

2020 LSBC 54
Decision issued: November 10, 2020
Citation issued: June 14, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MARK ALAN HOPKINSON

RESPONDENT

**DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION**

Written materials: September 15, 2020

Panel: Dean P.J. Lawton, QC, Chair
Lindsay R. LeBlanc, Lawyer
Lance Ollenberger, Public representative

Discipline Counsel: Kathleen M. Bradley
No-one appearing on behalf of the Respondent

BACKGROUND

- [1] On April 6, 2020 the Panel found that the Respondent had committed professional misconduct by failing to provide the quality of service expected of a competent lawyer; failing to rectify an error or omission in relation to a client's patent application; multiple failures to respond to communication from the Law Society; and representing himself as qualified and entitled to practise law while suspended. That decision is indexed as 2020 LSBC 17 and contains the factual background of the committed professional misconduct.

PROCEEDING IN THE ABSENCE OF THE RESPONDENT

- [2] On August 20, 2020 the Panel ordered that the disciplinary action phase of the hearing proceed on written submissions only and that the parties had until September 15, 2020 to provide their submissions with reply to occur by September 30, 2020. That decision is indexed as 2020 LSBC 38.
- [3] The Respondent neither delivered submissions by September 15, 2020 nor reply submissions by September 30, 2020.
- [4] Section 42 of the *Legal Profession Act* (the “Act”) permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of the hearing.
- [5] On August 20, 2020, the Hearing Administrator for the Law Society emailed and couriered to the Respondent the Panel’s decision to proceed with submissions in writing. The Panel finds that the Respondent was given notice of the hearing and the manner in which the hearing would proceed.
- [6] The Respondent did not attend the disciplinary action hearing and has provided no reason for his non-participation in this hearing.
- [7] The Panel finds that it would be in the best interests of the public to proceed with the hearing notwithstanding the Respondent’s absence.

POSITION OF THE LAW SOCIETY ON DISCIPLINARY ACTION

- [8] The Law Society submits that the appropriate disciplinary action is a suspension of one to three months, commencing on the date on which the Respondent is re-admitted to the Law Society of British Columbia, and costs of \$9,512.75, payable on or before one month from the date this Panel’s decision is released.

DECISION

- [9] The primary purpose of disciplinary proceedings is to uphold and protect the public interest in the administration of justice to ensure that public confidence in the legal profession is maintained generally, which is protected by ensuring the independence, integrity, honour and competence of lawyers: the *Act*, s. 3; *Law Society of BC v. Nguyen*, 2016 LSBC 21; and *Law Society of BC v. Hittrich*, 2020 LSBC 27.

[10] In *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 55, a review panel held that the objects and duties set out in section 3 of the *Act* are reflected in the non-exhaustive factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17:

- (a) the nature and gravity of the conduct proven;
- (b) the age and experience of the respondent;
- (c) the previous character of the respondent, including details of prior discipline;
- (d) the impact upon the victim;
- (e) the advantage gained, or to be gained, by the respondent;
- (f) the number of times the offending conduct occurred;
- (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
- (h) the possibility of remediating or rehabilitating the respondent;
- (i) the impact on the respondent of criminal or other sanctions or penalties;
- (j) the impact of the proposed penalty on the respondent;
- (k) the need for specific and general deterrence;
- (l) the need to ensure the public's confidence in the integrity of the profession; and
- (m) the range of penalties imposed in similar cases.

[11] In *Law Society of BC v. Dent*, 2016 LSBC 05, the panel stated that it is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, it is reasonable and appropriate for the hearing panel to state those factors that it considers relevant to, or determinative of, the final outcome of the disciplinary action. This approach flows from *Lessing*, which speaks to different factors having different weight.

[12] In cases involving multiple findings of misconduct, the usual approach in assessing the appropriate disciplinary action is to first determine on a global basis the type of

sanction to be imposed, taking into account the nature of all the misconduct (*Law Society of BC v. Gellert*, 2005 LSBC 15). The Panel sees merit in that approach.

[13] In this case, the Panel finds the following *Ogilvie* factors to be significant:

- (a) the nature and gravity of the proven misconduct;
- (b) the Respondent's prior discipline history
- (c) impact on the victim and the need to ensure public confidence in the integrity of the profession;
- (d) the number of times the conduct occurred; and
- (e) the range of sanctions imposed in similar cases.

Nature, gravity and consequences of the misconduct

[14] The Respondent acted for his client MB in applying for a US patent. The US Patent & Trademark Office wrote to the Respondent, informing him that the patent would issue if a \$140 fee was paid by November 14, 2017. As the Respondent did not pay the fee or inform MB about it, the patent application was deemed abandoned. From January to April of 2018, MB repeatedly contacted the Respondent for a status update regarding her patent application. The Respondent did not answer her inquiries or tell her that the patent application had been deemed abandoned.

[15] On April 19, 2018, the Respondent sent MB an email. He apologized for allowing the patent application to become abandoned and assured her that he would take steps to reinstate it. Despite these assertions, the Respondent did not reinstate the application. He also did not inform MB that he was no longer acting for her and that she should obtain independent legal advice, including that she may obtain a potential remedy against the Respondent for allowing the patent application to be abandoned.

[16] During the Law Society's investigation into the Respondent's conduct, the Respondent did not reply to the Law Society's communications. The Respondent's failure to respond to the Law Society hampered its ability to conduct an investigation, and as a result, the Law Society had to rely heavily on the complainant for evidence, which cost her additional time and resources in responding to the Law Society.

- [17] As a result of the Respondent's failure to respond to his regulator, he was administratively suspended from the practice of law. The Law Society advised the Respondent that he must not hold himself out to the public as being able to practise during his suspension and that he must immediately disable all online profiles that refer or imply that he is entitled to practise law. However, the Respondent continued to hold himself out as a practising lawyer on the website www.coastpatent.com and continued to do so until approximately September 19, 2019, a few days prior to the hearing of the citation that was initially scheduled for September 24, 2019.
- [18] On February 1, 2019, the Law Society issued a second administrative suspension to the Respondent for his failure to submit a final trust report. This suspension was issued after the Respondent's failure to respond to communications from the Law Society's Trust Assurance Department on August 15 and December 7, 2018, and January 3, 2019.
- [19] The Respondent also failed to respond to communications from the Law Society's Custodianships department in March 2019.
- [20] The Respondent's failure to provide the quality of service expected of a competent lawyer is significant. It involved several breaches of obligations that are fundamental to a lawyer's duties to a client. Here, the misconduct is aggravated by the fact that it occurred on multiple occasions over a period of approximately ten months. The matter was urgent, as there was a firm deadline from the US Patent Office that had to be complied with.
- [21] A highly aggravating factor is the harm caused by the Respondent's misconduct. The consequences to MB were serious and caused MB to be distraught and stressed. The value of the work that she had paid the Respondent to do in preparing and filing the patent application was lost. In addition, as a result of the Respondent's assurances that he would reinstate the application, MB was left with the impression that the Respondent was continuing to represent her and protect her interests when he was no longer doing so.
- [22] It is also significant that the misconduct encompassed representations to MB that were not candid. This includes the Respondent's failure to advise his client about the Notice of Allowance and the need to pay a fee, his failure to recommend independent legal advice, and his reassurances that he would take steps to reinstate the patent application.
- [23] As noted in *Law Society of BC v. Harding*, 2016 LSBC 09, there is a connection between the importance of candour and the duty to recommend independent legal advice where a lawyer's error has damaged the client. A lawyer's fiduciary duty to

the client and the need for candour ensure that the client is properly able to assess whether independent legal advice is needed and, if such advice is obtained, to ensure that it is informed and comprehensive.

- [24] Hearing panels have consistently considered as serious misconduct the failure to cooperate with a Law Society investigation by failing to respond to Law Society communications. In this case, the Respondent did so on at least six occasions over a period of approximately nine months. This conduct is aggravated by the fact that he was also unresponsive to communications from the Law Society's Trust Assurance and Custodianship Departments.
- [25] It is clear that the obligation to respond to the Law Society is of fundamental importance because a lawyer's failure to respond impairs the Law Society's ability to govern lawyers effectively. In *Law Society of BC v. Dobbin*, 1999 LSBC 27, the majority of the Benchers on review explained that the duty to respond to communications from the Law Society is a "cornerstone" of our independent, self-governing profession.
- [26] In *Law Society of BC v. Hall*, 2003 LSBC 11 at para. 2, a hearing panel explained the importance of the duty to respond to the Law Society as follows:
- ... it is essential for lawyers to respond to Law Society communications. Otherwise the Society cannot effectively discharge its responsibility of protecting the public interest in the administration of justice. It is simple: lawyers neither have the freedom not to respond nor the freedom to respond according to a schedule that suits them. They certainly cannot put their heads in the sand, as the Respondent said he did.
- [27] Lastly, with respect to the nature and gravity of the Respondent's misconduct in representing online that he was qualified and entitled to practise law by referring to his business as "Hopkinson Intellectual Property Law" and "Patent and Trademark Agency & Law Firm" while he was suspended, the Respondent's actions were particularly concerning because he knew that he was required to remove the online profiles that promoted him as a lawyer, but refused to do so until shortly before his scheduled Facts and Determination hearing.
- [28] The seriousness and gravity of the Respondent's conduct is an aggravating factor.

Character and professional conduct record

- [29] The Respondent was called and admitted as a member of the Law Society in Ontario on September 27, 2002 and as a member of the Law Society of British Columbia on October 22, 2002. At the time of the misconduct, the Respondent was an experienced lawyer and had been practising law for at least 15 years.
- [30] The Respondent's professional conduct record ("PCR") includes:
- a. January 25, 2019 to January 1, 2020 - administrative suspension for failing to respond to this complaint; and
 - b. February 1, 2019 to January 1, 2020 - administrative suspension for failing to submit his final trust report.
- [31] The Respondent's administrative suspensions ended when he became a former member of the Law Society as of January 1, 2020.
- [32] The Respondent's PCR is linked to the factual matrix of this case, as he was subject to these suspensions when he failed to respond to the Law Society's communications and when he practised law while suspended.
- [33] The Respondent's PCR is an aggravating factor because it demonstrates his ongoing unwillingness to address his failure to meet the minimum accepted standards of legal practice.

Impact on the victim

- [34] As stated above, the impact on the victim was serious and was aggravated by the Respondent's lack of communication and lack of candor. Deadlines were missed and MB was unnecessarily put into a vulnerable position. Even after the deadline was missed by the Respondent, the Respondent misled MB by assuring he would take care of the matter but then did nothing.

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

- [35] An important question the Panel must consider is whether the public will have confidence in the proposed disciplinary action.
- [36] If the sanction imposed does not reflect the seriousness of the conduct, public confidence in the integrity of the legal profession will be eroded.

- [37] The Respondent's lack of candour and lack of communication with the Law Society are both aggravating factors that warrant particular rebuke.
- [38] When a client retains a lawyer, that client hands over trust and confidence on matters of the utmost importance. A client has an expectation to be properly informed on the status of the file. In this case, the Respondent failed to advise MB of deadlines and then failed to advise MB when those deadlines had passed. This was not a matter where the Respondent simply forgot because MB was actively trying to find out information from the Respondent and the Respondent would not respond. When the Respondent did respond, he advised MB he would take care of any issues but then took no further steps. This conduct was a betrayal of MB and is particularly aggravating.
- [39] The duty to respond to communications from the Law Society is fundamental to the self-governance of the Law Society and repeated failures by the Respondent are egregious.

Range of sanctions in prior cases

- [40] The Law Society has referred the Panel to a number of cases but submits that there is no case directly on point, containing the same combination of misconduct. The Panel has reviewed the cases provided by the Law Society, and we agree. We find the cases provide some guidance in reaching an appropriate sanction; however, given the uniqueness of the misconduct the Panel places greater reliance on the other *Ogilvie* factors considered in reaching the appropriate sanction.

CONCLUSION

- [41] In all of the circumstances of this case, we conclude that a suspension is required. We order that the Respondent be suspended from the practice of law for three months, commencing on the future date on which the Respondent is re-admitted to the Law Society of British Columbia.

COSTS

- [42] The Law Society seeks total costs in the amount of costs of \$9,512.75.
- [43] The Panel has reviewed the Bill of Costs submitted by the Law Society and sees no reason to vary it. The Panel orders costs in the amount of \$9,512.75, payable within 60 days from the date this decision is issued.

SUMMARY OF ORDER

[44] This Panel orders that the Respondent:

- (a) be suspended from the practice of law for a period of three months to commence on the date on which the Respondent is re-admitted to the Law Society of British Columbia in the future; and
- (b) pay the Law Society of British Columbia, within 60 days of the issuance of this decision, costs and disbursements in the amount of \$9,512.75.