2020 LSBC 47
Decision issued: October 14, 2020
Citation issued: March 8, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

GLENN ARTHUR LAUGHLIN

RESPONDENT

DECISION OF THE REVIEW BOARD

Written submissions:	April 9 and 28, June 3 and 5, 2020
Review Board:	Michelle D. Stanford, QC, Chair Catherine Chow, Lawyer Robert Smith, Public representative Sandra Weafer, Lawyer Chelsea Wilson, Bencher
Discipline Counsel:	Kathleen Bradley
Appearing on his own behalf:	Glenn Arthur Laughlin

INTRODUCTION

[1] On application by the Law Society for a review of the hearing panel decision in *Law Society of BC v. Laughlin*, 2019 LSBC 42 (the "Hearing Panel Decision"), this Review Board was convened pursuant to Section 47 of the *Legal Profession Act*.

[2] The matter before this Review Board is the appropriateness of the $5,000 fine assessed against the Respondent for professional misconduct. The Respondent was found to have participated in conflicts of interest over the course of several years, in multiple situations involving his role as corporate counsel, while simultaneously acting for opposing shareholders. As well, he acted as legal counsel in a divorce

for one of the shareholders, and in matters involving the arrangements concerning his client's addiction issues.

[3] At the initial hearing, counsel for the Law Society and counsel for the Respondent made a joint recommendation that the penalty for the misconduct be a fine of $12,000. In determining the appropriate resolution, the hearing panel departed from the joint recommendation and imposed a fine of $5,000. The Law Society now seeks review of the $5,000 fine imposed by the hearing panel.

[4] At the pre-review conference on May 8, 2020, the President of the Law Society directed that the Review proceed on the written record. Accordingly, submissions were closed as of May 8, 2020. At this time, the Respondent took no position and agreed to proceed to the Review Board without submissions.

[5] On June 3, 2020, the Respondent filed written submissions on a purported *amicus curiae* basis, to draw the Review Board's attention to the recently issued *Wilson*[1] case, and to submit that it is inappropriate for the Law Society to be seeking costs for the Review.

[6] In reply submissions filed on June 5, 2020, counsel for the Law Society indicated that, in the interests of fairness, the Law Society did not object to the late filing of the Respondent's written submissions. However, as the Respondent had changed his position on the eve of the originally scheduled oral hearing date, which necessitated an additional written reply, the Law Society seeks costs in the minimum 5 units for the preparation and delivery of its written reply submissions.

PRELIMINARY MATTERS

[7] The Review Board considered the admission of the Respondent's written submission regarding the *Wilson* case and costs, and then considered the matter of the appropriateness of the fine imposed by the hearing panel.

Amicus Curiae

[8] The Respondent characterized his written submissions of June 3, 2020 as being filed on an *amicus curiae* or "friend of the court" basis. The criteria for an *amicus curiae* are not met. As explained in *R. v. Pereira*[2],

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[1] *Law Society of BC v. Wilson*, 2020 LSBC 20

[2] *R. v. Pereira et al*, 2007 BCSC 472 at paras. 30-43, quoting *Re F(TL)*, 2001 SKQB 271

> an *amicus curiae* is a neutral person appointed by the court to inform and assist the court. … Given the obligation of neutrality, the *amicus curiae* cannot adopt the position of any party to the proceeding.

The Review Board finds that the Respondent is a party to the proceeding and is therefore, neither a "friend" nor a "neutral" officer of the court.

[9] While the Review Board finds that the Respondent's written submissions are not those of an *amicus curiae*, the Review Board nonetheless accepts the late filing of the Respondent's written submissions, including reference to the *Wilson* case. The Review Board decides this for two reasons: 1) the Law Society is not opposed to the late filing by the Respondent; and 2) there is no prejudice in allowing the late filing of the Respondent's written submissions.

Costs

[10] The Law Society seeks the minimum units of costs because the Law Society was required to file a reply to the Respondent's written submissions. The Respondent did not make any submissions as to hardship, and only stated that costs were not appropriate. Accordingly, the Review Board orders that the Respondent pay the Law Society costs in the amount of $500.

ISSUES ON REVIEW

[11] In determining whether the hearing panel's imposition of a $5,000 fine should be overturned, the Law Society submitted that the issues are whether the hearing panel erred in:

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

(b) considering intent as a highly mitigating factor;

(c) failing to apply progressive discipline; and

(d) departing from a joint submission.

The Review Board adopts this approach.

STANDARD OF REVIEW

[12] Section 47 of the *Legal Profession Act* provides:

> (1) Within 30 days after being notified of the decision of a panel … the applicant or respondent may apply in writing for a review of the record by a review board. …
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> (5) After a hearing under this section, the review board may
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> (a) confirm the decision of the panel, or
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> (b) substitute a decision the panel could have made under this Act.

[13] Section 47(5) does not specify the applicable internal standard of review. The standard of review for internal Law Society reviews is correctness, as described in *Law Society of BC v. Hordal*[3] and *Law Society of BC v. Berge*[4], and as confirmed in *Law Society of BC v. Vlug*[5] and *Law Society of BC v. Harding*[6]; namely, correctness, is subject to two qualifications:

> (a) Where a finding is based on *viva voce* evidence and credibility is in issue, the review board should defer to the hearing panel and only intervene in cases where the panel made a clear and palpable error; and
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> (b) Where the review is of a disciplinary action decision and the review involves the duration or amount of action, as opposed to the type of sanction, the review board should accept the decision of the hearing panel as correct if the sanction imposed falls within the range of sanctions imposed in similar cases.

ANALYSIS

Mischaracterizing the nature and gravity of the misconduct

[14] Following the list of factors set out in *Law Society of BC v. Ogilvie*[7], the nature and gravity of the misconduct is especially important to consider given that one of the Law Society's key objectives is protecting and preserving public confidence in the legal profession.

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[3] 2004 LSBC 36
[4] 2007 LSBC 7
[5] 2017 BCCA 172
[6] 2017 BCCA 171
[7] 1999 LSBC 17

[15] The hearing panel characterized the nature and gravity of the Respondent's misconduct as being akin to the facts in *Law Society of BC v. Dent*[8], which involved a real estate transaction where the seller (long standing client) and the buyer arrived unannounced at the lawyer's office asking for the deal to be put through quickly and the lawyer failed to properly warn the buyer to seek his own legal representation. In *Dent*, the conflict of interest was a one-time conflict of interest concerning one transaction.

[16] The hearing panel considered a number of other cases involving less serious misconduct due to conflicts of interest and minor fines. The Review Board did not find any of these cases to be sufficiently similar or applicable to the Respondent's conduct in this case.

[17] The Review Board finds that the nature and gravity of the Respondent's misconduct is serious because there were multiple, over-lapping and perpetuating conflicts of interests, of which the Respondent, as a senior lawyer, should have been aware. The Respondent's behaviour was not akin to the situation in *Dent*, which was less serious and confined to a single transaction.

[18] The Review Board decided that the more comparable case is *Law Society of BC v. Culos*[9], where the conflicts and misconduct warranted a higher fine. In *Culos*, the respondent was a seasoned (25-year call) lawyer who was engaged in community service and committed professional misconduct with multiple conflicts. The lawyer had a Professional Conduct Record ("PCR") that included one conduct review and one set of practice standards recommendations, which is very similar to the present matter.

[19] In this matter, the Respondent acted for and against different shareholders of a company in two separate share sales while still purporting to act as corporate counsel. The Respondent also acted on behalf of one of the shareholders ("WD") in a divorce proceeding from his wife, who was another shareholder, where the valuation of the company and the value of the shares would impact all the shareholders. Indeed, the Respondent's ties to WD were further problematized when at one point, the Respondent held a power of attorney for WD for the sale of the matrimonial home. Finally, the Respondent acted in matters arranging for WD's drug rehabilitation treatment program.

[20] The Review Board finds that the failure of the Respondent, as a senior lawyer, to identify and avoid these conflicts of interest is serious misconduct.

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[8] 2016 LSBC 05
[9] 2013 LSBC 19

Considering intent as a highly mitigating factor

[21] Counsel for the Law Society submits that the hearing panel erred because the panel considered the Respondent's good intentions to help one of his clients with substance abuse issues as a highly mitigating factor to determine the appropriate disciplinary action. Urging that good intentions are at best a neutral factor, counsel for the Law Society relies on *Law Society of BC v. Coglon*[10], where that review panel found:

> … It is usual in conflict cases that the lawyer will lack some malign motivation and that he or she will have the strong hope that everything will work out for everyone.

In this light, the Respondent's good faith intention to help the financial plight of his client's drug addiction should not be considered as a highly mitigating factor.

[22] The Review Board disagrees with the Law Society's submission and finds that intent can be an aggravating or mitigating factor in determining the appropriate sanction. The consideration of one's intention is not necessarily a neutral factor in and of itself; rather, intent is a factor like many other factors to be considered positively or negatively. We consider the Respondent's good intention as a contextual rather than a determinative factor. We find that the hearing panel did not err in considering intent as a factor.

[23] In the consideration of intention as a mitigating factor, we find the hearing panel erred in placing too much weight on the Respondent's "good intentions". While the hearing panel noted that the Respondent did not stand to gain financially or otherwise[11], the Respondent, as an experienced lawyer, had other legitimate and viable options to avoid the conflicts of interests. The Respondent could have referred out the work or advised the clients to obtain independent legal advice. The Respondent wanted to resolve the client's financial difficulties and considered the matter urgent, but that objective did not necessitate the Respondent acting contrary to his professional obligations.

[24] The Respondent's altruistic intention to help his client overcome financial difficulties is considered by the Review Board as a mitigating factor, but not to the level of being "highly" mitigating as found by the hearing panel.

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[10] 2002 LSBC 21, [2002] LSDD No. 103, at para. 47
[11] Hearing Panel Decision, at para. 75

Failing to apply progressive discipline

[25] Rule 4-44(5) of the Rules states:

> The panel may consider the professional conduct record of the respondent in determining a disciplinary action under this rule.

[26] "Professional conduct record" is defined in Rule 1 of the Rules, and includes recommendations made by the Practice Standards Committee and any Conduct Review Subcommittee report delivered to the Discipline Committee.

[27] In *Law Society of BC v. Batchelor*[12], a hearing panel defined the principle of progressive discipline as follows:

> The principle of progressive discipline stipulates that a lawyer who has had prior discipline, whether for the same or different conduct and whether that conduct has been joined in one proceeding or dealt with by way of successive proceedings, will be subject to a more significant disciplinary sanction than someone who has had no prior discipline.

[28] The Review Board agrees with the rationale for the principle of progressive discipline as explained in *Batchelor*[13]: to protect the public and the reputation of the legal profession, and to send a clear message that the Law Society will not tolerate lawyers who repeatedly ignore their professional responsibilities.

[29] The Review Board finds that the hearing panel incorrectly determined that the principle of progressive discipline did not apply because this was the Respondent's first citation. This was the Respondent's first citation, but the Respondent had a relevant PCR that should have been considered. The hearing panel erred in not considering the Respondent's PCR, particularly, the 2011 Conduct Review.

[30] The 2011 Conduct Review centered around the same problem of conflicts of interest as in this citation and should have been considered as a highly aggravating factor by the hearing panel in this citation. Echoing the foreshadowing words of the Conduct Review Subcommittee, the Review Board "would have expected the [Respondent] to exhibit a greater degree of insight and awareness of his tendencies and errors along with a willingness to work to address them."

[31] Accordingly, the Review Board finds the Respondent's PCR is a highly aggravating factor, and the principle of progressive discipline ought to be applied.

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[12] 2013 LSBC 09, at para 49
[13] at para 50

Having considered the Respondent's PCR as a highly aggravating factor, the Review Board finds it should be given considerable weight with respect to the appropriate sanction.

Departing from a joint submission

[32] The hearing panel found that the $12,000 fine proposed in the joint submission was not in the range of what was "fair and reasonable in all of the circumstances that are in evidence"[14] and ordered that a fine of $5,000 be substituted in its place. The Law Society submits that the hearing panel erred in departing from the joint submission.

[33] The Law Society submits that in recent years, hearing panels have assessed joint submissions made outside of a Rule 4-30 hearing context (such as this one) based on whether the disciplinary action jointly submitted was "fair and reasonable."[15]

[34] The Law Society submits that this test does not accord with the test followed by other law societies throughout Canada and urges this Review Board to apply the "public interest test" as set out in the criminal case of *R. v. Anthony-Cook*[16]. As articulated in *Anthony-Cook*, a joint submission should only be departed from in the following circumstances:

> Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.
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> In *Druken*, 2006 NLCA 67, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system." And, as stated by the same court in *R. v BO2*, 2010 NLCA 19, at para 56, when assessing a joint submission, trial judges

[14] Hearing Panel Decision, at paras. 56-59
[15] *Law Society of BC v. Di Bella*, 2019 LSBC 32 at para. 57
[16] 2016 SCC 43

> should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts."
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> … Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead to reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down …[17]

[35] In *Law Society of Upper Canada v. Archambault*[18], this "public interest test" was applied in the context of professional regulatory hearings. Citing the explanation of Justice Moldaver in *Anthony-Cook*, the hearing panel wrote at para. 15:

> On behalf of the unanimous Supreme Court, Justice Moldaver explained why this stringent test is necessary, in comments that also apply to joint submissions before this Tribunal. His reasoning at paras. 35-44, adapted to our context, emphasizes that there needs to be a high degree of certainty that a joint submission will be accepted because:
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> - Joint submissions are a proper and necessary part of the system, and benefit the administration of justice and all participants including the licensee, complainants, witnesses and counsel.
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> - A joint submission helps the Law Society as prosecutor and the public interest, since an admission makes a finding of misconduct certain. The prosecution avoids the risk that flaws in its case, such as weaknesses in witness testimony, the unwillingness of a witness to testify, or evidence that is not admissible will affect whether a finding is made.
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> - Witnesses and complainants may prefer to avoid the stress of testifying, and may appreciate the acknowledgement of responsibility that comes from an admission.
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> - The licensee likely obtains a penalty that is more lenient than he or she might expect after a contested finding and/or penalty hearing. The costs and stress associated with contested hearings are minimized and certainty is maximized.

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[17] *Anthony-Cook*, at paras. 32-34
[18] 2017 ONLSTH 86

- Joint submissions play an essential role in saving the justice system time, resources and expenses.

- Law Society and licensee representatives are highly knowledgeable about the circumstances and the strengths and weaknesses of their respective positions. Law Society representatives put forward the public interest and licensee representatives focus on their clients' interests. They are together well-placed and can be relied upon to arrive at a joint submission that reflects both interests.

[36] In the Respondent's written submissions, the Respondent urges the Review Board to consider and apply the recent *Wilson* decision in determining whether the hearing panel was correct in departing from a joint submission on sanction. *Wilson* was released on April 30, 2020 – after the Hearing Panel Decision and before the hearing of this review. The Respondent argues in his submissions that *Wilson* is directly on point because the panel was presented with a joint submission on penalty, but instead asserted its independence to impose a penalty that the panel considered appropriate.

[37] The Law Society, in its reply submission, argues that *Wilson* is of little to no assistance to the Review Board because, amongst other things, it does not address the applicable test to be followed in departing from a joint submission on sanction. The Law Society does submit that *Wilson* adheres to the principles and procedures set out in *Anthony-Cook.*

[38] In this case, the Review Board does not have the benefit of written submissions from the Respondent regarding whether the "fair and reasonable" or "public interest test" is the correct test to apply in determining when it is appropriate for a hearing panel to depart from a joint submission on penalty. In addition, the Review Board does not have the benefit of oral argument on this point. As set out below, the Review Board finds that the hearing panel was incorrect in departing from the joint submission regardless of what test is applied. For all these reasons, the Review Board determines that this is not an appropriate case in any event to consider which test should be followed in British Columbia.

[39] Regardless of which test is applied, the Review Board finds that the hearing panel in the present matter erred in departing from the joint submission. The $12,000 fine proposed in the joint submission was fair and reasonable, particularly having regard to the nature and gravity of the Respondent's misconduct and his PCR. Further, the proposed fine would not bring the administration of justice into disrepute and is not otherwise contrary to the public interest. The acceptance of

this fine would not lead reasonable and informed persons, aware of all the relevant circumstances, to believe that the proper functioning of the Law Society disciplinary system had broken down.

[40] The Review Board orders that the $5,000 fine is set aside and that a fine of $12,000 be substituted in its place.

DECISION ON REVIEW

[41] The Review Board finds the hearing panel erred in characterizing the nature and gravity of the Respondent's misconduct as being at the lower end of the spectrum. Over the span of time and different matters, there were multiple, over-lapping and perpetuating conflicts of interests, of which the Respondent as a senior lawyer should have been aware. The Review Board concludes that the Respondent's misconduct was at the mid-to-higher end of the spectrum of misconduct.

[42] The Review Board finds that the hearing panel was correct in considering the Respondent's good intentions as a mitigating factor but erred in placing too much weight on the Respondent's lack of direct financial gain and humanitarian aims. Intention can be a mitigating or aggravating factor, but in this case, the misconduct is serious, and the Respondent's intentions were not "highly" mitigatory.

[43] The Review Board finds the Respondent's PCR is a highly aggravating factor, and the principle of progressive discipline ought to be applied. The Respondent's 2011 Conduct Review involved the same problem of acting in a conflict of interest. The Review Board finds the hearing panel erred in failing to properly consider the Respondent's relevant PCR.

[44] The Review Board finds that the hearing panel erred in departing from the joint submission proposing a $12,000 fine. The proposed fine was fair and reasonable, particularly having regard to the nature and gravity of the Respondent's misconduct and his PCR. Further, the proposed fine would not bring the administration of justice into disrepute and is not otherwise contrary to the public interest. The Review Board orders that the $5,000 fine is set aside and that a fine of $12,000 be substituted in its place.

COSTS

[45] The Review Board agrees with the Law Society's submissions regarding costs. The Review Board orders that the Respondent pay the Law Society costs in the amount of $500 for this Review hearing.

NON-DISCLOSURE ORDER

[46] The Law Society seeks an order under Rule 5-8(2) of the Rules that if any person, other than a party, seeks to obtain a copy of a transcript or any exhibit filed in these proceedings, client names and identifying information and any confidential or privileged information must be redacted before it is disclosed to that person. This order is sought by the Law Society in order to protect client confidentiality and solicitor-client privilege. The Review Board grants this order.

SUMMARY OF ORDERS

[47] The Review Panel makes the following orders:

(a) The decision of the hearing panel ordering a $5,000 fine is set aside and substituted with an order that the Respondent pay a fine of $12,000 to the Law Society by January 31, 2021;

(b) The Respondent is to pay costs in the amount of $500 to the Law Society by January 31, 2021; and

(c) Pursuant to Rule 5-8(2)(a) of the Rules, if any person, other than a party, seeks to obtain a copy of a transcript or any exhibit filed in these proceedings, client names and identifying information, and any confidential or privileged information must be redacted before it is disclosed to that person.