2019 LSBC 36
Decision issued: September 24, 2019
Citation issued: July 13, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

AMARJIT SINGH DHINDSA

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing dates:	May 30 and June 27, 2019
Panel:	W. Martin Finch, QC, Chair Carol Gibson, Public representative Lindsay R. LeBlanc, Lawyer
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Gerald A. Cuttler, QC

BACKGROUND

[1] In our decision on Facts and Determination (*Law Society of BC v. Dhindsa*, 2019 LSBC 05), we found that the Respondent had committed professional misconduct by acting in a conflict of interest, breaching undertakings and failing to honour a trust condition relating to the Respondent's representation of a developer with respect to its purchase and sale of a development property.

POSITION OF THE PARTIES

[2] The Law Society submits that the appropriate discipline is a four-month suspension. The Law Society also seeks an order for costs in the amount of

$15,548.34, payable by June 15, 2019, or such other date as this Panel may order. Finally, the Law Society seeks a sealing order to protect solicitor-client privilege and confidentiality.

[3] The Respondent submits that the appropriate discipline is a fine of $10,000 plus costs, or alternatively, if this Panel decides that a suspension is warranted, it should be in the range of two to three weeks. The Respondent also submits that costs should not be more than $13,748.34 and payable in 12 to 18 months. Lastly, the Respondent seeks a sealing order to protect all financial and corporate information disclosed in the hearing.

DECISION

[4] Section 38 of the *Legal Profession Act* states that, where a hearing panel finds, as this Panel did, that a lawyer'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 practice law.

[5] In cases involving multiple findings of misconduct, the usual approach in assessing the appropriate disciplinary action is to first determine on a global basis the type of sanction to be imposed, taking into account the nature of all the misconduct (*Law Society of BC v. Gellert*, 2005 LSBC 15). We have followed that approach.

[6] 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:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(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.

[7] 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.

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

(a) the nature and gravity of the proven misconduct;

(b) the need to ensure public confidence in the integrity of the profession;

(c) the respondent's character and the possibility of remediation or rehabilitation;

(d) the respondent's prior discipline history;

(e) the impact of the proposed sanction on the respondent; and

(f) the range of sanctions imposed in similar cases.

[9] The Respondent submits that the following *Ogilvie* factors are relevant to this matter:

(a) the nature and gravity of the conduct proven;

(b) the impact upon the victim;

(c) the advantage gained, or to be gained, by the respondent;

(d) 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;

(e) the possibility of remediating or rehabilitating the respondent;

(f) the need for specific and general deterrence;

(g) the range of penalties imposed in similar cases.

Nature, gravity and consequences of the conduct

[10] The professional misconduct of the Respondent arose from acting in a conflict of interest and breaching undertakings and trust conditions.

[11] In *Law Society of BC v. Welder*, 2014 LSBC 20, the Panel stated at para. 30:

> Acting in a conflict of interest amounts to a breach of one of the bastions of the legal profession, ranking with confidentiality, loyalty to clients, fulfilling undertakings, safeguarding trust funds, and duties to the Courts. Failure to uphold these bastions leads to disintegration of the public's confidence in the profession.

[12] In *Law Society of BC v. Coglon*, 2006 LSBC 14, at para. 6, the panel stated that the duty of loyalty to one's client is one of the core values of the legal profession, perhaps the core value.

[13] In *Dhindsa*, this Panel affirmed the sanctity of undertakings and the essential requirement of strict compliance.

[14] The trust and confidence vested in lawyers' undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted. Reliance on undertakings is a fundamental component to the practice of law in British Columbia. It follows that serious and diligent efforts to meet all undertakings are essential in maintaining public credibility and the public's trust in lawyers.

[15] The Respondent was found to have been in conflict of interest in acting for 93 end purchasers and their financial institutions and was also found to have committed breaches of undertakings in connection with 16 separate real estate transactions.

[16] The Respondent urges the Panel to categorize the conduct as one of error in judgment, inadvertence, oversight and miscommunication.

[17] With respect to the conflict of interest, such matters were brought to the attention of the Respondent early in the course of his retainer, and such concerns were dismissed wrongly by the Respondent.

[18] Regarding the breaches of undertakings that were found under the headings of allegation 2 and allegation 3 in our prior decision, the Respondent submits that no one was negatively affected and the breaches were ultimately and relatively promptly rectified. We do not accept that playing a lottery with respect to undertakings can be considered a mitigating factor. Undertakings are the essential underpinning upon which real estate transactions occur and can safely occur in British Columbia. The importance of adherence to an undertaking cannot be dismissed or discounted by consideration of whether harm happened to occur.

[19] Lastly, with respect to the breach of trust set out under allegation 4 of our prior decision, the Respondent submits that there was no advantage to be gained by him and this, he suggests, should be considered a mitigating factor. The Panel does not accept this submission. If the Form A Transfers had not been filed on the date filed by the Respondent, one of the Respondent's clients faced loss of a deposit in the sum of $100,000. The Respondent was motivated to ensure that the Form A Transfers were filed. Further, when the Respondent was notified by the opposing

lawyer to immediately withdraw the transfer, the Respondent refused to do so, thereby protecting his one client's interest and ultimately his own.

[20] Gravity of the conduct of the Respondent is an aggravating factor that has been considered by this Panel.

Character and professional conduct record

[21] The Respondent was called and admitted as a member of the Law Society of British Columbia on June 8, 2001, and he practises primarily as a solicitor in the area of real estate.

[22] The Respondent has a professional conduct record consisting of the following:

(a) **Conduct Review 2009:** On March 16, 2009, the Respondent attended a conduct review regarding a complaint the Law Society received in January 2007 about a breach of undertaking in a real estate transaction in which the Respondent acted for the sellers. The Respondent gave an undertaking to pay the outstanding property taxes and provide the seller's lawyer with proof of that payment. The Respondent disbursed the sale proceeds without first confirming that the property taxes had been paid. The Direction to Pay did not include authorization to pay the outstanding taxes. At the conduct review, the Respondent presented the subcommittee with a document entitled "Lessons Learned", which detailed that he had failed in his professional responsibilities by failing to properly supervise staff and that, as soon as he learned the property taxes were outstanding, he should have paid them. The document also compared the failings with the Respondent's current practices. It noted that the Respondent now "meticulously review[s] conveyance files before completion" and that he had advised staff to bring any problems to his attention immediately so they could be resolved.

(b) **Practice Standards Recommendations 2009:** Recommendations in an April 2009 Practice Review Report accepted by the Practice Standards Committee provided that the Respondent should personally review every undertaking, and implement a system to reflect when the Respondent had reviewed, accepted and complied with undertakings. It proposed that the Respondent should review real estate files within 30 days of completion to ensure that undertakings had been fulfilled. Another recommendation stipulated that the Respondent should ensure his staff complied with Rule 3-89 regarding report of mortgages that had not been discharged within 60 days of payout. The Practice Standards file was closed in July

2010, after the Respondent completed various recommendations of the Practice Standards Committee regarding the implementation of systems to ensure fulfillment of undertakings.

(c) **Conduct Review 2013:** In April 2013, the Discipline Committee directed the Respondent to attend a conduct review to discuss his conduct in putting his female legal assistant in a chokehold at his office. The conduct review took place in July 2013, and the Respondent explained his conduct was intended to be playful. The Respondent acknowledged his behaviour was unacceptable and unprofessional. He assured the subcommittee he was addressing it by his intention to consult with the Lawyer's Assistance Program, the Law Society's Personal Performance Consultants and the Law Society's Equity Ombudsperson for guidance and support in addressing his behaviour.

(d) **Citation 2013:** In April 2014, a hearing panel accepted the Respondent's Rule 4-22 [now Rule 4-30] proposal under which the Respondent admitted professional misconduct and consented to a fine of $5,000. The Respondent had breached undertakings given in a real estate matter by failing to provide opposing counsel with a copy of his letter to the bank enclosing the payout monies and failing to use diligent and commercially reasonable efforts to obtain a discharge of a mortgage and assignment of rents in a timely manner. He was also found to have failed to report to the Executive Director of the Law Society that he had failed to obtain discharges from a lender within 60 days of closing and to have failed to maintain responsibility for the file, improperly delegating tasks to his staff and failing to adequately supervise his staff.

[23] The Respondent has not implemented the standards of practice urged in prior conduct reviews regarding the supervision of staff and review of files to ensure compliance with undertakings. This remains as a serious issue in the professional misconduct in this citation.

[24] The Respondent produced three character references in support of his good character. On review of the letters it is not clear what information the authors were given in preparation of the letters. On this basis, the Panel has attributed little weight to the letters and considers them to be a neutral factor.

[25] The Respondent produced a letter from Dr. G, the Respondent's family physician. The letter speaks to the Respondent's medical condition and was submitted on the basis of "assisting the panel". It is not a medical expert report and has not been considered as one. Dr. G was not called on behalf of the Respondent. The Panel

did not take assistance from the letter in considering the condition of the Respondent.

[26] The Respondent seeks to have the Panel view the prior record in light of this letter that speaks to a diagnosis of attention deficit disorder/attention deficit hyperactivity disorder of the Respondent five years ago.

[27] We did not have sufficient evidence before us to consider the diagnosis in regard to the Respondent's character or professional conduct record.

[28] The conduct record is substantial and the prior breaches of undertakings in real estate transactions are aggravating factors.

Impact upon the victim

[29] The Respondent submits that no one was directly negatively affected and no conflict ultimately arose. The evidence does not lead to a conclusion that no conflict has arisen. The fact that the Respondent was acting in conflict leads to the misconduct in the circumstances of this case. The parties were not offered undivided representation whether or not any harm has occurred to date. We do not find this factor to be mitigating, as the Respondent urged.

Advantage gained, or to be gained, by the respondent

[30] The Respondent submits that he did not gain any advantage through his conduct. We do not accept that submission. The Respondent had a financial gain by acting for two parties in the transaction. This factor is not mitigating.

Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating factors

[31] We find this factor does not assist in the determination in this case.

[32] The Law Society submits that we should draw a negative inference from the position taken by the Respondent in the Facts and Determination phase of the hearing. We have found no legal authority to accept that position.

Possibility of remediating or rehabilitating the respondent

[33] The principle of progressive discipline has been applied in our finding and supports a suspension instead of a fine.

[34] There is no evidence that the Respondent is not capable of remediation. A period of suspension will provide time for reflection and implementation of file management practices.

Impact of the proposed penalty on the respondent

[35] The Respondent tendered some evidence on his finances in an effort to demonstrate the hardship a suspension would have on him. The financial information that was provided was selective and not complete. Little weight has been given to it in our determination.

[36] There was no evidence that the Respondent could not financially or otherwise retain a lawyer to manage his practice during a period of suspension.

[37] The Respondent also submitted that a suspension would impact EM, a lawyer who works at the law firm, under a part-time contract. There was no direct evidence from EM on what impact a suspension might have, and accordingly, we are unable to consider this as a mitigating factor. The submission was speculation by the Respondent.

Need for specific and general deterrence and public confidence in the legal profession

[38] The question the Panel must consider is whether the public will have confidence in the proposed disciplinary action when comparing it to similar cases.

[39] If the sanction imposed does not reflect the seriousness of the conduct, public confidence in the integrity of the legal profession will be eroded.

[40] The Law Society directed the Panel to the Saskatchewan Court of Appeal decision of *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56, and we adopt the following passages:

> [119] The general approach to sentencing in disciplinary proceedings was explained by Wilkinson JA in *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33:
>
> > 98 However, the sentencing approach in disciplinary proceedings is different than in criminal courts. In *Law Society of Upper Canada v. Kazman*, 2008 ONLSAP 7, the Law Society Appeal Panel considered the philosophy of sentencing in disciplinary matters and its unique considerations. The panel quoted extensively from

Bolton v. Law Society, [1994] 2 All ER 486. The critical distinction between sentencing in criminal matters and sentencing in disciplinary matters is highlighted in this paragraph:

> [74] A criminal court judge … is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group -- the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.

[41] To ensure the public has confidence in the legal profession and the system in which lawyers handle real estate transactions, including reliance on undertakings, a suspension in this case is warranted. A fine would not reflect the nature of the misconduct, which is serious.

Range of sanctions in prior cases

[42] The Law Society directed this Panel to the following cases: *Coglon, Law Society of BC v. Ooi*, 2010 LSBC 06, *Law Society of BC v. Scholz*, 2009 LSBC 33, *Law Society of BC v. Welder*, 2014 LSBC 20, *Law Society of BC v. Culos*, 2013 LSBC 19, *Law Society of BC v. Goddard*, 2006 LSBC 12 and 2008 LSBC 14, *Law Society of BC v. Ghag*, 1999 LSBC 32, [1999] LSDD No. 49, and *Law Society of BC v. Hill* 2011 LSBC 16. The range in these cases was a suspension of one to six months.

[43] The Respondent directed this Panel to the following cases: *Law Society of BC v. Nguyen*, 2016 LSBC 21, *Law Society of BC v. Promislow*, 2009 LSBC 04, *Law Society of BC v. Richardson*, 2008 LSBC 05, *Law Society of BC v. Shojania*, 2004 LSBC 25 and *Law Society of BC v. Dhindsa*, 2014 LSBC 18. The range in these cases was a fine of between $2,000 and $7,500.

[44] All of these cases have been considered in determining the sanction to be imposed, along with the other factors described above.

Summary of the *Ogilvie* factors

[45] In this matter, two *Ogilvie* factors stand out. First, 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. Second, the prior professional conduct record of the Respondent that references similar misconduct.

[46] The ongoing professional misconduct throughout the Respondent's retainer, including multiple breaches of undertakings, is an aggravating factor that has also been considered.

[47] We conclude that a fine, which the Respondent submitted would be appropriate, would not be sufficient to reflect the nature of the professional misconduct in this case.

[48] Having reviewed the cases provided on range of sanction, along with the other factors discussed above, a suspension of four months, as sought by the Law Society is not supported.

[49] A suspension is called for, and the appropriate length of the suspension is seven weeks.

COSTS

[50] The Law Society seeks total costs in the amount of $15,548.34: $13,900, the result of applying the tariff in Schedule 4, plus disbursements of $1,648.34.

[51] The Respondent submits that the Bill of Costs should be reduced by 121 units, for a total of $12,100, plus disbursements. There is no disagreement between the parties on the amount of the disbursements.

[52] Having heard submissions on costs, the Panel has reduced the units sought by the Law Society by a total of 9 units, based on the following changes to the Schedule 4 tariff items proposed by the Law Society:

(a) Item 1 - units claimed reduced from 10 units to 7;

(b) Item 3 - units claimed reduced from 18 units to 15;

(c) Item 9 - units claimed reduced by 1 unit from 16 to 15;

(d) Item 12 - units claimed reduced from 5 units to 3.

[53] The Panel approves costs in the amount of $13,000 in fees, plus $1,648.34 in disbursements, for a total of $14, 648.34.

[54] The Respondent submitted that, pursuant to Rule 4-44(1)(c)(ii), he be given 12 to 18 months to pay the Law Society's costs in equal monthly instalments. In light of the seven weeks suspension of the Respondent, he is granted 24 months to pay the costs in equal monthly instalments. The first payment is to be made by December 1, 2019.

ORDER

[55] This Hearing Panel orders that the Respondent:

(a) be suspended from the practice of law for a period of seven weeks, to commence November 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, within 24 months of the pronouncement of this decision, costs and disbursements in the amount of $14,648.34, such payment to be made as provided in Paragraph [54] herein.

NON-DISCLOSURE ORDER

[56] 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.

[57] 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.

[58] 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.

[59] The Law Society and the Respondent have made applications for non-disclosure of certain information.

[60] Both parties have sought an order under Rule 5-8(2). The Law Society seeks a general order that copies of exhibits or transcripts in the proceedings be redacted for confidential or privileged information before being provided to the public.

[61] The Respondent alone seeks an order sealing certain documents found in Exhibit 43 that contain personal information.

[62] Rule 5-8(2) of the Law Society Rules provides:

> On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:
>
> (a) an order that specific information not be disclosed;
>
> (b) any other order regarding the conduct of the hearing necessary to the implementation of an order under paragraph (a).

[63] Rule 5-9(1) provides that any person may obtain a transcript of a hearing and Rule 5-9(2) of the Law Society Rules permits any person to obtain a copy of an exhibit that was tendered in evidence when a hearing is open to the public.

[64] The burden to establish a basis for sealing such information is on the person seeking the sealing order. This order at first instance conflicts with the general public interest in openness of hearings. For the Respondent to succeed, he must demonstrate that the public's interest in openness should be displaced by a superior societal interest. This requires a weighing of the conflicting interests of privacy and openness. This also requires consideration of the importance of the information in the public's need to know in order to understand the decision as a whole. Where persons other than the Respondent have privacy interests, those

should be respected where they do not frustrate the public need to understand the decision.

[65] We find that Exhibit 43, Tabs 2 and 3, would not enhance nor increase the public's knowledge or awareness of the issues of this case and their disclosure may unnecessarily affect the privacy interest of others to whom those documents relate. The subject Exhibits contain private and sensitive information regarding the Respondent and his family. Except to the extent set out in this decision, we find that it is unnecessary for members of the public or legal profession to be privy to that information and that the persons referenced are entitled to have their identities kept secret and the information related to them not disclosed. The report of Dr. G dated May 10, 2019 contains very private and personal information about the Respondent that members of the public and legal profession do not need to know, and it is not in the public interest that it be disclosed, except to the extent set out in this decision. The documents in Exhibit 43, other than those in Tabs 2 and 3, are either documents that are available in public registries or are documents that are peculiar to the Respondent. We do not find that a privacy interest of the Respondent displaces the public interest in transparency for those documents.