2020 LSBC 27
Decision issued: June 8, 2020
Citation issued: April 17, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JOHN (JACK) JOSEPH JACOB HITTRICH

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	January 15, 2020
Written submissions:	April 6, 2020 April 20, 2020
Panel:	Phil Riddell, QC, Chair Linda Michaluk, Public representative Shona Moore, QC, Lawyer
Discipline Counsel:	Peter R. Senkpiel and Julia K. Lockhart
Counsel for the Respondent:	Peter Leask, QC, Russell Tretiak, QC and Rasjovan S. Dale

INTRODUCTION

[1] The Respondent committed professional misconduct in that he:

> In approximately September 2016, in the course of representing your clients in a proceeding against the Director of Child, Family and Community Services (the "Director") in the Supreme Court of British Columbia, Docket [number], Vancouver Registry, you attempted to

resolve litigation in favour of your clients through improper means, by doing one or more of the following:

(a) in a letter dated September 5, 2016 to counsel for the Director, in an attempt to gain a benefit for your clients, threatening to expose alleged perjury by representatives of the Director in related proceedings unless the Director agreed to settle the litigation as your clients proposed; and

(b) through the threat described in the preceding sub-paragraph, attempting to influence the Director to exercise her statutory decision-making authority for an improper purpose.

[2] The reasons of the Panel dealing with the Facts and Determination, 2019 LSBC 24 ("F&D Reasons"), set out the factual background and the manner in which the Respondent committed professional misconduct.

POSITION OF THE PARTIES

The Law Society

[3] The Law Society seeks the following:

(a) The Respondent be suspended from the practice of law for a period of four months, commencing on the first day of the month following this decision;

(b) An Order be made under Rule 5-8(2)(a) of the Rules; and

(c) The Respondent pay costs in the amount of $18,655.85.

[4] The Law Society canvassed the factors set out in *Law Society of BC v. Ogilvie,* 1999 LSBC 17, placing emphasis on:

(a) nature, gravity and consequence of conduct;

(b) character and professional conduct record ("PCR") of the respondent;

(c) acknowledgement of misconduct and remedial action; and

(d) public confidence in the legal profession, including public confidence in the disciplinary process.

[5] The Law Society characterizes the conduct of the Respondent as his trying to "blackmail a government official into taking a step inconsistent with that official's statutory duty to act in the best interest of a child."

[6] The Law Society emphasized our determination that the acts of the Respondent were both serious and deliberate.

[7] The Law Society relies upon the Respondent's PCR, which consists of:

(a) a Conduct Review in September 1994 dealing with his acting in a conflict of interest when he met with the husband and the wife in a matrimonial dispute, prior to acting for the wife;

(b) a Conduct Review in September 2000 dealing with the Respondent continuing to hold in trust funds that he had an obligation to pay to an opposing party. The Respondent sought clarification of the court's order. The court's reasons show some frustration with the Respondent's argument as to why he was not required to release the funds. The Conduct Review Subcommittee reported that the Respondent felt that the difficulties had "been caused by a lack of objectivity and over identification with the client's dilemma";

(c) a Conduct Review in November 2000 dealing with the Respondent's conduct in backdating correspondence revoking an offer to settle and speaking to a client who was under cross-examination. The Respondent advised that "he had learned from his mistakes and believes the experience will make him a better lawyer in the future."

(d) a Conduct Review in November 2014 dealing with the Respondent's conduct in causing three inaccurate affidavits to be filed in court. The affidavits were sworn by a legal assistant who was also the Respondent's wife. The court found that the affidavits were inaccurate and that the Respondent had failed to verify them. The Respondent acknowledged that the "buck stops" with him, and that he should have taken steps to verify the accuracy of the affidavits;

(e) a Practice Standards Referral, August 2014 to April 2015, dealing with putting administrative systems in place to ensure proper supervision of delegated tasks, file management and general office administration issues.

[8] The Respondent provided a report from a counsellor, and that report created several concerns for the Law Society, including, in addition to the Respondent's problem with over-identification with his client, his intellectual ambition to win a debate.

[9] The Law Society submitted that character references provided on behalf of the Respondent do not indicate that his disciplinary past has been fully disclosed to the referees. The Respondent's PCR was said to "speak louder" than the character references.

[10] Counsel for the Law Society raised the issue of an email of September 5, 2017 at 7:48 pm, which referenced further changes to the letter that was eventually sent. This was raised at the commencement of the Disciplinary Action hearing on January 15, 2020. This additional email was not disclosed to the Law Society prior to the hearing and came to light at the hearing of NG, the respondent in a separate citation hearing. The Law Society says this email shows that the drafting process for the impugned letter was "intentional, deliberate and thought out."

[11] Counsel for the Law Society cross-examined the Respondent at the Disciplinary Action hearing in January 2020 with regard to his conduct when called as a witness at the hearing of NG. He was questioned in particular with respect to his conduct after he had testified, including his interjections and the fact that he was warned by the panel to cease this conduct. This is said to be relevant to whether or not the Respondent can be rehabilitated.

The Respondent

[12] The Respondent's position is that:

(a) the Respondent be suspended from the practice of law for a period of two to six weeks, with three weeks as the suggested term of suspension; and

(b) the Respondent pay costs in the amount of $16,965.85 to be paid over a period of time at the rate of $2,000 per month.

[13] The Respondent emphasizes our finding that there was a lack of *mala fides* on his part, although the conduct was serious.

[14] Regarding the Respondent's PCR, the following observations were made by the Respondent's counsel:

(a) The five items occurred over 34 years;

(b) There were no citations until 2018;

(c) There was a 14-year gap in the PCR; and

(d) In the September 2000 conduct review, failure to pay funds held in trust to an opposing party contrary to an Order, was characterized as a situation where there was no prejudice since the funds were not paid out to the Respondent's client.

[15] A number of letters of reference were filed on behalf of the Respondent. Counsel were advised that the F & D Reasons were forwarded to the referees. There was no indication that the PCR was provided to the referees.

[16] The Respondent submits that he did not gain from his conduct and that, even if the impugned offer had been accepted, the Respondent would not have gained any personal advantage.

[17] The Respondent takes the position that, since there was only one letter sent, there is no pattern of deliberate wrongdoing and this should be considered a mitigating factor.

[18] The Respondent relies on the fact that he is in counselling and that the counsellor has provided a report. The counsellor advises that the Respondent has taken active steps to improve his work-life balance and "analytical judgment" through counselling.

[19] The Respondent has taken steps to reduce his workload and has changed his practice situation to change his situation. He has associated with a practice that has the ability to deal with the non-family law aspects of his clients' files.

[20] The Respondent has suffered other sanctions, including the payment of a special costs order made by Fisher J. in the amount of $22,500 and the legal fees associated with defending that matter in the amount of $60,000. The Respondent has incurred legal fees, and costs "defending these matters and the Law Society matters are now in excess of $120,000."

[21] The Respondent has suffered adverse publicity because of the media coverage of the decision of Fisher J.

[22] The Respondent argues that a four-month suspension would make it difficult for him to rebuild his practice and would make it difficult if not impossible given his current trial schedule.

[23] The Respondent says the failure to disclose the 7:48 pm email was inadvertent and accepts the submission of the Law Society regarding the effect of the email on the drafting process.

ANALYSIS

[24] In determining the appropriate sanction to be imposed, *Law Society of BC v. Ogilvie,* 1999 LSBC 17, [1999] LSDD No. 45, paras. 9 and 10, sets out the factor to be considered:

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel·must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
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> The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following 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;
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> (d) the impact upon the victim;
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> (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.

[25] *Law Society of BC v. Dent*, 2016 LSBC 5, confirms that a hearing panel is not required to go through every factor set out in *Ogilvie* as if it were a shopping list. What is required is for the panel to consider the factors that are relevant or determinative to the sanctions imposed.

[26] Section 38(5) of the *Legal Profession Act* sets out the range of sanctions that may be imposed upon an adverse determination being made.

[27] The purpose of the disciplinary process was discussed by the Review Board in *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 36, as having two main purposes.

> The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. *If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.*
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> [emphasis added]

[28] In finding that the Respondent had committed professional misconduct we set out in our F&D Reasons several factors that are relevant to the seriousness of the

misconduct and the circumstances in which the misconduct took place. At paragraph 86 we stated:

> The finding that the letter on an objective basis constituted the use of a threat in order to induce another to act does not end the analysis as to whether or not the Law Society has proved professional misconduct on the balance of probabilities. The factors referred to in *Law Society of BC v. Lyons*, 2008 LSBC 09, should be considered, although not all factors are present in every case:
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> (a) *For the reasons set out above, the Letter was a threat to take a course of action to induce the holder of an office with a statutory duty to act contrary to that duty. This is magnified by the fact that the duty sought to be breached was to act in the best interests of SS. This is misconduct that is serious;*
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> (b) *The sending of the Letter was one act, but it was an act that was deliberate*. There were a number of drafts sent to the Team. NG had advised the Respondent regarding his concern that the earlier draft of the Letter might be considered blackmail. It should be noted that, after this concern was expressed by NG, the Respondent added the sentence containing the phrase "appropriate sanctions may be appropriate." The *Letter was drafted to be "minimalistic for tactical reasons." The Letter was not drafted in the heat of the moment but was thought out*;
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> (c) *This is a case of a single act of the sending of the Letter*;
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> (d) The Respondent has argued throughout that he was acting in good faith and believed he was acting in the best interests of SS. The difficulty in part with this is that, while in the Paragraph he stated that he did not appreciate the special position of Director, in his *viva voce* evidence, he took steps to distance himself from this statement. The Respondent is a lawyer with more than 30 years' experience in the practice of family law. *It is difficult to accept that he did not understand the role of the Director. The absence of mala fides does not necessarily mean the presence of bona fides*;
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> (e) There was no harm caused directly by the Letter in that it was not successful in inducing the conduct sought. *The harm done was to the reputation of the profession resulting in a lawyer using the tactics as set out in the Letter to induce a statutory officer to act*

contrary to her duty. The harm to the reputation of the profession is great.

[emphasis added]

[29] When examining the *Ogilvie* factors we have found the following factors to be of significance in this case:

(a) *The nature and gravity of the conduct proven*:

The conduct is serious.

(i) The letter was written to induce the holder of public office to act in a manner contrary to their public duty, that was, to act in the best interests of the child. This conduct is serious;

(ii) The sending of the letter was deliberate. The letter went through a drafting process. The Respondent was advised by NG that this might be considered blackmail. The letter was drafted with tactical considerations in mind. This was not an impulsive act, it was planned and deliberate;

(iii) The Respondent was at the time a lawyer with 30 years' experience in the area of family law. Although we did not find *mala fides* on the part of the Respondent, we did not find he acted in good faith; and

(iv) Although the letter did not achieve its goal by inducing the public officer to act contrary to their public duty, the harm done to the reputation of the profession is great;

(b) *The previous character of the respondent, including details of prior discipline*:

(i) The Respondent does have a PCR. This is the first time he has been found to have committed professional misconduct;

(ii) The September 25, 2000 Conduct Review is the most troubling in that it illustrates an attitude that pervaded the Respondent's conduct in this case: that of knowing better than anyone else what was the right thing to do;

(iii) Several letters of reference were provided on behalf of the Respondent. They are favourable on his character on a general basis. One of the referees who had worked with the Respondent stated that he had reviewed the reasons on F&D and stated: "I have no doubt his errors in judgement were the result of his overzealous pursuit of an outcome he believed was in the best interest of his comparatively powerless client."; and

(iv) The PCR and even one of his referees show the Respondent as someone who believes he knows what is best and will act in that manner;

(c) *Whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of mitigating circumstances*:

The Respondent has apologized for his conduct. The issue at the hearing was whether that conduct constituted professional misconduct. In a case where a respondent has contested that the conduct constitutes professional misconduct, it is difficult for a respondent to then say, upon a finding of misconduct, that he was wrong. In the course of submissions we were advised the Respondent had attempted to file a review under s. 47 of the *Act*. We take nothing from this. It is the Respondent's right to take a review. We find that the conduct of the Respondent has been neutral in that his conduct with regard to acknowledgement of his conduct has been neither an aggravating nor a mitigating factor;

(d) *The possibility of remediating or rehabilitating the respondent*:

The Respondent has attended upon a counsellor. The counsellor reported that the Respondent acknowledged an over identification with his client and an intellectual desire to prove he is right and win the debate. Counselling has recommended a better work-life balance, and it would appear that the Respondent has taken steps to vary his practice arrangements to address this. Given the length of time the Respondent has been in practice, his PCR, and the fact this is the first time he has been found to have committed professional misconduct, the Panel can neither be overly optimistic or pessimistic about his chances of rehabilitation. There is nothing to suggest that the Respondent is a person with no probability of rehabilitation;

(e) *The impact upon the respondent of criminal or other sanctions or penalties*:

The Respondent has made submissions dealing with the order of Fisher J. requiring the Respondent to pay costs in the amount of $22,500. Costs were ordered as a result of two petitions being struck as an abuse of process. The Respondent had to pay legal fees regarding that matter, and legal fees with regard to matters before the Law Society. Regarding the order for costs and legal fees associated with the order of Fisher J.: those are related to the conduct of the underlying litigation, not to the Respondent's conduct that was the basis for the finding of misconduct. Costs associated with defence of this citation are not in the nature of "other sanctions of penalties";

(f) *The impact of the proposed penalty on the respondent*:

The overriding purpose in imposing disciplinary action "is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession." This means that the effect upon the rehabilitation of the Respondent has a secondary role. The Respondent has submitted a four-month suspension will lead to the Respondent's financial ruin. After a four-month suspension it will be "extremely" difficult for him to rebuild his practice. There is no other senior family law practitioner at his existing firm who would be able to oversee his practice during a suspension. His court commitments mean that such a suspension would be disruptive to a number of matters that are scheduled. The fact that a suspension may create a greater hardship for a lawyer who practises as a sole practitioner or in a small firm than it would for a lawyer who practises in a larger firm is not a basis for not suspending a lawyer when a suspension is required to protect the public interest and maintain public confidence in the legal profession: *Law Society of BC v. Bauder*, 2013 LSBC 7; *Law Society of BC v. Siebenga*, 2015 LSBC 44;

(g) *The need to ensure the public's confidence in the integrity of the profession*:

In this case, this factor is interwoven with the "nature and gravity of the conduct proven" referred to earlier. This was serious misconduct that was planned and deliberate. It was intended to improperly induce the holder of a public office to breach their statutory duty to act in the best interest of a foster child. The harm to the integrity of the profession is great in having

a member of the profession make a concerted effort to induce a public official to act contrary to their duty. The public is entitled to expect members of the legal profession will not behave in the manner that the Respondent did. The maintenance in the public's confidence in the integrity of the legal profession requires that a sanction imposed on the Respondent reflect this;

(h) *The range of penalties imposed in similar cases*:

Counsel have provided several cases, but none of them deal with a factual situation similar to the one before us. Counsel have provided the following authorities:

(i) *Law Society of BC v. Foo*, 2014 LSBC 21 – The lawyer received a two-week suspension for making "discourteous or threatening remarks to a social worker" at the courthouse. The behaviour occurred on one occasion. The lawyer had one prior citation and three prior conduct reviews;

(ii) *Law Society of BC v. Harding*, 2018 LSBC 9 – The lawyer received a three-week suspension. The lawyer had attended at a towing yard wishing to take pictures of the damage to his mother-in-law's car. He was refused entry. He then called the non-emergency number for the RCMP and advised the dispatcher that he needed "someone there to talk to these idiots because otherwise, you'll have to send a police officer, probably to arrest me because I'm going to get a crowbar and smash up the place." The lawyer had a PCR with two conduct reviews and two citations for incivility about opposing counsel;

(iii) *Law Society of BC v. Kirkhope*, 2013 LSBC 35 – The lawyer received a 45-day suspension for receiving a spousal support payment from his client and not paying it to his client's spouse when it was due pursuant to a court order. He held onto the funds to motivate a settlement. The lawyer had two previous citations. The first was for receiving and using illegally intercepted privileged communication, and the second was for arranging for the registration of a mortgage against his client's property to secure his fees, contrary to a court order;

(iv) *Law Society of Alberta v. Ouellette,* 2016 ABLS 53 – The lawyer was disbarred. He faced a number of allegations, including

threatening criminal proceedings and child welfare proceedings to gain a benefit for his client. To place the lawyer's conduct into context, the hearing panel stated "that Mr. Ouellette had been found guilty of citations that went to the core of his duties to the profession, his duties to his own client, and his duties to uphold the administration of justice. Mr. Ouellette breached every type of duty he could breach. His discreditable conduct covered the gamut. He had been warned in previous discipline proceedings about his behaviour and the consequences of repeating it."

(v) *Law Society of BC v. Berge*, 2005 LSBC 53 – The lawyer was suspended for one month. The lawyer was charged with impaired driving, which was ultimately resolved by way of a plea to a *Motor Vehicle Act* offence. He was found to have made a conscious effort to thwart the police investigation by disposing of a can of beer and consuming mouthwash. The lawyer had no prior discipline history and had a record of outstanding service and contribution to the Law Society.

The misconduct of the Respondent was not the result of an impulsive act but was planned and committed for tactical advantage. This factor differentiates the Respondent's act from those in *Foo, Harding* and *Berge.* The conduct in *Kirkhope*, while deliberate, dealt with conduct dealing with the withholding of funds contrary to a court order for tactical advantage. *Ouellette*, due to the breadth of misconduct, is of little precedential value.

[30] In considering the applicable *Ogilvie* factors, we find the factors of particular importance are:

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

(b) the previous character of the respondent, including details of prior discipline;

(c) the possibility of remediating or rehabilitating the respondent; and

(d) the need to ensure the public's confidence in the integrity of the profession.

[31] This is a case where the seriousness of the conduct emphasizes the need to ensure the public's confidence in the integrity of the profession. The overriding purpose of the discipline process is to ensure the protection of the public and to maintain

public confidence. As in a case such as this where there is a conflict between this purpose and the second purpose of rehabilitation of the lawyer, the first purpose must prevail.

[32] We find that the appropriate penalty is a three-month suspension commencing on the first day of the month following the release of these reasons.

COSTS

[33] Rule 5-11 governs the awarding of costs of the hearing. The parties agree with the disbursements claimed by the Law Society.

[34] There is a dispute regarding four Tariff Items. These are Items 1, 3, 7 and 9. The Respondent seeks a global reduction of 10 units. We find the amount claimed by the Law Society to be reasonable in all of the circumstances.

[35] The Law Society is awarded fees in the amount of $16,800 and disbursement and applicable taxes in the amount of $1,865.85, for a total of $18,665.85.

[36] The Respondent seeks time to pay the costs over a period a time, and proposes that the costs be paid at a rate of $2,000 per month until fully paid. This is a reasonable request in all of the circumstances. The first payment should be made on the last day of the month following the end of the suspension imposed, and continue on the last day of each month until paid in full.

ORDERS

[37] We order that the Respondent

(a) be suspended for a period of three months commencing July 1, 2020; and

(b) pay costs to the total amount of $18,665.85 at a rate of $2,000 per month, commencing October 31, 2020 and on the last day of every month thereafter until the costs are paid in full.

CONFIDENTIAL INFORMATION

[38] Pursuant to Rule 5-8(2)(a) of the Rules, we order that, if any person other than a party seeks a copy of a transcript of the proceedings or any exhibit filed in these proceedings, the names of the birth parents, foster parents and SS, identifying

information concerning the birth parents, foster parents and SS, and any information protected by solicitor-client privilege be redacted from the exhibit or transcript before it is disclosed to that person.