2020 LSBC 33
Decision issued: July 3, 2020
Citation issued: June 7, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DONALD ROY MCLEOD

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing dates:	September 10, 11, 12 and December 3, 2019
Panel:	Bruce LeRose, QC, Chair Thelma Siglos, Public representative Sarah Westwood, Bencher
Discipline Counsel:	Robin N. McFee, QC
Counsel for the Respondent:	Jeffery E. Wittmann

INTRODUCTION AND PRELIMINARY MATTERS

[1] On May 3, 2018, the Discipline Committee of the Law Society of British Columbia (the "Law Society") directed that a citation (the "Citation") be issued against Donald R. McLeod (the "Respondent"). Issued on June 7, 2018, the Citation sets out five allegations against the Respondent, namely:

1. Between September 2015 and March 2016, in the course of representing your client SM (the "Client") in a family law matter, you failed to discharge your professional obligations as an officer of the court by:

(a) misstating facts in court and/or failing to correct the record regarding the start date and end date of a pension division, contrary to one or more of rules 2.1-2(a), 2.1-2(c), 2.2-1, and 5.1-1 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*");

(b) abusing the court's process by instituting a contempt application and a recusal application when you knew or ought to have known that the applications were unfounded, premature, and/or without merit, contrary to one or more of rules 2.2-1, 5.1-1, 5.1-2(a), and 5.1-2(b) of the *BC Code*; and

(c) drafting and relying on an affidavit of your staff which materially misrepresented the position of the pension plan, and the position of opposing counsel, regarding the requirement of a copy of the opposing party's birth certificate, contrary to one or more of rules 2.1-2(a), 2.1-2(c), 2.2-1, 5.1-1, and 5.1-2(e) of the *BC Code*.

2. Between September 2015 and March 2016, in the course of representing the Client in a family law matter, you failed to discharge your professional obligations to opposing counsel by:

(a) instituting a contempt application against opposing counsel personally, and a recusal application, when you knew or ought to have known that the applications were unfounded, premature, and/or without merit, contrary to rules 2.1-4(a), 2.2-1, and 7.2-1 of the *BC Code*; and

(b) communicating with opposing counsel in a discourteous manner, contrary to one or more of rules 2.1-4(a), 5.1-5, 7.2-1, and 7.2-4 of the *BC Code*.

[2] It was alleged that this conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act* (the "*Act*").

[3] The Respondent admitted that, on June 7, 2018, he was served through counsel with the Citation and waived the requirements of service under Rule 4-19 of the Law Society Rules (the "Rules").

FACTS

[4] The Law Society provided, and relied upon, evidence contained in a Notice to Admit and attachments, including several court transcripts, dated July 26, 2019 (the "NTA"). The Respondent largely admitted the contents of the NTA, although

provided some qualifications and explanations for context or clarification. These will be dealt with in the course of these Reasons.

[5] The Citation flows from events originating during and following a family matter that came before Macintosh J. at the British Columbia Supreme Court as a summary trial proceeding on September 17, 2015 (the "Summary Trial") to determine matters relating to the Client's almost 12-year common-law relationship with her ex-spouse. The transcript of the Summary Trial forms part of the NTA, and was admitted.

[6] At the Summary Trial, the Client's ex-spouse appeared without counsel; the Respondent represented the Client.

[7] One of the issues at the Summary Trial was the division of the ex-spouse's Municipal Pension Plan benefits (the "Benefits"). The Court advised the Respondent at the outset that it was not overly familiar with the division of such assets in family law proceedings. Before this Hearing Panel, the Respondent confirmed that it was apparent the Court was very confused regarding the correct approach to take with respect to dividing the Benefits.

[8] At the start of the Respondent's submissions at the Summary Trial regarding the Benefits, the Respondent set out the position that the Client's entitlement period should start on the date the couple "got together", and then end on the date they separated; a period of almost 12 years. The Client's ex-spouse generally agreed with this submission.

[9] At the close of the submissions at the Summary Trial, the Court asked the Respondent to clarify the calculation of the Client's entitlement to the Benefits. The Court was clear that the Respondent was being asked for his input to assist the Court in obtaining an appropriate result.

[10] At the hearing before this Panel, both the Respondent and the lawyer hired by the Client's ex-spouse subsequent to the Summary Trial (the "Complainant") testified. The Respondent and the Complainant agreed generally, and explained, that the standard calculation of spousal entitlement to the division of pension benefits is 50 per cent of the result where A (being the period of entitlement) is divided by B (the duration of the pension). The Respondent and Complainant further testified that, while courts are entitled to take various dates into account in determining those dates, the general practice is for "A" to be determined as the duration of a relationship, such that the entitlement to pension benefits is limited by the duration of the relationship. The Respondent and Complainant also stated that deviation from this "general" approach occurs but is the exception, not the rule, and is

usually supported by submissions as to hardship, failures to provide support, or other unusual or extraordinary circumstances.

[11] During his final submissions at the Summary Trial, however, the Respondent stated that "A" in his Client's case should be the total period during which the pension accrued, namely from "when [the ex-spouse] began paying into it … until the date of the order" and that the numerator would be the date from which the ex-spouse began paying into it until the date the Client received a transfer from the pension plan.

[12] The Respondent made these submissions in response to the Court's request for clarification as to the numbers that should be entered into the calculation to determine the Client's entitlement to the Benefits. The Respondent made no submissions as to how those numbers should be chosen, circumstances that would justify the court from deviating from the ordinary calculation, or even suggesting to the Court that there was a range of dates that could be chosen. These submissions differed both from the Respondent's stated position at the start of the Summary Trial, and from the position of the ex-spouse.

[13] That same date, the Court ordered that "I adopt the formula [the Respondent] produced … For what I call the "A" portion, the accrual date is [the date the ex-spouse started paying into the pension] and the entitlement date is today, September 17, 2015. For the "B" portion, it is the same accrual date, and the transfer date will be the date [the Client's] share of the plan is achieved by the transfer" (the "Pension Order"). (Oral Reasons for Judgement, dated September 17, 2015)

[14] The Pension Order therefore awarded the Client a share of the entirety of the ex-spouse's pension, rather than a share of the pension that accrued just during the time the parties resided together. The Respondent testified at the hearing before this Panel that this result was unusual, in that it awarded to the Client a greater share of the Benefits than would ordinarily be the case, but not illegal, in that it was an order the Court could make.

[15] On September 21, 2015, the Respondent provided his Client's ex-spouse with a copy of the Pension Order. Over the next two weeks, the Client's ex-spouse indicated that he had noticed errors with the Pension Order, was seeking counsel, and that the Respondent would hear from his lawyer shortly. On October 20, 2015, the Respondent emailed the ex-spouse with a filed appointment to settle the terms of the Pension Order (the "Appointment to Settle"); the ex-spouse responded the same day to inform the Respondent that "Your e-mail has been forwarded to my lawyer, [the Complainant]." The Appointment to Settle was set for October 29, 2015.

[16] The Complainant testified that the ex-spouse retained her shortly after the Summary Trial, specifically to determine whether the Pension Order accorded with the Court's intention regarding the dates for pension division. The Complainant confirmed that she found the dates within the Pension Order unusual, and testified that, while the Court has discretion to order pension division for pre- and post-relationship accruals, it is highly unusual for it to do so and she would expect the Court to provide reasons for the deviation from the normal practice of ordering pension division for the duration of the relationship only. The Complainant testified that her concern was that the Court had mistakenly ordered the division of pre- and post-relationship accruals.

[17] Although the Complainant completed a Notice of Change of Lawyer on October 9, it was not received by the Respondent until October 21, at which time he emailed the Complainant regarding the Appointment to Settle and informed her that he would not change the date.

[18] Over the next week, the Complainant and Respondent exchanged several emails regarding the Pension Order, with the Respondent indicating that he would oppose any adjournment. The Complainant obtained the transcript of the Summary Trial on October 28, and expressed her concern to the Respondent that the Court had erred when ordering pre- and post-relationship accrual, or at least had not made any conscious decision to do so. The Complainant suggested it might be necessary to seek an appearance before the Summary Trial judge to clarify the Court's intent, given the contents of the transcript and the unusual nature of the Pension Order. The Respondent stood by the terms of the Pension Order as drafted.

[19] The Appointment to Settle occurred on October 29, 2015, and the terms of the Pension Order were confirmed as drafted. It is unclear whether the Complainant did, in fact, ask for the matter to be adjourned, but in any event it proceeded, and the Pension Order was entered. That day, the Respondent emailed his Client stating that the Pension Order awarded her a share of the Benefits "for three more years than would normally be the case."

[20] That same day, the Respondent also emailed the Complainant, outlining his position that the Pension Order, having been entered, was not open to variation, that the time for an appeal had expired, and that the judge who heard the Summary Trial was now *functus officio*. Given the Complainant's concerns regarding the dates in the Pension Order and whether they actually reflected the Court's intentions, she testified to this Hearing Panel that she was concerned that the Respondent and the Client intended to proceed with the pension division before the matter could be rectified.

[21] On November 9, 2015, the Complainant submitted a request for an appearance before the Summary Trial judge to clarify the dates in the Pension Order. The Complainant informed the Respondent of the request on the same day.

[22] Between October 29 and the reappearance before the Summary Trial judge on December 2, 2015, the Respondent testified that he understood the pension plan administrator to have informed the Client that she was entitled to begin collecting her share of the Benefits immediately. The Respondent testified that, the Pension Order having been entered, he was of the view that the Client could, and should do so. Further to this, in November the Respondent received a letter stating that it required proof of the Client's age and/or identity before it could pay her the Benefits.

[23] The Respondent and Complainant appeared back before the Summary Trial judge on December 2, 2015 (the "December Appearance"). The Complainant submitted that the parties, at the Summary Trial, were in agreement that the Benefits were to be divided 50 per cent to each for the period of the relationship, but that the actual Pension Order divided the pension for the entire time it accrued up to the date of the Summary Trial. Referring to the Summary Trial transcript, the Complainant presented that the numerator A should have been the duration of the relationship, that this was the Respondent's stated position at the Summary Trial, and reflected the normal procedure in relation to pension division.

[24] The NTA includes the transcript of the December Appearance and was admitted. At the December Appearance, in an exchange between the Summary Trial judge and the Respondent, the Respondent made the following responses:

> The Court: I'm talking about how this would be approached when we were dealing with it back in September and your friend was in court and you were in court, as if that had been the case, so – so do you accept that July 7, '97, would be June 30, 2000?
>
> Respondent: Let me just read it for a second, My Lord. I think it should be the number of years, and I'm just trying to remember what dates because I don't have them all in front of me, but I think it would be the getting-together date until –
>
> The Court: Right.
>
> Respondent: -- September 17, 2015.
>
> …

> The Court: All right. You would say – you would say June 30, 2000, would be the start date, but September 17, 2015, would be the end date.
>
> Respondent: Yes, I am.
>
> The Court: All right.
>
> Respondent: And then I'm saying for the B fraction, it is correct.
>
> Transcript of December Appearance, page 11, lines 17 – 47

[25] The judge at the December Appearance continued:

> The Court: All right. Just let me switch, if I may. [Complainant], where – again, forget – forgetting for now about my jurisdictional powers and pretending we're all in court back in September 2015, July 7, 19 – 7 – 1997 seems to be changed by agreement to June 30, 2000. So if – repeat for me your – your submission, so to speak, on why it's June 12, 2012, versus September 17, 2012, in light of your friend's submission that the current legislation make – or the then applicable legislation makes the court date the entitlement date.
>
> Transcript of December Appearance, page 12, lines 35 – 46

[26] The Complainant then continued to make submissions as to why the end date for entitlement should be the date the relationship ended, rather than the date of the court date, a position contrary to that offered by the Respondent.

[27] The Court concluded by inviting a one-page submission from the Respondent, with a similar length response from the Complainant, as to the matter of whether the end date should be the date of the Summary Trial as opposed to the date the relationship ended. The Court made no further reference to the start date.

[28] Later on December 2, 2015, the Respondent emailed the Complainant proposing to settle the dates for pension division, changing the start date but leaving the end date as the date of the Summary Trial. The Complainant rejected the offer, maintaining that the appropriate dates for the entitlement period were the start and end of the relationship.

[29] The Respondent completed his written submissions on December 7, and provided them directly to the court. On the matter of the appropriate dates under consideration, the Respondent submitted that the start and end dates should be the period of the relationship, with the total contribution period being the period from

when the ex-spouse started work, to the date the pension was frozen due to his ceasing work (incidentally, the first time this latter date was proposed).

[30] The Complainant provided her submissions on December 16, 2015, maintaining in part that, unless the court intended otherwise, the default provisions for pension division should be in accordance with the usual practice; that is, division of the pension from the date of commencement of cohabitation until the date of separation.

[31] On December 21, 2015, the Respondent received a letter dated December 15, 2015, addressed to the Client from the pension plan (the "December Letter") stating that it required proof of age and/or identity from the ex-spouse before it could pay her Benefits. The letter stated that a clear copy of any one of five documents acceptable as proof of age or identity: passport; Canadian citizenship or immigration papers; current driver's licence or BCID card; birth certificate; and, Certificate of Indian Status card. The Respondent did not forward a copy of this letter to the Complainant.

[32] On December 22, 2015, the court issued a Memorandum to Counsel (the "Memorandum"), ordering that the end date for the entitlement period should be changed to the end date of the relationship, and stating that the judge had erred when he set this date as the date of the Summary Trial. The Complainant testified before this Panel that, upon receiving the Memorandum, she believed the matter resolved.

[33] That same date, the Respondent emailed to the Complainant stating that the Pension Order required the ex-spouse provide a copy of his birth certificate if the plan required it, that the plan required either a copy of the birth certificate or of one of the other pieces of identification listed. The Respondent asked that a copy of one of these pieces of identification be provided immediately and before his return to the office on January 4, 2016. The Respondent testified before this Panel that he did not know if the ex-spouse had a passport or BCID card, and did not enquire as to whether the ex-spouse had a drivers' license.

[34] In response to the Respondent's email, the Complainant emailed to suggest that, in light of the Memorandum, the Pension Order would need to be revised and re-submitted to the pension plan before further steps were taken. The Complainant requested a revised draft order and that, accordingly, she would speak with the ex-spouse about providing his identification. The Complainant stated she, too, would be out of the office until January 4, 2016. At the hearing before this Panel, the Complainant testified that she was unsure why the Respondent was demanding the

birth certificate immediately, and was concerned that he was trying to facilitate pension division before the Pension Order was corrected.

[35] The Respondent did not send a revised draft of the Pension Order to the Complainant, but instead, still on December 22, 2015, sent it directly to Supreme Court Scheduling, asking it be provided to the judge for guidance regarding whether it needed to be endorsed by counsel, or if it would simply be signed and entered.

[36] Supreme Court Scheduling contacted the Complainant on December 23, 2015, to ask her position on the Respondent's request that the order be submitted without counsel's endorsement. The Complainant responded that the draft was incorrect, as it still listed the commencement date for pension division as the date the ex-spouse started contributing to the pension plan, rather than the date the relationship started. The Complainant continued that she would not object to the order being entered without counsel's signature, provided they first agreed on its terms.

[37] When this position was relayed to the Respondent, he indicated that he refused to revise it further, stating that the only change ordered was the change in the end date, and that asking for any further changes was vexatious and abusive. The Complainant testified before the Hearing Panel that she found the tone of the Respondent's email to Supreme Court Scheduling shocking and was offended by it.

[38] On Christmas Eve, the judge issued a second Memorandum to Counsel (the "Second Memorandum") stating that he had only been asked to consider the change in the entitlement date, if further issues arose they should be addressed by counsel in writing in the New Year, but that he did not wish it inferred that he encouraged such a process.

[39] On January 6, 2016, the Respondent emailed the Complainant informing her that, if she did not endorse and return the order by January 8, he would apply to have the terms settled. The Respondent also noted that he had not yet received a copy of the birth certificate, which was preventing the Client from receiving her share of the Benefits, as she had elected to receive immediate payment. The Respondent further said the ex-spouse was in contempt of court and that he would oppose any further application to the court on the basis that the ex-spouse was in breach of the Pension Order.

[40] The Complainant testified before this Panel that the January 6, 2016 email caused her alarm as it reinforced her concern that the Respondent was trying to have the pension plan divide the Benefits based on an incorrect order. The Complainant stated that she felt the Respondent's demand for immediate receipt of the ex-

spouse's birth certificate and his comments regarding contempt of court were an attempt to intimidate her and to persuade her against further attempts to clarify the terms of the Pension Order.

[41] The next day the Complainant, having obtained a transcript of the December Appearance, sent a copy of it to the Respondent, outlining that he had agreed to the change in the start date, which is why the court had not decided that issue. The Complainant requested that the Respondent send her a draft order with the correct dates, and if he refused she would seek to have the matter put back before the court. The Complainant stated she would provide the ex-spouse's birth certificate once the order was settled, as the pension could not be divided until the order was finalized.

[42] The Respondent emailed back later that same day, stating that the order reflected the court's Memorandum and the Complainant had misread the transcript of the December Appearance. He restated that refusing to provide the ex-spouse's birth certificate was contempt of court and demanded that the order be endorsed without further revision. The Complainant testified that, again, she found the tone of the email offensive, sarcastic and derogatory and she believed the Respondent to be using the threat of contempt of court to intimidate her and the ex-spouse to prevent them from proceeding with attempts to finalize the order.

[43] The Complainant replied to the Respondent's email stating that, in light of the Respondent's refusal to amend the order further, they would have to appear back before the court. She denied the Respondent's assertion that she was counselling the ex-spouse to breach a court order.

[44] Still on January 7, 2016, the Respondent met with the Client to request written instructions to proceed with a contempt and conflict of interest application, which he obtained. The Respondent confirmed, before this Panel, that he drafted the letter of instructions regarding the contempt application for the Client to sign.

[45] On January 8, 2016, the Respondent wrote to another member of the Complainant's firm who had represented the Client approximately 22 years earlier on an unrelated matrimonial matter, and asked that the Complainant's firm consider carefully whether, in light of this earlier representation, they could continue to act for the ex-spouse against the Client. The Respondent did not provide anything other than broad details regarding the representation, and the Client was unable to provide further information as to the nature of the conflict, other than that the Complainant's firm had represented her. The Respondent testified that he did not have, at that time, any additional, specific information about what confidential

information or documents the Client may have provided to the Complainant's firm during the earlier retainer.

[46] On January 14, 2016, the other member of the Complainant's firm responded by letter, stating that, if neither the Respondent nor the Client could establish a basis for identifying a conflict, the firm could not see how one existed. The letter went on to state that it was not aware of any information that might be prejudicial to the Client and that the previous file had been destroyed in early 2015. The Complainant testified that this letter reflected her own position.

[47] The Complainant further testified at this hearing that the January 8, 2016 letter from the Respondent was the first time she became aware of an earlier retainer. The Respondent did not provide anything in response to her firm's request for particulars regarding the alleged conflict. Further, the Complainant asserted that she never had access to the firm's paper file from the earlier matter and was not aware of its contents. She stated that she had found the file opening card, which she believed listed solely the client's name, file opening date, and the word "marital" as a general indication of the file's subject-matter, but that her recollection was that it contained no substantive information about the file. The Complainant stated that, so far as she knew, as of January 2016, no member of the firm had reviewed the contents of the file from the earlier retainer and that the file had been destroyed as part of a routine file destruction rota early in 2015.

[48] On January 22, 2016, the Complainant submitted further written argument to the Court on the terms of pension division, stating that, at the December Appearance, the Respondent consented to the change in commencement date, and accordingly the only date that had remained in dispute, and that required corresponding submissions, was the end, or entitlement date. The Respondent provided response submissions on January 28, 2016, stating that he had not, in fact, agreed to the change in commencement date, that his statements regarding that had related only to the end date, and that the Complainant could not now seek yet another variation to the terms of the Pension Order.

[49] A week later, on January 29, 2016, the Respondent filed a Notice of Application for the contempt and conflict of interest applications, including an application for special costs (the "January Applications"). Before this Panel, when asked in direct examination why the Respondent filed the contempt application, he testified that he did so "to force the issue" and that he expected, in response to this filing, that the Complainant would telephone him and he would be able to talk to her about the birth certificate and the matter would become moot.

[50] In support of the January Applications, the Respondent drafted and filed the Affidavit #4 of his legal assistant (the "Affidavit"). This document was included in the NTA, and was admitted. The Affidavit stated that the Pension Order required the ex-spouse to provide a copy of his birth certificate if the pension plan required it, and it was so required. The legal assistant further swore that she wrote to the Complainant three times requesting the document, but that the Complainant refused to abide by the order to provide a copy.

[51] It is important to note that neither the Affidavit nor the January Applications make any reference to the ex-spouse being in contempt of the Pension Order by being in arrears of support. The Affidavit sets out that the sole ground of contempt relates to the failure to provide a certified copy of the ex-spouse's birth certificate, and complains that the ex-spouse is picking and choosing what parts of the Pension Order to observe, as he "is taking advantage of that part of the [Pension Order] which is advantageous to him by reducing by paying [sic] $330.00 per month spousal support, which is the reduction the Court ordered from the previous $1,100.00 payable".

[52] In both cross and direct examination, however, the Respondent repeatedly justified bringing the contempt application on the basis that he wanted to get the spousal support and pension affairs in order. It is clear, however, that there was no spousal support issue at the time of the January Applications, as the spousal support was being paid, and had in fact been referred to the Family Maintenance Enforcement Program for collection in November the previous year.

[53] The Complainant testified to this Panel that she found the content of the Affidavit frustrating, as it did not provide the context of the communications regarding the Pension Order. The Complainant further testified that, as of the date the Affidavit was filed, she still had not received anything from the pension plan indicating that it required a copy of the ex-spouse's birth certificate.

[54] On February 5, 2016, the Complainant and the Respondent appeared, again, before the court, who ordered a further amendment to the Pension Order so that the dates for division indeed reflected the dates on which the parties started cohabiting and the date of separation.

[55] The Court awarded the ex-spouse fixed costs in the total amount of $3,200 in respect of the December Appearance and the further appearance in February. This costs award was entered on March 4, 2016.

[56] Following this appearance, the Complainant emailed the Respondent asking if he intended to proceed with the January Applications, given that, in Court, the

Respondent had confirmed that the pension plan did not, in fact, require a copy of the ex-spouse's birth certificate to complete the pension division.

[57] The Respondent wrote back to the Complainant stating that the conflict issue seemed moot, the Client had been told that the pension plan would obtain the identification themselves and that therefore the issue of contempt was also moot, and that the Client was "implying not to proceed with the [January Applications]."

[58] Seeking further clarity, on February 9, 2016, the Complainant again asked the Respondent to confirm that the Client was withdrawing the contempt application, and inquiring whether the Respondent would provide an assurance in writing that the Client would not raise the issue of the conflict of interest either now or in the future.

[59] In response, on February 11, 2016, the Respondent emailed the Complainant, denying that he told her the pension corporation did not require the ex-spouse's birth certificate, stating that the Pension Order still required its provision and that he could not proceed further until the pension corporation confirmed it had received the ex-spouse's identification.

[60] On the same date, the Respondent emailed the Client asking her to contact the pension corporation to confirm if it required a copy of the identification, or if they could obtain it from his employer, as this would determine if they proceeded with the contempt application.

[61] In light of the Respondent's email, the Complainant filed her Application Response on February 12, 2016, pleading, amongst other things, that: the Client, through the Respondent, demanded a copy of the ex-spouse's birth certificate during the period the pension entitlement dates were in question; neither the Complainant nor the ex-spouse had at any time received communication from the pension plan, the Respondent nor the Client to indicate the plan actually required the birth certificate; none of the lawyers or staff at the Complainant's firm who remained with the firm since 1993 had any recollection of the Client's retainer with the firm; and, any file the firm might have had regarding the Client had been destroyed.

[62] The January Applications were heard in March 2016. In the contempt portion of the proceedings, the Respondent submitted that the pension plan required a copy of the ex-spouse's birth certificate, and only at this time produced a copy of the December Letter to the Complainant's lawyer.

[63] The Court dismissed the contempt proceedings on March 1, 2016, with oral reasons for judgment. These reasons were included in the NTA, and admitted. In the oral reasons for judgment, the Court stated

> ... [T]here was no notice to either of the alleged contemnors … that the Plan did require a certified copy of the birth certificate, except perhaps through a letter dated December 15, 2015, on the letterhead of the Municipal Pension Plan, which was produced to [ex-spouse] and [the Complainant] through counsel only today.
>
> Until the letter was produced today, the evidence of the Plan requiring the production of the birth certificate was hearsay at best …
>
> … I have a concern about the contempt allegation being resorted to here, as a first resort, instead of as a last resort in this family dispute. In my respectful view, the allegation of contempt was not only unfounded; it was premature.
>
> Oral Reasons for Judgment re: Contempt Application, March 1, 2016

[64] On March 2, 2016, the Court delivered oral reasons for judgment in the conflict of interest application; the application was dismissed.

[65] The Court ordered that the Client pay special costs in the application for contempt, on the basis that "advancing the contempt application is deserving of chastisement." The Court awarded ordinary costs on the conflict of interest application.

Oral Reasons for Judgment re: Costs, March 2, 2016

[66] At the hearing of this matter, the Client's affidavit, sworn March 13, 2014, was also filed as an Exhibit (the "Client's Affidavit"). One of the exhibits to the Client's Affidavit is a printout addressed to the ex-spouse indicating documents that are received or required in relation to the pension in what appears to be a spreadsheet format. The document does state that the ex-spouse's Birth/Identification documents are required, but also seems to suggest that they were received on October 13, 1999. This document was clearly in the Client's care and control.

ISSUE

[67] This issue for this Panel to decide is whether or not, on the above facts, the Respondent's behaviour violates the portions of the *BC Code* so as to amount to professional misconduct, as alleged by the Law Society.

LEGAL FRAMEWORK

[68] The Law Society summarized the allegations contained within the Citation in the following broad strokes, stating that the concerns are that the Respondent: misstated facts in court and/or failed to correct the record; committed an abuse of process by instituting the contempt and recusal applications; drafted and relied on the Affidavit, which materially misrepresented the positions of the pension plan and of the Complainant; instituted the contempt application against the Complainant personally when he knew he should not do so; and, communicated with the Complainant in a discourteous manner.

[69] It is important, however, to note the wording of the sections of the *BC Code* that form the basis of the Citation, and these are excerpted below (without commentaries):

> **Chapter 2 - Standards of the legal profession**
>
> **2.1-2 To courts and tribunals**
>
> (a) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
>
> …
>
> (c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court.

2.1-4 To other lawyers

(a) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.

2.2 Integrity

2.2-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Chapter 5 – Relationship to the administration of justice

Advocacy

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

5.1-2 When acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

Courtesy

5.1-5 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Chapter 7 – Relationship to students, employees and others

Courtesy and good faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Communications

7.2-4 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

[70] The Law Society alleges that the Respondent's conduct as set out in the Citation constituted professional misconduct pursuant to section 38(4) of the *Act*, which states:

Discipline hearings

(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming the profession;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is an individual who is not a member of the society, conduct that would, if the respondent were a member,

> constitute professional misconduct, conduct unbecoming the profession or a breach of this Act or the rules.

[71] It is the Law Society's burden to prove the facts necessary to support a finding of misconduct. Adopting the standard articulated by the Supreme Court of Canada's decision in *F.H.* v. *McDougall*, 2008 SCC 53, 297 (4th) 193, Law Society hearing panels such as that in *Law Society of BC* v. *Seifert*, 2009 LSBC 17 at para. 13, have held that:

> … the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. …

[72] While "professional misconduct" is not defined by the *BC Code*, the *Act*, or the Rules, it is a term that has regularly been considered by hearing panels. In the leading case of *Law Society of BC* v. *Martin*, 2005 LSBC 16, at paragraph 171, the hearing panel stated the test for professional misconduct as:

> … 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.

[73] In 2011, in the matter of *Re: Lawyer 12*, 2011 LSBC 11, after reviewing previous decisions the single Bencher hearing panel concluded at paragraph 14 that:

> … the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[74] This Hearing Panel must, therefore, consider the evidence presented to it to determine whether the Law Society has met its burden of showing that the Respondent either failed to discharge his professional obligations as an officer of the court, or to opposing counsel, or both, by acting contrary to the enumerated provisions of the *BC Code* in such a way as to have committed professional misconduct.

CREDIBILITY

[75] Both the Complainant and the Respondent testified at the hearing as to the facts and their recollection of events surrounding the Summary Trial and subsequent events.

Accordingly, this Panel must consider the credibility of the testimony presented, particularly where the Panel is urged to consider the context and interpret the documentary evidence presented in a particular manner.

[76] When witness testimony is presented, hearing panels have relied on the principles set out in the 1951 case of *Faryna* v. *Chorny*, [1952] 2 DLR 354 (BCCA) to evaluate credibility, namely that "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." These principles have been adopted in such matters as *Law Society of BC v. Shauble*, 2009 LSBC 11, and *Law Society of BC* v. *Vlug*, 2018 LSBC 26.

[77] Generally, the events that led up to and constitute the subject of the Citation are detailed in documents, particularly the transcripts and emails contained in the NTA. These largely speak for themselves.

[78] Over the several days of testimony, however, the Respondent urged a particular interpretation of the documents and, in defending that interpretation frequently became defensive, argumentative and unresponsive to particular questions. The Respondent's evidence was evasive on several occasions, notably in relation to the contempt and conflict matters. With regard to his personal interpretation of the transcripts from the Summary Trial and the December Application, his evidence was incoherent.

[79] The Complainant's evidence was generally straightforward and simple. When challenged on her memory of a matter not evidenced by the documents, the Complainant admitted easily that her recollection may be faulty. The Respondent admitted of no such fault. The Respondent frequently failed to answer questions directly and defended behaviour, such as bringing a contempt application against the Complainant personally as well as the ex-spouse, as an appropriate way to "force the issue" and bring the Complainant to the point of having a "discussion".

[80] Where necessary to weigh the evidence of the Respondent against that of the Complainant on material points, therefore, the Hearing Panel prefers the evidence of the Complainant. It is important to reiterate, however, that this is largely not a "he said, she said" matter, given the preponderance of court transcripts, emails and reasons for judgment that were provided in the NTA.

ANALYSIS

Did the Respondent abuse the Court's process by instituting the contempt and recusal applications when the Respondent knew or ought to have known that the applications were unfounded, premature and/or without merit?

[81] The January Applications involved both an application for a ruling regarding civil contempt and an application that the Complainant's firm be recused from proceeding. In *Carey* v. *Laiken*, 2015 SCC 17, [2015] 2 SCR, at para. 30, the Court stated that contempt of court:

> rest[s] on the power of the court to uphold its dignity and process … The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect … It is well established that the purpose of a contempt order is "first and foremost a declaration that a party has acted in defiance of a court order".
>
> [citations omitted]

[82] In analyzing the claim for civil contempt, the Court went on to state at paras. 31 to 36 that civil contempt is:

> … generally seen "primarily as coercive rather than punitive." However, one purpose of sentencing for civil contempt is punishment for breaching a court order. …
>
> Civil contempt has three elements which must be established beyond a reasonable doubt. …
>
> The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done." …
>
> The second element is that the party alleged to have breached the order must have had actual knowledge of it. …
>
> Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels. …
>
> [citations omitted]

[83] In the instant case, the Pension Order required that "The Respondent … will provide a certified copy of his birth certificate to the [Client], if the Plan requires it."

[84] The Respondent wrote to the Complainant on several occasions, stating that the Plan required a certified copy of the birth certificate. The Respondent based this assertion on letters from the Plan that he failed to provide to the Complainant until the actual court date when the January Applications were dismissed.

[85] The letters from the Plan were included as part of the NTA. At no point does any letter suggest it requires a "certified copy of [the ex-spouse's] birth certificate." Nor, in fact, did the Complainant state that she intended never to provide the birth certificate, but rather that she wished to finalize the terms of the pension division before providing it.

[86] The Complainant informed the Respondent, and testified, that she believed the Respondent wished to obtain the birth certificate to proceed with pension division before the Pension Order terms were finalized. The Respondent acknowledged that he was aware the Complainant still had concerns that the entitlement dates in the Pension Order were incorrect and that she wished the Court's final word on these before proceeding in a way that may disadvantage her client. The Respondent reiterated his determination to proceed on the basis of the Pension Order as amended in December and insisted that the December variation was the basis on which he was going to proceed. The Respondent vehemently denied any attempt to proceed with pension division contrary to that actually intended by the Court, relying on the Pension Order as entered for the basis of the amount of the Pension Benefit to which he believed the Client was entitled.

[87] Support for the Complainant's understanding of the Respondent's motivation is found in a letter sent by email to the Complainant on January 6, 2016, wherein the Respondent wrote:

> … Your client's failure to provide his identification has prevented the Pension Corporation from continuing with our client's application to receive her share, regardless of what that share is.
>
> Regardless of what the share is, it could be adjusted, but your client's failure to provide identification has meant that our client, who can and wishes to elect immediate payment, and intends to do so because there is no benefit to her in delaying payment, has now been without her share of the pension for October, November, December, and January. …

[88] At no time did the Respondent refer to the documents in the Client's Affidavit, which suggested that the Pension Plan already had the documentation required, nor did he attempt to clarify with the Pension Plan what they actually needed.

[89] Both the Complainant and the Respondent testified that, once the Pension Plan had acted so as to divide a pension, adjusting that division would be difficult, if even possible. Accordingly, the Complainant testified that she wanted to ensure the Pension Order was correct as to the dates of the Client's entitlement period, as any correction after the fact would be complicated.

[90] In February, the Court confirmed that the Complainant's understanding of the Court's intended pension division was, in fact, correct and awarded lump sum costs against the Client in the amount of $3,200; $1,200 more than the Client received as a result of the Respondent's insistence on settling the Pension Order in October of 2015.

[91] The Respondent testified that he made no efforts to confirm, following the final determination of the pension division dates, whether the Plan actually required any further documentation, as he asserted that the Client had talked to the Plan who had said they would themselves obtain the documentation required. On February 5, 2016, he wrote to the Complainant stating that

> as it appears the Pension Corporation will shortly be acquiring your client's identification itself, the issue of contempt, well [sic] probably technically there, is also moot. … My client is implying to not proceed with the application set for March 1 and 2 on the grounds that it simply be either dismissed without costs to any party or will be withdrawn.

[92] Despite these statements, the Respondent continued with the January Applications, insisting that the Complainant and the ex-spouse were still in contempt because a certified copy of the ex-spouse's birth certificate had not been provided. While the Respondent did ask the Client, on February 11, 2016, to contact the Pension Plan to determine if they still required the ex-spouse's identification, there is no evidence as to whether he received a response or otherwise confirmed the need for the identification. At no time following the Court's determination of the appropriate entitlement dates did the Respondent renew his demands for the birth certificate.

[93] The Respondent also proceeded with the recusal application. In the seminal case of *MacDonald Estate* v. *Martin*, [1990] 3 SCR 1235 at 1260, the majority decision establishes that the test for considering whether a lawyer should be disqualified from acting has two parts:

> … (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?
>
> … once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. …

[94] In this case, the Respondent testified that, in January 2016, the Client asked him if there was a problem in that the Complainant's firm had represented her in another matrimonial matter in 1993. The Client and the Respondent provided no details regarding this former representation, and the Respondent had no answer before this Panel when asked how a 22-year old matrimonial file could be said to be "sufficiently related" to a retainer regarding the division of pension benefits from a relationship that started in 2012 or to a present case in which the Complainant's firm represented the ex-spouse regarding sexual assault allegations involving the Client's daughter.

[95] On March 1 and 2, the January Applications went ahead, and were dismissed, with the comments of the Court already noted. The Court awarded special costs against the Client in respect of the contempt proceeding and ordinary costs against the Client in respect of the recusal application.

[96] The Respondent testified that he thought the result of filing the January Applications would be a phone call from the Complainant, in which he would have talked to her about getting the birth certificate and the application would then have been moot; the Respondent stated under direct examination that he had no intention of pursuing the contempt application, but wanted to give the Complainant time to think about her actions.

[97] Allegation 1 of the Citation alleges that the Respondent committed professional misconduct in respect of the January Applications by failing to discharge his professional obligations as an officer of the court by virtue of breaches of rules 2.2-1, 5.1-1, 5.1-2(a), and 5.1-2(b) of the *BC Code.*

[98] Rule 5.1-2(a) of the *BC Code* requires that an action be "clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party." There is no evidence that either the application for civil contempt or the recusal application was motivated by malice on the part of the Client, nor that they were brought solely to injure the ex-spouse.

[99] Rule 5.1-2(b) of the *BC Code* forbids counsel from assisting a client to do anything "that the lawyer considers to be dishonest or dishonourable." There is nothing *prima facie* dishonest about the January Applications, and the Respondent testified as to his belief that the January Applications were justified and legitimate. As such, the evidence does not support the allegation under rule 5.1-2(b), as there is no evidence the Respondent considered anything amiss with the January Applications.

[100] Rule 2.2-1 of the *BC Code* considers, objectively, the manner in which a lawyer interacts with clients, tribunals, the public and other members of the profession, stating that lawyers must do so honourably and with integrity. Similarly, rule 5.1-1 requires counsel to represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

[101] As an officer of the courts, counsel is required to act to promote the dignity and authority of the courts by acting honourably and with integrity. Generally, "integrity" deals with soundness of moral principle and character, and to act "honourably" is to act in a way that is honest, fair and deserving of respect.

[102] The Respondent testified that he brought the January Applications to "force the issue" regarding obtaining the ex-spouse's birth certificate and to make the Complainant negotiate. He also testified that this rationale for bringing the application for civil contempt lay at the root of the delay between the filing of the applications and setting them for hearing in March; a delay of some two months.

[103] The Court found the application in civil contempt to be premature, unfounded and deserving of chastisement. In addition to this conclusion, with which the Respondent disagreed, are to be considered the following facts:

(a) the Plan did not ask for a certified copy of the ex-spouse's birth certificate;

(b) the Respondent did not provide the Complainant with copies of any correspondence from the Plan suggesting that it required any form of identification from the ex-spouse;

(c) the exhibits to the Client's Affidavit stated that the birth certificate was "received";

(d) the Respondent testified that he brought the application for civil contempt to force the Complainant to negotiate and as a means of getting the ex-spouse's birth certificate;

(e) the Complainant stated that the birth certificate would be produced once the entitlement dates were settled;

(f) the Respondent was aware of, and participated in, the process for finalizing the entitlement dates. While he opposed the settlement requested by the Complainant, he was not unaware that the dates were in dispute, nor that she and the ex-spouse were proceeding to clarify them; and

(g) the Respondent did not renew his requests for the birth certificate once the Entitlement dates were settled.

[104] It was therefore never the case that the Plan required a certified copy of the ex-spouse's birth certificate, nor that the Complainant refused absolutely to provide the birth certificate. It is, however, clear that the Respondent believed that bringing the application in civil contempt would be a means to obtain the result he wanted; that is, that he could obtain a copy of the birth certificate and enable the Client to proceed with her application for the division of the pension, in advance of the court's final determination regarding the appropriate dates for pension division.

[105] By bringing an action in civil contempt unsupported by the facts, and for an ulterior purpose, the Respondent failed to discharge his obligations as an officer of the court. Such a course of action is neither fair nor deserving of respect; it is an example of using the court's process to force an outcome that, while desired by the Client, remained ultimately unjust, as demonstrated by the Court's determination that the entitlement dates insisted upon by the Respondent were, in fact, incorrect.

[106] It is less clear that the recusal application was similarly tainted. While it is clear that the Respondent had no specific evidence, other than a mere assertion of a dated retainer, to justify the claim that the Complainant's firm should be recused from acting, the fact of the prior retainer does suggest that, at the least, the test in *MacDonald* needed to be considered. It is not abusive of the court's process to bring before the adjudicative body a question on which there may be legitimate differences, and this is reflected in the fact that the Court awarded simple costs, rather than special costs, upon the Respondent's loss on this question.

[107] The second part of the Citation alleges that the Respondent failed to discharge his professional obligations to opposing counsel by bringing the contempt application against counsel personally, and a recusal application, when he knew or ought to have known that they were unfounded, premature, and/or without merit, contrary to rules 2.1-4(a), 2.2-1, and 7.2-1 of the *BC Code*.

[108] Rule 2.1-4(a) requires that a lawyer's conduct to other counsel must be characterized by courtesy and good faith. The Respondent testified that he brought the contempt application to force negotiations, that he delayed setting it for hearing

as he believed that those negotiations would result in him getting the birth certificate and thus the application would become moot, that he never did provide the Complainant with a copy of documentation suggesting that the Pension Plan required the ex-spouse's identification, and that he never confirmed with the Pension Plan that they actually required the identification. He did not renew the demands for the birth certificate even after the Client's entitlement dates were clarified by the Court. All of these are instances of not acting in good faith.

[109] The Respondent's actions in bringing the contempt application were therefore not taken in good faith; he brought the contempt application to effect a result, the payment of the pension to the Client in accord with the terms of the original Pension Order, which he knew was both in dispute and remained to be determined by the Court. Moreover, the Respondent knew that the claim in contempt was weak; the letter of instructions he had his client sign made it clear that he had little faith in the success of the contempt application.

[110] The Respondent testified that he brought the contempt application against the Complainant personally because he believed that the Complainant was instructing the ex-spouse not to provide the birth certificate, thereby aiding and abetting the ex-spouse in not complying with what the Respondent believed to be the requirements of the Pension Order and depriving the Client of what the Respondent testified he felt was her lawful entitlement to the Pension benefits. The Respondent testified that he believed the Complainant was personally responsible by virtue of her writing, in an email, that "As soon as we have the wording of this [Pension Order] sorted out, I will get you the copy of my client's birth certificate"; the Respondent characterized the Complainant's behaviour as "holding the birth certificate hostage to get what she wanted."

[111] Bringing a contempt application against opposing counsel personally in an attempt to make that counsel act in a certain way, regardless of their duty to their clients or the status of the matter in dispute, is not acting in good faith. It is, furthermore, substantively different from the obligation to act in good faith as an officer of the court. By putting counsel in a position where they have to defend their own actions against such a claim is an attack on opposing counsel's integrity and good faith, rather than merely suggesting that it is the client who is refusing to comply with the order of the court.

[112] Rule 2.2-1 of the *BC Code* has already been discussed above, and the same reasoning applies in relation to the bringing of the contempt application personally against the Complainant. By bringing the application against the Complainant personally, however, the Respondent did not create a second breach of rule 2.2-1of

the *BC Code*, rather he compounded the existing breach. Bringing an action in civil contempt that was unfounded, premature and without merit and was brought to achieve an end other than that of requiring compliance with a court order is, objectively, contrary to the obligation to act in good faith. Bringing that action against counsel personally, rather than simply against counsel's client, does not add anything new to the delict in question. This Panel therefore declines to find a separate breach of the rules in respect of this section, in that the principles in *R.* v. *Kienapple*, [1975] 1 SCR 729, as explained in *R.* v. *Heaney*, 2013 BCCA 177, at para. 25 apply to the allegation in relation to rule 2.2-1, that is that "the offences charged do not describe different … wrongs, but instead describe different ways of committing the same … wrong."

[113] Rule 7.2-1 of the *BC Code* requires that a lawyer be courteous, civil and act in good faith in dealings with others in the course of practice.

[114] The Law Society restricted its allegation of professional misconduct regarding rule 7.2-1 to the bringing of the civil contempt action against the Complainant personally and the recusal application. In this context, it is again important to note the Respondent's testimony that he brought the application in civil contempt to force the Complainant to negotiate. By bringing the application against her personally, the Respondent questioned her *bona fides* and forced the Complainant into a position whereby she had to retain counsel personally to respond. Given the context of this matter, where the entitlement to pension benefits was in the course of being determined, and the evidence upon which the application was brought is so lacking, the good faith of the application is entirely absent.

[115] Again, however, the recusal application is not as clearly abusive as the contempt application. While the grounds for alleging recusal were weak, it is not disputed that the Complainant's firm had been retained by the Client. Moreover, when there is a dispute about such a conflict, it is not abusive to bring the matter before the court, particularly when, as with the sexual assault litigation, the Complainant's firm would continue to act on behalf of an opposing party.

[116] In defence of his actions regarding the January Applications, the Respondent pointed to the letter of instruction provided by the Client, in which she wrote "I am aware that [the Respondent] may be criticized by the Court for bringing the applications on my behalf and I confirm that I have told him to go ahead with both applications and that he can show this letter to the Court in his defence if the Court seems inclined to criticize [him] or order him to pay costs."

[117] That the Respondent was aware of the inherent weakness of the contempt and recusal applications is apparent from the terms of the Client's letter and his

testimony before this Panel, where he advised that he had told the Client that there was little chance of success and warned her of the possibility of costs. When challenged on cross-examination, however, and asked if, in the case where there was not much chance of success and exposure to special costs and criticism, it would not be better to decline instructions, the Respondent asserted that it was his "job to bring forward any argument" in furtherance of a client's instructions.

[118] While it is a lawyer's duty to pursue a client's claims resolutely and honourably and act as a client's advocate, this obligation is not untrammelled. A lawyer who receives instructions contrary to law, or that he knows or should know are improper or would lead to actions inconsistent with the lawyer's professional obligations, should refuse to act. As the panel in *Law Society of BC* v. *Kirkhope*, 2013 LSBC 18 stated at para. 46, "… when … a client asks his or her lawyer to do something that is inconsistent with the lawyer's professional obligations, that lawyer must say no. There is no flexibility on this issue."

[119] It is therefore no defence to an allegation of professional misconduct to assert that one was simply acting in accordance with a client's instructions. Accordingly, while the Client's letter of instruction may have acted to shield the Respondent from the Court's approbation, it is no defence to the allegation of professional misconduct.

[120] The Law Society submits that the Respondent's behaviour must be assessed in light of the broader context of the entirety of the interactions between the Respondent and the Complainant; however, this is not how the allegations in the Citation are phrased. Because the allegations in the Citation are restricted to specific instances, such as the context of the January Applications or specifically the bringing of the contempt application against the Complainant personally, this Panel must consider the Citation as presented, rather than expanding the scope of the consideration to the entirety of the interactions between the parties.

[121] With respect to the January Applications, therefore, this Panel finds that:

(a) With respect to the first allegation in the Citation, the Respondent breached rules 2.2-1 and 5.1-1 of the *BC Code*, which behaviour constitutes a marked departure from the standard of conduct expected of a lawyer and therefore amounts to professional misconduct; and

(b) With respect to the second allegation in the Citation, the Respondent breached rules 2.1-4(a) and 7.2-1 of the *BC Code*, which behaviour constitutes a marked departure from the standard of conduct expected of a lawyer and therefore amounts to professional misconduct. This Panel

finds that the principles in *Kienapple* apply to the breach of rule 2.2-1, and decline to find an additional breach of rule 2.2-1 of the *BC Code*.

Did the Respondent misstate facts in court and/or fail to correct the record regarding the start date and end date of a pension division at the Summary Trial?

[122] The Law Society alleges that the Respondent committed professional misconduct by misstating facts in court and/or failing to correct the record regarding the start date and end date of the entitlement to pension division, contrary to the *BC Code*.

[123] Rule 2.1-2(a) of the *BC Code* requires a lawyer's conduct to be characterized by candour and fairness, and to maintain, and to insist on clients maintaining, a courteous and respectful attitude to the courts and tribunals while still discharging duties to clients resolutely and with self-respecting independence.

[124] Rule 2.1-2(c) of the *BC Code* requires, in part, that a lawyer not attempt to deceive a court or tribunal by offering false evidence or misstating facts or law.

[125] Rule 2.2-1 of the *BC Code*, again, states that a lawyer has a duty to carry on the practice of law and discharge all responsibilities honourably and with integrity.

[126] Rule 5.1-1 of the *BC Code* requires a lawyer, when acting as advocate, to represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

[127] Both the Complainant and the Respondent agreed that there was nothing actually illegal about the original Pension Order. Further, both testified that it is, in fact, open to the courts to make an order for pension division that encompasses the entirety of the period during which a pension accrues, rather than just the period for which a relationship lasts.

[128] The Complainant and the Respondent also agreed that the presumption, and more common order, is that the pension entitlement will be limited to the duration of a relationship and that it would generally require argument or submissions regarding a reason to diverge from that common practice before a court would order pension division in excess of the duration of a relationship.

[129] The Complainant was not present at the hearing where the original Pension Order was made, so had to order the transcripts of the Summary Trial to confirm, and correct, the Pension Order. Eventually, and over the Respondent's entrenched

objections, the Pension Order was corrected. The ex-spouse, at the time of the Summary Trial, was self-represented.

[130] As is apparent from the transcript of the Summary Trial, the Court was not clear on the mechanics and law surrounding pension division following the end of a relationship.

[131] At the start of the Summary Trial, the Respondent stated that the appropriate dates for pension division would be the start and end of the relationship. The ex-spouse agreed with this.

[132] When questioned further, the Respondent outlined several other dates the court could use for pension division, including the entirety of the pension accrual period. The Respondent offered no explanation of the law or practice around pension division, merely offering numerous dates from which the court could choose. The Respondent also made no submissions regarding which dates the Court should use for pension division, merely leaving it to the Court to determine, in a vacuum, which dates were appropriate.

[133] Eventually, the Court ordered that pension division should be calculated based on the entire accrual period, rather than simply the duration of the relationship. The Respondent did not question this, or seek to clarify the reasons for this order, at the time it was pronounced. The Respondent acknowledged that it was a better order than expected, giving the Client several years' more pension benefit than would ordinarily be expected.

[134] In the strict sense, the Respondent did not misstate the facts or attempt to deceive the court regarding the dates for pension division, did not offer false evidence regarding the appropriate dates by, for example, misstating the length of the relationship, and was not particularly disrespectful to the court in presenting the Client's case.

[135] However, by not offering any submissions at all as to which dates the court should use or any argument regarding why some dates would be preferable to others, the Respondent was neither fair nor candid, and effectively did misstate the law by omission.

[136] It is an important factor that the ex-spouse was self-represented at the time of the Summary Trial. Commentary 6 to rule 5.1-1 of the *BC Code* provides:

> When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof

> and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[137] In the absence of counsel, the Respondent had a positive obligation to inform the Court fully as to the law surrounding pension division. The Respondent set out the standard procedure at the start of the Summary Trial by confirming that, "Under Part 6 of the *Family Law Act* and the Regulations, the entitlement period began June 30, 2000 when they got together, and ended June 12, 2012. That's 11 years, 50 weeks, which is 11.96 years." The Respondent then proceeded later in the hearing to present numerous other dates, which he defended before this Panel as being legal options the court may choose.

[138] At no point did the Respondent state to the Court that the other dates represented a variation from the norm, nor suggest that there should be any special or unusual circumstances under which departing from the initial entitlement period would be justified.

[139] It is clear that the Court, the Respondent and the ex-spouse became confused as to what was being sought. The Respondent never sought to clarify that confusion, testifying that it was part of his job to get the best outcome for the Client he could, and not to question the Court's order.

[140] In this case, however, the Respondent's duty to the Client was counter-balanced with his duty to the Court to provide "full proof and argument" and to be "accurate, candid and comprehensive." The Respondent did neither.

[141] The Court pronounced the Pension Order the same date as the Summary Trial. The Respondent did not question or otherwise confirm the Court's deviation from the norm in relation to the entitlement dates under the Pension Order, although the Respondent was fully aware that the Pension Order gave the Client more than he expected and that he had made no argument or submissions on which such variation could be based.

[142] When questioned, both by the Complainant and this Panel, the Respondent insisted that the Pension Order as originally pronounced was the Court's order, it was legal, and he was entitled to defend it. While technically true, it is clear that it was not the Court's intent to grant the Client entitlement to the entirety of the pension and that the Court had not turned its mind to whether a variation to the usual practice, entitlement limited to the duration of the relationship, would be justified. The

Court did not so turn its mind because the Respondent failed to point out that there was anything out of the ordinary in exceeding that presumptive period.

[143] As a consequence of the Respondent's actions and his insistence on his right to defend the original Pension Order despite all evidence that it was not the Court's intention to provide the Client with a windfall, the ex-spouse was put to the expense of hiring counsel and of paying for three more appearances, including the January Applications. The Client was put to the expense of paying for costs, both lump-sum, ordinary and special costs. By insisting on the "rightness" of the original Pension Order, the matter was delayed, and all parties were prejudiced. The Respondent could have avoided the extra cost and expense to the Client and ex-spouse by simply admitting that the original Pension Order did not reflect the Court's intent and provided the Client with a benefit in excess of that to which she was presumptively entitled.

[144] That the original Pension Order was not reflective of the Court's intent is demonstrated by the fact that the final Pension Order, confirmed in February 2016, reflected the dates as originally set out by the Respondent at the Summary Trial, rather than the dates the Court ordered following the Respondent's failure to make submissions or clarify the law regarding pension division. By failing to correct the order, the Respondent failed in his obligation to present the Client's case accurately, candidly and completely, thereby failing in his obligation to represent the Client "honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect."

[145] With respect to the matter of pension division, therefore, this Panel finds that the Respondent failed to discharge his professional obligation as an officer of the Court by failing to correct the record regarding the start date and end date of a pension division, contrary to rules 2.1-2(a) and 5.1-1 of the *BC Code*, which behaviour constitutes a marked departure from the standard of conduct expected of a lawyer, and therefore amounts to professional misconduct.

Did the Respondent draft and rely on the affidavit, which materially misrepresented the position of the pension plan, and the position of opposing counsel, regarding the requirement of a copy of opposing party's birth certificate?

[146] The Law Society alleges that the affidavit materially misrepresented the Complainant's position regarding the Pension Plan's requiring the ex-spouse's birth certificate, contrary to rules 2.2-1, 5.1-1, and 5.1-2(e) of the *BC Code*.

[147] It was this claim, that the Complainant and her client were refusing to provide the birth certificate as required by the Pension Order, that formed the basis of the Respondent's application to have the Complainant and the ex-spouse held in contempt.

[148] While the affidavit was not well-drafted and contained impermissible conclusory and argumentative statements, this Panel finds that it did not materially misrepresent the position of the Pension Plan or that of the Complainant.

[149] With respect to the position of the Complainant, the affidavit did include the quote from the Complainant that, "As soon as we have the wording of this order sorted out, I will get you the copy of my client's birth certificate." It is true that the affidavit did not include any mention of the Complainant's follow up email, in which she explicitly stated that she intended to comply with the order of the court, and would not encourage her client to do otherwise. The latter communication elaborated on the initial quote, but did not add anything material to it. This Panel does not agree with the Law Society that the affidavit materially misrepresented, or was misleading regarding, the Complainant's position.

[150] Regarding the position of the Pension Plan, while the affidavit only made mention of the requirement for a birth certificate, the Respondent's letter of December 22, 2015, which was attached as an exhibit to the affidavit, stated that any one of five different forms of identification are required. While it may not have been complete, and including the actual letter from the Pension Plan may have been preferable, in and of itself, the affidavit was not misleading as to the communication the Client received from the Pension Plan.

[151] Accordingly, this Hearing Panel does not find that the Law Society has established that the Respondent drafted and relied on an affidavit that materially misrepresented the position of the pension plan and of the Complainant.

Did the Respondent communicate with the Complainant in a discourteous manner?

[152] The Law Society finally alleges that the Respondent communicated with the Complainant in a discourteous manner, contrary to rules 2.1-4(a), 5.1-5, 7.2-1, and 7.2-4 of the *BC Code*.

[153] The Law Society suggests that it is the entirety of the interactions between the Respondent and the Complainant that must be evaluated when considering this allegation, rather than individual examples of correspondence.

[154] The Respondent cites *Groia* v. *Law Society of Upper Canada*, 2018 SCC 27, in defence of the Respondent's correspondence, arguing that the impugned communications occurred within the context of the Respondent's reasonably held belief that the Complainant and her client were in contempt of court by failing to produce the ex-spouse's birth certificate and that they were dragging the division of the pension out and thereby prejudicing the Client.

[155] While the Respondent's communications were condescending and frequently aggressive, following *Groia*, this Panel notes the Supreme Court of Canada's reasoning at paras. 99 to 101 that:

> Considering the manner and frequency of the lawyer's behaviour was reasonable. Trials are often hard fought. … Emotions can sometimes get the better of even the most stoic litigators. Punishing a lawyer for "a few ill-chosen, sarcastic, or even nasty comments" ignores these realities.
>
> This does not mean that a solitary bout of incivility is beyond reproach. A single, scathing attack on the integrity of another justice system participant can and has warranted disciplinary action … Be that as it may, … as a general rule, repetitive personal attacks and those made using demeaning, sarcastic, or otherwise inappropriate language are more likely to warrant disciplinary action.
>
> … When considering the manner and frequency of the lawyer's behaviour, it must be remembered that challenges to another lawyer's integrity are, by their very nature, personal attacks. They often involve allegations that the lawyer has deliberately flouted his or her ethical or professional duties. Strong language that, in other contexts, might well be viewed as rude or insulting will regularly be necessary to bring forward allegations … or other challenges to a lawyer's integrity. Care must be taken not to conflate the strong language necessary to challenge another lawyer's integrity with the type of communications that warrant a professional misconduct finding.

[156] None of the Respondent's correspondence amounted to a "single, scathing attack on the integrity of another justice system participant." Moreover, while the tone of the Respondent's correspondence was often abrupt, aggressive, and condescending, its content did not amount to repetitive personal attacks, and the language used was not demeaning or otherwise inappropriate. The allegation of contempt of court against the Complainant personally may be seen as a personal attack, but in the context of the Respondent's subjective belief that he was in the right, the

communications do not amount to discourtesy sufficient to warrant a finding of professional misconduct.

CONCLUSION

[157] This Panel therefore finds that the Respondent's behaviour amounted to a marked departure from the standards the Law Society expects of lawyers with respect to allegations 1(a) and (b) of the Citation, and of 2(a) of the Citation, and that this behaviour amounted to professional misconduct.

[158] This Panel finds that the Law Society has not met the onus of showing, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct on a balance of probabilities with respect to allegations 1(c) and 2(b) of the Citation.

ORDER TO PROTECT CONFIDENTIAL AND PRIVILEGED INFORMATION

[159] The Law Society made an application pursuant to Rule 5-8(2) for a "non-disclosure order" such that information protected by client confidentiality and solicitor-client privilege in any exhibit filed in these proceedings, if any person other than a party seeks to obtain a copy, is redacted.

[160] Openness and transparency are an important part of these disciplinary proceedings. Rule 5-8(1) provides that every hearing is open to the public. Rule 5-9 permits any person to obtain a copy of an exhibit entered during a public portion of a hearing.

[161] However, the Rules also recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing. For example, a person's ability to obtain a copy of an exhibit is expressly subject to solicitor-client privilege. Rule 5-8(2) permits a panel to make an order that specific information not be disclosed in order to "protect the interests of any person".

[162] In this case, the evidence of the events giving rise to the Citation and the evidence filed in this hearing include information that is subject to solicitor-client privilege.

[163] In our view, the need to protect solicitor-client privilege and the interests of other third parties in maintaining the confidentiality of the information given in evidence outweighs the interests of a member of the public in obtaining that information.

ORDER

[164] For all of the foregoing reasons, this Hearing Panel makes the following Order:

(a) An Order under Rule 5-8(2) of the Law Society Rules excluding all confidential or privileged information from disclosure to the public. Further, if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, that client names, identifying information, and any confidential information or information protected by solicitor-client privilege, must be redacted from the exhibit before it is disclosed to that person.