respondent at the outset of the hearing. Counsel for the Respondent advised the Hearing Panel that the Respondent was prepared to admit to a finding of professional misconduct in regard to each of the three allegations set out in the Citation.

## THE CITATION

[6] The Citation alleges that each of the following conduct amounts to professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*:

(a) Between approximately May 9, 2017 and December 21, 2017, in the course of representing RM in a matrimonial matter, the Respondent failed to promptly sign an appropriately drafted consent order after the British Columbia Supreme Court action held that RM had agreed to a binding and enforceable settlement agreement on November 21, 2016, contrary to commentary 5 of rule 5.1-2 of the *Code of Professional Conduct for British Columbia* (the *Code*);

(b) Between approximately May 9, 2017 and July 25, 2017, in the course of representing RM in the same matrimonial matter, the Respondent failed to promptly sign an appropriately drafted court order granted on May 9, 2017 by the British Columbia Supreme Court in the same action, contrary to commentary 5 of rule 5.1-2 of the *Code*;

(c) Between approximately May 9, 2017 and December 21, 2017, in the course of representing RM in the same matrimonial matter, the Respondent failed to answer with reasonable promptness some or all of communications dated May 9, 16, 17 and 30, 2017, June 5, 16, 21, 22 and 26, 2017 and September 7 and 8, 2017 from opposing counsel that required a response, contrary to rule 7.2-5 of the *Code*.

[7] At the outset of the hearing, counsel for the Law Society advised the Hearing Panel that the dates of June 26 and September 7, 2017 in regard to allegation (c) of the Citation were no longer being pursued.

## FACTS

### Allegation 1

[8] In or about November 2016, the Respondent was retained to represent RM in matrimonial proceedings involving her former spouse, MS. At the material times, MS resided in British Columbia while RM resided in Quebec.

[9] The Superior Court of Quebec granted the parties a divorce on September 23, 1992. On August 3, 1995, the Superior Court of Quebec ordered MS to pay spousal support to RM commencing January 1, 1996 (the "Quebec Order").

[10] By 2016, significant arrears in spousal support were outstanding under the Quebec Order. In June 2016, MS filed an application seeking various orders to resolve the issue of the spousal support arrears.

[11] Over the November 12, 2016 weekend, the parties entered into negotiations by phone and that weekend, reached settlement of all outstanding issues.

[12] On November 14, 2016, counsel for MS ("Opposing Counsel") emailed a summary of the settlement to the Respondent. The settlement contemplated that the parties would execute a consent order to vary the Quebec Order and to reflect their agreement.

[13] On November 15, 2016, Opposing Counsel emailed the first draft of the settlement documents to the Respondent for her review. The settlement documents consisted of a mutual spousal support release, a final release of all claims and a draft consent order (collectively, the "Settlement Documents").

[14] On November 17, 2016, Opposing Counsel delivered his client's personal cheque in the amount of $110,000 to the Respondent on her undertaking not to release or deposit the cheque until such time as her client had executed the releases and the Respondent had approved the consent order and returned the Settlement Documents (the "Undertaking").

[15] On November 18, 2016, the Respondent communicated her acceptance of the Undertaking. Also on that day, the Respondent advised Opposing Counsel that her client agreed to the Settlement Documents provided he made four specific changes.

[16] On November 21, 2016, Opposing Counsel provided the Respondent with a revised version of the Settlement Documents that reflected the requested changes.

[17] The Respondent sent the Settlement Documents to SC, her client's Quebec counsel ("Quebec Counsel").

[18] On November 22, 2016, the Respondent forwarded to Opposing Counsel a letter from Quebec Counsel who requested the addition of a tax indemnity provision to the Settlement Documents.

[19] On November 22, 2016, Opposing Counsel responded, in part, that:

(a) the Respondent's client had already agreed to execute the Settlement Documents once revised to reflect the Respondent's requested changes; and

(b) he requested the Respondent have her client execute the Settlement Documents as previously agreed.

[20] On November 29 and December 2, 2016, Opposing Counsel emailed the Respondent confirming his client's position that the parties had settled all issues and requesting the return of the executed Settlement Documents.

[21] On December 5, 2016, the Respondent replied to Opposing Counsel indicating that Quebec Counsel had advised her client not to execute the Settlement Documents. That same day, Opposing Counsel responded in part, that:

> To reiterate my client's position, your client has agreed to execute the documents following certain requested changes all of which my client agreed to make and were made (again, see your email of November 18, 2016 delivered at 3:09p.m.). The parties have a meeting of the minds; the terms of the settlement as set out in the settlement documents have been agreed to and finalized by both parties. ... We look forward to delivery of the settlement documents.

[22] The Respondent's client did not execute the Settlement Documents, and the Respondent did not approve or sign the consent order.

[23] On February 17, 2017, Opposing Counsel wrote to the Respondent and set a deadline of February 24 for delivery of the executed Settlement Documents. Opposing Counsel advised the Respondent that if the Settlement Documents were not received by the deadline, he would proceed to court.

[24] On February 20, 2017, Opposing Counsel again requested delivery of the Settlement Documents and advised the Respondent that he would seek special costs and substantial damages if required to bring the matter to court.

[25] The Respondent did not reply to Opposing Counsel's letters of February 17 or 20, 2017 and did not deliver the Settlement Documents or approve and sign the consent order. Opposing Counsel then brought an application on behalf of his client seeking a declaration that MS had entered into a binding settlement agreement with RM.

**Allegations 2 and 3**

[26] Mr. Justice Voith heard the application on April 6, 2017. At the application, the Respondent argued that the parties never agreed on the terms of a binding and enforceable settlement agreement. Mr. Justice Voith granted the declaration and awarded special costs of $7,500 to MS. In his reasons of May 9, 2017, Mr. Justice Voith held at para. 44:

> Contrary to the Respondent's argument that the agreement between the parties is a "living document" prior to execution, the settlement agreement between the parties crystalized upon the Applicant's acceptance, on November 21, 2016, of the Respondent's counter-offer dated November 18, 2016. On November 21, 2016 there was mutuality between the parties on all essential terms. Consequently a binding and enforceable settlement agreement was formed at that time.

[27] On May 9, 2017, Opposing Counsel emailed the draft Order Made After Application (the "Voith Order") to the Respondent for her review, approval and return. The Respondent did not reply to Opposing Counsel's email and did not approve or sign and return the Voith Order.

[28] Opposing Counsel followed up with the Respondent by email, as follows:

(a) On May 16, 2017, Opposing Counsel wrote the Respondent asking her to respond to his May 9, 2017 email. He stated:

> Hi Crystal,
>
> Just following up again on the draft order forwarded to you last week on the MS and PM matter. Do you know when I will have it back from you? Also, we need to sort out the logistics of finalizing the documentation and money related matters.

(b) On May 17, 2017, Opposing Counsel wrote:

> Hi Crystal,
>
> Are you able to respond to my email below? My client would like to have all matters wrapped up sooner rather than later.

(c) On May 30, 2017, Opposing Counsel wrote:

> Hi Crystal,

Any progress on having the draft order approved regarding the MS and PM matter and the settlement documents signed and the settlement order approved?

(d) On June 5, 2017, Opposing Counsel wrote:

Hi Crystal,

I haven't heard back from you with respect to my email below of May 30, 2017 regarding the MS and PM matter. Would you please provide an update at your earliest opportunity?

(e) On June 16, 2017, Opposing Counsel wrote the Respondent asking her to return his client's certified cheque:

Crystal,

With respect to the MS and PM matter, please return my client's certified cheque forthwith. It will be replaced (adjusting for the $7,500.00 special costs your client owes my client and any monies your client received subsequent to the November settlement) as soon as the Order of Mr. Justice Voith has been issued by the Court.

(f) On June 21, 2017, Opposing Counsel wrote:

Crystal,

Please confirm that MS's trust cheque is being returned and is in the mail to my office, as requested in my email reproduced below.

(g) On June 22, 2017, Opposing Counsel wrote:

Hi Crystal,

Still haven't heard back from you on my emails below as well as the many communications regarding your approval of the two draft orders and the settlement documents. May I please receive a response?

[29] The Respondent did not respond to Opposing Counsel's emails of May 9, 16, 17 and 30, 2017 or June 5, 16, 21 and 22, 2017.

[30] The Respondent did not approve and return the Voith Order. Having received no response from the Respondent, Opposing Counsel scheduled an appointment with the court to settle the Voith Order.

[31] On June 26, 2017, Opposing Counsel emailed the Respondent and served the Respondent with the appointment the same day. Opposing Counsel wrote:

> Hi Crystal,
>
> With respect to the PM and MS matter, I confirm that I have sent you repeated emails and left you repeated telephone messages concerning approving the draft Order of Mr. Justice Voith none of which have been returned. I have now made a number of requests to you that MS's] trust cheque be returned with follow ups requesting confirmation of its return but have received no communications from you in response. I confirm that to date you have not approved the draft order of Mr. Justice Voith despite repeated requests from me that you do so. Given that you won't approve the draft Order of Mr. Justice Voith or communicate with me regarding same, MS is now placed in the position of having me book an appointment with the court in order to have Mr. Justice Voith's order issued. Please be advised that at that appointment, we will be seeking special costs against both your client and you personally. We will serve you with our materials in due course returnable July 25, 2017 at 11:30 a.m. Kindly diarize accordingly.

[32] Following service, the Respondent did not communicate with Opposing Counsel with respect to the proceedings.

[33] On July 25, 2017, the Respondent and Opposing Counsel attended before Master Bouck sitting as a Registrar. The Respondent indicated to Master Bouck that her client took "no position" with respect to the appointment. Master Bouck determined that the Voith Order was appropriately drafted, settled the terms and granted costs in favour of MS in the amount of $7,956.50.

[34] The Voith Order, as settled, was entered on July 27, 2017. Notwithstanding the entry of the Voith Order, the Respondent did not approve and sign the consent order.

[35] At 2:30 pm on August 16, 2017, Opposing Counsel emailed the Respondent:

> Hi Crystal,
>
> My client proposes that we modify your undertakings such that you may now deposit the certified cheque in the amount of $110,000 into your trust account; immediately forward your firm cheque to my attention in the amount of $7,956.50 payable to "MS"; and forward the settlement documents properly executed by your client to my attention as soon as they become available. Following fulfilling these undertakings, I will advise you in writing that you are

> released from your undertakings and thereafter you will be free to distribute the remaining $102,043.50 as your client advises.
>
> Please advise whether this is agreeable.

At 2:43 pm, the Respondent replied:

> Thanks. That will assist in getting things done quicker.

[36] On August 16, 2017, the Respondent deposited the amount of $110,000 into trust. The Respondent also provided Opposing Counsel with a firm cheque on account of MS's costs, which funds were withdrawn on or about August 22, 2017.

[37] On August 25, 2017, the Respondent emailed Opposing Counsel asking if she could release the remainder of the settlement funds to her client.

[38] On August 29, 2017, Opposing Counsel responded:

> ... I will need a few things before the deposit of my client's certified cheque and the release of the funds to your client:
>
> 1. My client is insistent and requires that the settlement documents be signed by your client and forwarded to us for signature as well as the settlement Order approved by you and forwarded to us so that we can file it with the Court; and
>
> 2. My client requires written confirmation from FMEP that your client has paid the $1,200.00 in full or, in the alternative, that you provide us with your personal undertaking that you will forthwith pay the $1,200.00 to FMEP from the settlement monies and provide us with written confirmation that you have done so.
>
> Following receipt of 1 and 2 above, my client is agreeable to the deposit of his trust cheque and the release of the balance of the funds to your client. We will forward a copy of the issued settlement Order once it becomes available to us.

The Respondent replied:

> Dear [Opposing Counsel]:
>
> I do not accept any further undertakings from you regarding this matter.

Opposing Counsel responded:

> Perhaps we should speak directly about the best way to finalize matters as I would expect that your client wishes to receive the balance of the settlement funds and my client has no interest in holding that up. At this stage, you remain subject to the undertakings already provided and are unable to deposit and/or distribute the settlement cheque. …

[39] On September 7, 2017 and September 8, 2017, Opposing Counsel and the Respondent exchanged further emails about the Undertaking, as follows:

(a) September 7 at 11:52 am, Opposing Counsel to the Respondent:

> ... Please confirm that my client's trust cheque in the amount of $110,000.00 continues to be held by you, has not been deposited and that you have not distributed any of the settlement funds to your client.

(b) September 7 at 11:56 am, the Respondent to Opposing Counsel:

> I will not say it again. There is a court order.

(c) September 7 at 2:54 pm, Opposing Counsel to the Respondent:

> … please provide a response to my question regarding confirmation that my client's certified cheque in the amount of $110,000.00 continues to be held by you, has not been deposited and that you have not distributed any of the settlement funds to your client.

(d) September 8 at 10:01 am, Opposing Counsel to the Respondent:

> My client has asked me to follow up with you again requesting your response to my question to you ... confirming that you are following your personal undertaking ...

(e) September 8 at 10:33 am, the Respondent to Opposing Counsel:

> I have not distributed funds to my client. I am waiting to resolve matters and to hear that your client's cheque cleared. ...

(f) September 8 at 11:11 am, Opposing Counsel to the Respondent:

> With respect, you are still not answering my question in full. Please confirm that my client's certified cheque in the amount of $110,000.00 continues to be held by you and has not been deposited as per your personal undertaking.
>
> I again want to be clear that you have provided your undertaking and without my client's written consent, none of the settlement funds can be distributed. Of

> course there is a simple resolution to this matter – being that your client could simply sign the settlement documents and you could approve the draft order (all of which your client has previously agreed to do) …

[40] The Respondent did not respond to Opposing Counsel's email of September 8, 2017 at 11:11 am.

[41] On September 21, 2017, Opposing Counsel complained about the Respondent's conduct to the Law Society.

[42] The Respondent did not provide the executed Settlement Documents, including the consent order, to Opposing Counsel until on or about December 21, 2017.

[43] The Respondent released the settlement funds to her client on or about December 22, 2017.

**Respondent's Explanation**

[44] In response to a Law Society letter, the Respondent explained in November 2017 that she:

(a) did not provide Opposing Counsel with the executed Settlement Documents and did not sign the consent order or the Voith Order because she did not have instructions from her client; and

(b) responded to Opposing Counsel's communications as she received instructions from her client who resided in Quebec, and there was often a delay due to her client wishing to consult with Quebec Counsel.

**ANALYSIS**

[45] The Law Society bears the onus of proving the allegations in the Citation on a balance of probabilities: *Foo v. Law Society of BC*, 2017 BCCA 151 at para. 63.

[46] The test for "professional misconduct" is not defined in the *Legal Profession Act*, the Law Society Rules or the *Code*, but has been considered in several cases.

[47] The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171 (see also *Re: Lawyer 12*, 2011 LSBC 35 at para. 14 and *Law Society of BC v. Gellert*, 2013 LSBC 22 at para. 67) where the hearing panel concluded that the test for "professional misconduct" is:

> …whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

Additionally, the hearing panel explained at para. 154:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

**Lawyers Must Promptly Sign Court Orders**

[48] Section 5.1-2 of the *Code* sets out the standards lawyers in British Columbia are required to meet in regard to signing court orders. Commentary 5 provides:

> In the absence of a reasonable objection, lawyers have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to. This duty continues, notwithstanding subsequent instructions of the client.

[49] In March 2012, the principle of commentary 5 was adopted by the Law Society's Ethics Committee when it issued an opinion entitled "Chapter 8: Lawyers' Duty to Approve Orders" in which the Committee explained:

> [T]here is ample authority to support the proposition that lawyers have a positive duty to sign court orders that have been granted or agreed to, notwithstanding subsequent instructions of the client to the contrary.
>
> [authorities omitted]

[50] Case law in both the civil litigation and professional regulatory contexts confirms that lawyers have an obligation to sign court orders promptly, even where their clients have changed their minds or the lawyers have ceased acting for their clients. In *Folkes v. Greensleeves Publishing Ltd.*, 2002 CanLII 44917, 159 OAC 99 the Ontario Court of Appeal held at para. 31 that "[t]o hold otherwise would create an inappropriate impediment to the proper processing of orders of the court."

[51] In *Law Society of BC v. Wesley*, 2015 LSBC 05, Ms. Wesley was found to have committed professional misconduct when she failed for about 20 months to enter an interim order made at a Judicial Case Conference regarding child support, access and custody. Ms. Wesley was also found to have failed to advise her client about the risks of not entering the order or the costs required to settle its terms.

[52] In *Law Society of BC v. Dunnaway*, 2000 LSBC 02, Ms. Dunnaway was found to have committed professional misconduct when she failed to enter a court order governing custody, guardianship and access. Ms. Dunnaway delayed finalizing and entering the order because her client wished to add to the court order and would not consent to its terms. The hearing panel found that Ms. Dunnaway allowed her client's views to interfere with her duty to have court orders approved and entered with reasonable promptness.

[53] Other jurisdictions also recognize lawyers' obligations to sign and enter appropriately drafted court orders promptly. In *Law Society of Alberta v. Virk*, 2013 ABLS 20, Mr. Virk was found to have committed professional misconduct as a result of his six-month delay in signing a court order prepared by opposing counsel. In that case, opposing counsel repeatedly requested that Mr. Virk attend to the court order.

[54] Similarly, in *Law Society of Upper Canada v. Opara*, 2016 ONLSTH 140, Mr. Opara was found to have committed professional misconduct when he refused to sign two draft court orders prepared by opposing counsel, despite numerous requests that he do so. Opposing counsel had to settle the orders before a hearing officer.

[55] Similarly, in *Law Society of Manitoba v. Young*, 2015 MBLS 9, Mr. Young was found to have committed professional misconduct when he took about one year to file a court order after being directed to do so.

**Both Consent Orders and Court Orders Must Be Signed and Entered Promptly**

[56] It is settled law that, where parties to a proceeding intend to finally settle the issues between them, a consent order will operate as a final judgment to put a stop to the litigation. (See *Campbell v. Campbell*, [1955] 1 DLR 304, 1954 CanLII 231 (BC SC), which adopted the ruling of Lord Herschell, LC in *Re South American & Mexican Co., Ex p. Bank of England*, [1895] 1 Ch. 37; and *Shackleton v. Shackleton*, [1999] BCJ No. 2653 at para. 12.)

[57] We accept the Law Society's submission that, where parties have agreed to resolve proceedings by way of a consent order, lawyers are obligated to sign and enter appropriately drafted consent orders promptly in the same way they are obligated to sign and enter appropriately drafted court orders promptly.

**Lawyers Must Communicate Reasonably Promptly to Other Lawyers**

[58] Rule 7.2-5 of the Code requires a lawyer to reply reasonably promptly to any communication from another lawyer that requires a response.

[59] There are a number of decisions in which hearing panels have found lawyers to have committed professional misconduct for failing to respond to communications from another lawyer. The relevant cases considered by the hearing panel include the following:

(a) In *Law Society of BC v. Perrick*, 2014 LSBC 3, Mr. Perrick failed to respond to communications from another lawyer regarding the handling and disbursement of trust funds. The relevant period of delay was three months involving a significant amount of money. The hearing panel rejected Mr. Perrick's explanations for the delay;

(b) In *Law Society of BC v. Tsang*, 2005 LSBC 18, Mr. Tsang failed to respond to two telephone messages and two subsequent letters from opposing counsel, who also attended at Mr. Tsang's office and left a message, which was not returned. The relevant period of delay was five months;

(c) In *Law Society of BC v. Niemela*, 2013 LSBC 15, Mr. Niemela failed to respond to eight letters from opposing counsel over a 12-month period; and

(d) In *Law Society of BC v. McLean*, 2015 LSBC 1, Mr. McLean neglected to respond to four letters and three telephone messages from opposing counsel for about six months.

**NON-DISCLOSURE ORDER**

[60] The Law Society seeks an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public. The Panel agrees that an order to protect privilege and confidentiality is appropriate in this case.

**CONCLUSION**

[61] Pursuant to section 38(4) of the *Legal Profession Act*, the Hearing Panel finds that the Respondent's conduct set out in the Citation amounts to professional misconduct as follows, in:

(a) failing to sign an appropriately drafted consent order promptly, as set out in allegation 1 of the Citation;

(b) failing to sign an appropriately drafted court order promptly, as set out in allegation 2 of the Citation; and

(c) failing to answer with reasonable promptness some or all of the communications from opposing counsel dated May 9, 16, 17 and 30, 2017, June 5, 16, 21 and 22, 2017 and September 8, 2017**.**

[62] Pursuant to Rule 5-8, the Hearing Panel further orders that, if a member of the public requests copies of the transcripts or exhibits, those exhibits and transcripts must be redacted for confidential or privileged information before being provided to the public.