2019 LSBC 26
Decision issued: July 22, 2019
Citation issued: May 2, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

WADE CAMERON MACGREGOR

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION

Hearing date:	March 8, 2019
Panel:	Steven McKoen, QC, Chair John Lane, Public Representative Lindsay R. LeBlanc, Lawyer
Discipline Counsel:	Tara McPhail
Appearing on his own behalf:	Wade MacGregor

BACKGROUND

[1] In our decision on Facts and Determination, 2018 LSBC 39, we found that the Law Society had shown that the Respondent had committed professional misconduct by counselling his client to breach the terms of a separation agreement that were enforceable as if they were a court order. These are our reasons on the disciplinary action to be taken.

POSITION OF THE PARTIES

[2] The Law Society submits that the appropriate discipline is a one-month suspension, commencing on the first day of the first month after release of this Panel's decision, or such other date as this Panel may order. The Law Society also seeks an order for costs in the amount of $6,954.73, payable by September 8, 2019, or such other date as this Panel may order.

[3] The Respondent submits that the appropriate discipline is the public reprimand of the finding of professional misconduct itself and that no fine, suspension or order of costs is warranted on the facts of this matter. The Respondent also submits that, if an order for costs is made, that it not be payable until December 31, 2019, due to his personal financial circumstances.

DECISION

[4] Section 38 of the *Legal Profession Act* states that, where a hearing panel finds, as this Panel did, that a member's actions constitute professional misconduct, the panel must do one or more of the following:

a. reprimand the respondent;

b. fine the respondent;

c. impose conditions or limitations on the respondent's practice;

d. suspend the respondent for a period of time or till any conditions or requirements imposed by the panel are met;

e. disbar the respondent; or

f. require the respondent to do one or more remedial actions or make submissions respecting their competence to practise law.

[5] When making a determination as to disciplinary action, this Panel is guided by s. 3 of the *Legal Profession Act*, which states that it is the object and duty of the Law Society to uphold and protect the public interest in the administration of justice. In *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 55, the benchers confirmed that the "…objects and duties set out in section 3 of the Act are reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 at paras. 9 and 10 … ." In *Ogilvie*, the panel set out 13 factors that, while not exhaustive:

> … might be said to be worthy of general consideration in disciplinary dispositions:
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> a. the nature and gravity of the conduct proven;
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> b. the age and experience of the respondent;
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> c. the previous character of the respondent, including details of prior discipline;

d. the impact upon the victim;

e. the advantage gained, or to be gained, by the respondent;

f. the number of times the offending conduct occurred;

g. whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

h. the possibility of remediating or rehabilitating the respondent;

i. the impact on the respondent of criminal or other sanctions or penalties;

j. the impact of the proposed penalty on the respondent;

k. the need for specific and general deterrence;

l. the need to ensure the public's confidence in the integrity of the profession; and

m. the range of penalties imposed in similar cases.

[6] Those factors have been considered in many discipline decisions. In *Law Society of BC v. Dent*, 2016 LSBC 05 at para. 16, the panel stated:

> It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

[7] The panel in *Dent* also endorsed an approach of identifying any additional *Ogilvie* factors that, while not primary, may tip the scales one way or the other and described them as secondary factors. This Panel agrees that it is appropriate to mention in decisions any such secondary factors.

[8] The Law Society submits that the four *Ogilvie* factors that should be considered in this matter are:

a. the nature, gravity and consequences of the conduct;

b. the character and professional conduct record of the respondent;

c. the public's confidence in the legal profession; and

d. the range of sanctions imposed in similar cases.

[9] While this Panel agrees that those are the primary factors that are relevant, we also find that the following secondary factors should be considered:

a. the number of times the offending conduct occurred; and

b. acknowledgement of misconduct and any remedial actions.

Nature, gravity and consequences of conduct

[10] The nature of the conduct here is of a mixed character. At its base, we observe that it is the duty of all lawyers in this province to uphold the orders of our courts and not counsel clients to intentionally breach those orders (see *Law Society of BC v. Kirkhope*, 2013 LSBC 18). As the Law Society argued, counselling respect for court orders is fundamental to the role of lawyers in our legal system.

[11] However, we find that the Respondent had a genuine belief that there was a valid distinction to be drawn between court orders and agreements that are deemed by legislation to have the effect of court orders. We agree that there are many circumstances where a lawyer may counsel breach of an agreement and be completely in line with their professional obligations. The Respondent erred in believing that contract principles rather than court order principles applied to the matter before us. We find that the Respondent had an honest but mistaken belief that he was not engaged in professional misconduct by counselling his client to withhold payments in these circumstances.

[12] As we addressed in our decision on Facts and Determination, the Respondent was not correct in his analysis, and his conduct was professional misconduct. While the Respondent's belief about the character of his actions is not determinative of whether professional misconduct occurred, it is part of the nature of the Respondent's actions that he was not acting in a deliberate manner to knowingly breach his obligations.

[13] The consequences of the Respondent's conduct should also be considered. As a result of the advice given, the spouse of the Respondent's client was underpaid $800 of the funds she was owed and suffered consequent financial hardship. The payments from the Respondent's client were her sole source of income. She was the primary caregiver to their children, and she was unable to pay her bills. We

accept that she suffered the strain that would clearly result from being in those circumstances.

[14] The Respondent clearly communicated to counsel for the spouse the nature of the advice he had given his client and actively participated to bring the matter before a court for consideration within four weeks of the breach of the support agreement. While his actions resulted in the hardship suffered by the spouse, they also resulted in the issue he created being resolved reasonably quickly.

[15] The Respondent in no way personally benefitted from his conduct.

Character and professional conduct record

[16] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 18, 1990, and he practises primarily family law.

[17] The Respondent has a professional conduct record that consists of the following:

a. **Ceased membership/reinstatement:** The Respondent ceased to be a member of the Law Society on January 1, 1995 due to failure to pay practice fees and insurance premiums. He applied for reinstatement on March 13, 1995, and his application was rejected with the panel noting that there was evidence from psychologists that the Respondent had exhibited avoidant behaviour that resulted in a number of issues surrounding competence, record keeping, reporting to clients and general disorganization in his practice. The Court of Appeal (*MacGregor v. Law Society of BC*, 1999 BCCA 7, [1999] BCJ No. 47) sent the matter back for reconsideration by the Law Society and stated at para. 3 that the rejection of his application was "more severe than his shortcomings deserved" given that fines and suspensions were the more usual outcome of similar behaviour rather than a complete prohibition on his ability to practise law. The matter of his good character was considered by both the hearing panel that heard the matter after it was sent back, which decided to reinstate the Respondent, and a review panel of seven benchers after the Law Society appealed the decision to reinstate the Respondent. He was found to be of good character, notwithstanding some evidence of ethical issues between 1993 and 1995. He was reinstated on November 2, 2001 with certain conditions placed on his practice, including not acting as a sole practitioner, entering into a practice agreement and consenting to a practice review by the Practices Standards Committee. He was relieved of the requirement for practice supervision on April 1, 2004 and from the requirement that he not practise as a sole practitioner on May 30, 2007;

b. **Practice standards review:** The practice review resulted in a recommendation being made in March 2003 respecting continued supervision by his practice supervisor and improvement of his file documentation; and

c. **Additional practice standards recommendations:** In 2011 and 2012, the Respondent received additional recommendations from the Practice Standards Committee related to his file documentation, reporting and billing practices.

[18] This is a reasonably substantial conduct record. The Law Society submitted that the ethical issues raised in the record are an aggravating factor in these proceedings. There have been no findings of professional misconduct in the past, but there have been numerous concerns raised with respect to the Respondent's competence, organization, client reporting, billing practices and file documentation. All of those appear to have been dealt with through the actions of the Practice Standards Committee. Importantly, none of the conduct that was considered in the conduct record appears to have been repeated in the matter before this Panel. The matter before us deals with the content of advice given, rather than competence, organization, client reporting, billing practices or file documentation. The only matter that may be related is competence, but we do not find that giving incorrect but reasoned advice gives rise to any question with respect to the Respondent's competence.

[19] There was some evidence of ethical issues before the various bodies in the Respondent's conduct record, but ultimately he was found to be of good character by two reviewing bodies. None of the behaviour that is being considered by this Panel gives us concern respecting his character. He was forthright and honest about the advice he gave, both before this Panel and to the other lawyer and the judge involved in the matter that gave rise to this proceeding.

Public confidence in the legal profession

[20] In *Dent*, the panel found that the specific item at issue with respect to public confidence is whether the public will have confidence in the proposed disciplinary action when comparing it to similar cases (*Dent*, para. 23).

[21] As did the panel in *Ogilvie*, the Law Society, in its submissions before us, separated the consideration of prior cases and public confidence. We believe that there is merit in that approach in this case.

[22] In this case, one of the fundamental issues is ensuring that the outcome will provide the public with confidence that this matter has been dealt with appropriately. Separation agreements have been given the status as being enforceable as if they were court orders for a very specific reason. The prior regime, where a spouse had to get an enforcement order before they could take actions for breach of a separation agreement, led to unnecessary costs and delays before a spouse could get a remedy for a failure to pay support. Lawyers should not undermine that regime by counselling breach of the support provisions of separation agreements. Support provisions in separation agreements were given the status of being enforced as court orders specifically so they would have an enhanced status above and beyond mere contracts.

[23] The Respondent submits that, of the range of available outcomes under s. 38 of the *Legal Profession Act*, we should impose only a reprimand due to his professional misconduct stemming from an honest but mistaken belief with respect to the advice he gave. While we acknowledge that there had been no prior decision of the Law Society that gave specific guidance to the Respondent on what actions he could properly advise his client to take in this circumstance, we believe that upholding public confidence requires the result in this case to be more than a reprimand.

Range of sanction in prior cases

[24] The Law Society directed this Panel to two Ontario cases where a lawyer counselled the breach of a court order and indicated that there are no British Columbia cases with those facts. As the Respondent pointed out, neither of the Ontario cases relate to a situation, as we have in the matter before us, where a lawyer counselled the breach of an agreement that contained provisions that were enforceable as if they were a court order.

[25] In *Law Society of Upper Canada v. Sussman*, 1995 CanLII 537, [1995] LSDD No. 17, a one-month suspension was imposed after the respondent was found to have advised a client to breach a court order with respect to parental access to children. Unlike in the case before us, the respondent did not take any actions to attempt to alter the terms of the court order. Sussman, a lawyer with more than 50 years' experience, had no record of being the subject of proceedings before the law society.

[26] In *Law Society of Upper Canada v. Argiris*, 1996 CanLII 466, [1996] LSDD No. 88, the respondent breached a court order. Rather than paying $75,000 into court as ordered, he placed a $75,000 mortgage on a property, and then he allowed that mortgage to be discharged without making payment or arranging alternate security.

That case also involved a conflict of interest because the respondent acted as trustee for one party to the dispute while counsel for the other. The Law Society Discipline Committee also found that the respondent believed he was acting in accordance with the spirit of the court order in question, despite acting contrary to its wording. The respondent was suspended for one month and paid $3,000 in costs.

[27] In both of those cases the sanction was a one-month suspension. Also, in both of those cases the lawyer in question counselled the breach of an express court order, which we believe distinguishes those cases from the matter before us. Another distinguishing factor is that, in *Sussman*, parental access was denied and in *Argiris*, the quantum at issue was far higher than in the current matter. Consequently, we find that the behaviour in those cases was more egregious than the behaviour in the matter before us.

[28] Other cases, such as *Kirkhope* and *Lessing*, were also raised by the Law Society; however, we believe the cases raised are not of significant assistance in determining the precedent outcomes in similar cases due to the nature of the conduct in those cases being substantially different than the matter before us. In *Kirkhope*, counsel breached a court order as part of an attempt to force a settlement of a case and received a 45-day suspension and an order for costs in the amount of $7,725.20. In *Lessing*, the review panel was considering breaches of court orders in the context of the respondent's own matrimonial proceedings, a finding of contempt of court and eight unsatisfied judgments against the respondent who, on review, received a one-month suspension. In both those cases, the conduct was too dissimilar to the facts of this case to provide much useful guidance on range of sanctions.

Secondary factors

[29] As noted, there are two *Ogilvie* factors that we find to be secondary factors in this matter.

[30] First, *Ogilive* identified the number of times the offending conduct occurred as a factor that could be considered. Here, like in *Sussman* and *Argiris*, the Respondent's conduct has occurred only once and is not part of a pattern of ongoing professional misconduct.

[31] Second, *Ogilvie* considered whether the respondent acknowledged the misconduct and took any remedial actions. Here, the Respondent acknowledged his misconduct at the hearing on the decision phase of this matter. We do not find that to be a particularly positive or negative factor. However, we do note that the

Respondent, in counselling his client to breach the separation agreement, also advised his client to keep the unpaid money available to be paid to the spouse in case the court disagreed that his client was entitled to reduced support payments. Further, the Respondent immediately advised opposing counsel of the advice he gave and he took steps to have the matter brought before a judge for determination reasonably quickly. While it is important to stress that what the Respondent should have done is sought a court order prior to his client reducing his support payments, his actions of having the money in question preserved and the matter judicially decided with alacrity both were taken into consideration by this Panel.

Summary of the *Ogilvie* factors

[32] In this matter, two aggravating primary factors stand out. The public's confidence in the legal profession was undermined by the Respondent's actions, and our decision must be seen to deter similar professional misconduct. Also, the unpaid spouse suffered unnecessary financial distress due to the Respondent's actions.

[33] The mitigating primary factor that is most prominent is that similar but more severe conduct in the two precedent cases was found to warrant a one-month suspension.

[34] We find that a reprimand, which the Respondent submitted would be appropriate, would not be sufficient to reflect the nature of the professional misconduct in this case. However, the benchmark cases, when considered with the other primary and secondary factors discussed above, do not support a one-month suspension as requested by the Law Society. We find that a suspension is called for and that the appropriate length of the suspension is 15 days.

COSTS

[35] The Law Society requested an order for costs in the amount of $6,954.73. That amount is the result of applying the tariff in Schedule 4 to the Law Society Rules, to which Rule 5-11 directs us to have regard when considering an order for costs. We believe that amount is reasonable and appropriate given the finding of professional misconduct in this matter, and we find no reason to deviate from the tariff costs.

[36] The Respondent requested that, if costs are awarded, he be given till December 31, 2019 to make such payment.

ORDER

[37] This Hearing Panel orders that the Respondent:

a. be suspended from the practice of law for a period of 15 days to commence August 1, 2019 or on some earlier date as agreed to by the Law Society and the Respondent; and

b. pay the Law Society of British Columbia on or before December 31, 2019 costs of $6,954.73.

NON-DISCLOSURE ORDER

[38] As granted in the facts and determination phase, discipline counsel again applied for a sealing order in these proceedings to protect confidential or privileged information about the clients from being disclosed. The Respondent consented to this application.

[39] Rule 5-8(2) of the Law Society Rules provides that, upon application or on its own motion, a panel may order that specific information not be disclosed to protect the interests of any person. Rule 5-8(5) requires that, if the panel makes such an order, it must give its written reasons for doing so. In the absence of such an order, Rule 5-9(2) of the Law Society Rules permits a person to obtain a copy of an exhibit entered into evidence when a hearing is open to the public.

[40] We find that the citation, the Agreed Statement of Facts and all other exhibits filed in this hearing as well as any transcript of the hearing contain confidential and privileged information of the clients that should not be disclosed. We therefore make the following order:

a. if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information and any information protected by solicitor-client privilege, must be redacted from the exhibit before it is disclosed to that person; and

b. if any person, other than a party, applies for a copy of the transcript of these proceedings, client names, identifying information and any information protected by solicitor-client privilege, must be redacted from the transcript before it is disclosed to that person.