2021 LSBC 06
Decision issued: February 4, 2021
Citation issued: March 18, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

SANDRA HELEN MARY SMAILL, QC

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	December 18, 2020
Panel:	Michael F. Welsh, QC, Chair Thelma Siglos, Public representative Sandra E. Weafer, Lawyer
Discipline Counsel:	Michael D. Shirreff
Appearing on her own behalf:	Sandra H.M. Smaill, QC

BACKGROUND

[1] By a decision dated March 3, 2020 (2020 LSBC 14), this Panel determined that the Respondent, Sandra H.M. Smaill, QC, committed eight instances of professional misconduct. These were all the allegations of misconduct for which she had been cited.

[2] These eight findings of professional misconduct were:

1. Between January 2016 and April 2018, the Respondent failed in 15 specific instances to maintain accounting records in compliance with the Law Society Rules;

2. Between May 17, 2017 and August 31, 2017, the Respondent in 22 instances misappropriated sums totalling $1,104.18 from client trust

funds by withdrawing the residual balances in her pooled trust account on inactive or concluded files;

3. Between March 22, 2017 and March 15, 2018, the Respondent in six instances misappropriated sums totalling $5,386.06 by withdrawing funds from her pooled trust account without statements of account or other supporting documentation when she knew or ought to have known that the withdrawals were not properly required for payment to or on behalf of the clients and that she was not entitled to the funds;

4. Between January 6, 2016 and September 29, 2017, the Respondent in two instances received retainers totalling $1,168 from clients but failed to deposit the funds into her pooled trust account and instead deposited the funds into her general account without first preparing and delivering a bill to her clients;

5. Between approximately January 2016 and March 2018, the Respondent in 11 instances misappropriated sums totalling $3,341 from client trust funds by withdrawing funds when there were insufficient funds on deposit to the credit of those clients;

6. Between October 2015 and January 2018, the Respondent collected Goods and Services Tax ("GST") from her clients, but failed to remit the GST funds, totalling $46,977.16, to the Canada Revenue Agency ("CRA");

7. Between January 2016 and March 2018, the Respondent failed to remit employee payroll source deductions to the CRA, resulting in a debt to the CRA of $43,509.54 including arrears, penalties and interest; and

8. The Respondent persistently and repeatedly failed to respond to various Law Society communications or to cooperate during the Law Society investigation of her practice and during the disciplinary process leading up to the hearing on Facts and Determination ("F&D Hearing").

[3] In its F&D Hearing decision, this Panel found that it "… has no trouble concluding that each and every allegation in the citation is proven and that each and every allegation, considered both individually and cumulatively, constitutes professional misconduct."

[4] In making these findings, this Panel did not simply rely on the facts in a Notice to Admit presented by counsel for the Law Society, but relied on the documentary evidence presented at the F&D Hearing by counsel for the Law Society substantiating those admissions. As this Panel noted at para. 8: "… the Respondent did not respond to the Notice to Admit. As such, the facts in the Notice to Admit, which support all of the allegations in the citation, are deemed to be admitted. Notwithstanding that counsel for the Law Society put forward a great deal of documentary evidence in addition to the Notice to Admit. All the evidence adduced clearly meets the burden on the Law Society to establish the allegations in the citation through clear, convincing and cogent evidence."

[5] The Respondent did not participate in the F&D Hearing. This Panel found as follows regarding her failure to participate:

> Although the citation and the amended citation were served on the Respondent, the Respondent did not appear at the hearing. In fact, from the time that the Rule 4-55 investigation was commenced, the Respondent did not cooperate at all with either the Law Society investigation or this disciplinary process.
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> In March, 2018, the Respondent was suspended from practice for failing to provide responses and records to the Law Society during the course of the compliance audit. Prior to this hearing, the Law Society prepared a Notice to Admit that was delivered to the Respondent, but she did not provide any response to that Notice.
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> Although notified of the hearing date, the Respondent did not attend the hearing. She did provide a confirmation from her former legal assistant that she would not attend the hearing. She also provided through another member of the Law Society who was not representing her, an unsigned letter dated December 9, 2019 indicating, again, that she would not be participating in the hearing.
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> As the evidence clearly established that the citation and the Notice of Hearing had been provided to the Respondent, and as she confirmed that she would not be participating in the hearing, the Panel had no concerns about granting the Law Society's application to proceed in the absence of the Respondent. As such, pursuant to s. 42(2) of the *Legal Profession Act*, we granted the application to proceed in the absence of the Respondent.

[6] The Respondent did participate in this discipline phase hearing, acting for herself. She gave no evidence, but made submissions in which she admitted some of the

instances of professional misconduct but disputed others. We will deal with her submissions in more detail later in this decision.

ISSUES

[7] The Law Society seeks disbarment. The Respondent submits that this is too draconian a penalty and that instead, she should be subject to an order that she not apply to become a practising lawyer again. She has not practised law since she was suspended in 2018, nor has she renewed her membership.

[8] This Panel must decide if disbarment is the appropriate penalty or if a lesser penalty, as suggested by the Respondent, is warranted. What this Panel cannot do is reopen its findings from the F&D Hearing based on the submissions of the Respondent. As counsel for the Law Society put it, and echoing comments made by this Panel in the F&D Hearing decision, those submissions are again "too little and too late".

SUBMISSIONS

[9] Counsel for the Law Society provided written submissions augmented by brief verbal submissions. The Respondent provided verbal submissions.

[10] The Law Society submits that even though the Respondent no longer practises law and is a former lawyer, protection of the public requires an order of disbarment in light of her "numerous and serious instances of misconduct, combined with her refusal to participate in the regulatory process."

[11] The Law Society also seeks its costs, calculated under Rule 5-11 and Schedule 4, of $10,052.79, plus costs of the court reporter at the discipline hearing of $250. This totals $10,289.04. Counsel for the Law Society submits that costs should be paid within 60 days of the date of our order, or on such other timeline as we determine.

[12] Counsel for the Law Society submits that the primary purpose of disciplinary proceedings is to fulfill the Law Society's public interest mandate set out in section 3 of the *Act*: to uphold and protect the public interest in the administration of justice by ensuring the independence, integrity, honour and competence of lawyers. Counsel refers us to the oft-cited cases of *Law Society of BC v. Ogilvie*, 1999 LSBC 17 and *Law Society of BC v. Lessing*, 2013 LSBC 29 (on review). From those cases flow a number of factors (referred to as the *Ogilvie* factors) that we should consider in assessing an appropriate disciplinary action:

(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 effect on and consequences for 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 effect on the respondent of criminal or other sanctions or penalties;

(j) the consequences of the proposed penalty for 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.

[13] The Benchers on review in *Lessing* affirmed those factors as a guide or "roadmap" at paragraph 85 of their reasons, while noting that not all may apply in a particular case and that their respective weight will vary from case to case. *Lessing* noted that, in the end, protection of the public, including public confidence in the legal profession, prevails over other conflicting factors.

[14] The more recent discipline decision, *Law Society of BC v. Dent*, 2016 LSBC 05, boiled those factors down to:

(a) the nature, gravity and consequences of the conduct;

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

(c) any acknowledgement of the misconduct and remedial action taken; and

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

[15] Counsel for the Law Society submits that what *Dent* calls these "consolidated *Ogilvie* factors" provide a reasonable framework for this Panel to assess the proper disciplinary action to be taken.

[16] In so doing, the Law Society notes:

(a) the sheer number of our findings of professional misconduct in this case;

(b) that many involved misappropriation or mishandling of client trust funds and of government remittances;

(c) how they were compounded by the shambles in the Respondent's financial recordkeeping; and

(d) the Respondent's lack of acknowledgment of that misconduct or any effort by her to remediate her clients or the CRA, or to cooperate with the Law Society investigation in any meaningful way.

[17] Instead, as counsel for the Law Society put it, like the proverbial ostrich, the Respondent "buried her head in the sand".

[18] Counsel for the Law Society also brings forward the Respondent's disciplinary record over her 40 year career at the Bar. That record constitutes two conduct reviews in 2015 for breach of undertaking, failure to provide prompt service to a client, inadequate quality of service, failure to properly supervise her assistant and failure to properly respond to another lawyer to whom a client transferred from her.

[19] The Respondent was also before the Practice Standards Committee in 2012 and the Committee made several recommendations to improve her practice.

[20] The Law Society submits that the Respondent was a "seasoned practitioner" who was expected to know better and that this, combined with her disciplinary record, are aggravating factors.

[21] The Law Society submits that, while the evidence clearly shows that the Respondent was in very straitened financial circumstances when these actions of professional misconduct occurred, "[m]any can face financial distress in their lives. However, that does not justify the misappropriation of client's funds." (*Law Society of BC v. Lebedovich*, 2018 LSBC 17 at para. 25)

[22] Finally, referring back to *Dent* on public confidence in the legal profession, it notes that the panel in that case analyzed this factor on three general and specific deterrence bases:

(a) Is there sufficient specific or general deterrent value in the proposed disciplinary action?

(b) Generally, will the public have confidence that the proposed action is sufficient to maintain the integrity of the profession?

(c) Specifically, will the public have confidence in the proposed disciplinary action compared with similar cases?

[23] Referencing a number of prior discipline decisions, Law Society counsel submits that only disbarment will fulfil these criteria. To this we will return in more detail in our own analysis.

[24] In her submissions, when asked why she had not participated in the F&D Hearing, the Respondent said that she recognized that some of the matters for which she was cited, such as her failure to make government remittances, could constitute professional misconduct. As a result, she did not dispute the citation. She said, however, that she disagreed with other of the cited matters, and in retrospect, she should have responded to the Notice to Admit.

[25] In particular, the Respondent submitted that she had cooperated with the Law Society investigators and said that she had never taken "a penny" of any client money to which she was not entitled. She denied misappropriation.

[26] When asked about the specific findings of misappropriation and failure to deposit retainers into trust, the Respondent said that she had in cases prepared accounts but that they had not been processed. She did not provide specific examples.

[27] The Respondent also referenced two specific occasions where she took money from trust without an account. The first was when she borrowed some $8,000 in trust funds for an estate she was probating of which her son was beneficiary, with her son's consent. The second was when another lawyer gave her $1,000 to cover her expenses to travel to Vancouver to argue an appeal for him that she had put into trust. She said the other lawyer told her that she did not have to account for the money. When asked by the Panel whether, in both these cases, she agreed that it was improper to remove the funds from trust as she did, she answered "I guess so".

[28] Finally, the Respondent admitted preparing accounts to clear out funds from inactive or completed client files, charging whatever was in trust for file closing, and not seeing anything wrong with doing so.

[29] The rationale that the Respondent gave for her bookkeeping being in disarray was what she called a "perfect storm of circumstances" where her bookkeeper/conveyancer left and her other assistant took over. That assistant was diagnosed with aggressive cancer and was frequently away in Calgary or Cranbrook for treatment. As a result, the assistant was not keeping up with her work. The Respondent admitted that she should have ensured that the accounts were processed and she should have supervised the assistant so that the accounts "got off her desk", but she thought that they were being dealt with.

[30] The Respondent also said that, during this time, the CRA was garnishing her legal aid payments, her CPP and OAS, and the stipend that she was receiving as a school trustee. She was living on $1,300 per month.

[31] The Respondent used this lack of income as her reason for not making any attempts to remediate by paying back clients. She said that it was not wilful. Instead, she just did not have any financial resources with which to pay.

[32] The Respondent made the same submission respecting paying costs, saying she had no resources with which to do so. She said that after her practice closed, she did not have the money to pay for her car insurance, let alone Law Society fees as a non-practising lawyer. She went some 13 months with no vehicle until she could pay for insurance again.

[33] The Respondent pointed out that she had kept up with her PST remittances, using funds from an estate of which she was beneficiary and borrowing from relatives to pay them and to keep her practice open. She said all her woes flowed from poor bookkeeping and that she never stole any money.

[34] Finally, the Respondent pointed out her service to the profession and her community over her decades of practice. This included her service to the CBABC as a Provincial Council representative for which she attributed her receiving her Queen's Counsel in 1998, a more recent recognition award she received from the Legal Services Society for her legal aid work and her 35 years' service as an elected school trustee for Kimberley.

[35] The Respondent was not sure if disbarment might mean she could no longer continue as a trustee. When asked why she had not declared bankruptcy to address the money she owes to the CRA, she said she did not want to do so, as again that

might mean she would have to resign her trusteeship or would be unable to run again. She does not want to give up that position.

[36] The Respondent's proposed disciplinary action was that she enter into an order that she never re-apply to be a practising lawyer. She suggested that there was no public need for protection from her, that she never made much money practising law and that she had exhausted her resources trying to keep her practice alive. She said she will be 71 next birthday and must "look forward" to living the rest of her life in poverty.

ANALYSIS

[37] As noted earlier, despite now having finally heard from the Respondent, this Panel cannot change any of its findings in the F&D Hearing decision. However, even if we could, the explanations given by the Respondent are woefully insufficient to meet the specifics of the evidence, particularly documentary evidence that supported those findings.

[38] When asked about the emptying of residual balances in inactive or completed files, the Respondent readily admitted preparing accounts for that purpose when no fees or disbursements were properly owing. This confirmed the evidence submitted by the Law Society in the F&D Hearing, as noted in our decision:

> Some, but not all, of these 22 withdrawals were supported by Statements of Account which referred to the work done as "file closing" or "file closure". The Respondent's explanation to the investigators was that, as these files had been closed for a long time with minimal balances, and she was unable to contact the clients or executors, she simply prepared accounts for internal records only and did not deliver the accounts to the clients. The Rule 4-55 investigation reports noted that the Respondent was aware of Rule 3-89(1) with regard to unclaimed trust money, but that she considered that she had earned the money through trying to locate the clients.

[39] This has been found to constitute professional misconduct, most notably in *Law Society of BC v. Sas*, 2015 LSBC 19 (aff'd 2016 BCCA 341).

[40] When asked to explain the several instances of misappropriation or failure to place retainers into trust, the Respondent did not address any of them, except as noted earlier with the two occasions where she took out trust funds from her son's portion of an inheritance and the $1,000 for expenses given by another lawyer.

[41] While the Respondent made submissions relating to her cooperation with the Law Society, the documentary record at the F&D Hearing speaks otherwise. She may have had interactions with the investigators when they were in her office, but she was intermittent at best in contact with them afterwards, and she did not participate in the discipline proceedings until now.

[42] The Panel also finds that the Respondent has consistently refused to properly acknowledge responsibility for her misconduct. In the disciplinary hearing she minimized or denied responsibility, or she put the responsibility on her staff and cast herself as a victim of the "perfect storm" of circumstances in which she found herself.

[43] The only mitigating factor that might apply as part of the nature, gravity and consequences of the conduct and of the lack of remediation is the extreme financial hardship in which the Respondent found herself. She did not have the monetary resources to pay for proper maintenance of her financial records, or to pay the GST and payroll remittances, and she needed infusions of money to cover her practice and personal expenses. But as the earlier quotation from the *Lebedovich* decision notes, misappropriation in particular cannot be excused by financial distress. While the Respondent's situation may engender sympathy, especially after a long career with clear moments of distinction, that does not diminish the gravity of her actions.

[44] Looking at the first three "consolidated *Ogilvie* factors", the Panel finds that both the multitude and nature of the findings of professional misconduct make them grave, especially the misappropriations. The Panel also finds that the Respondent's position as a Queen's Counsel and senior member of the Bar, and to a lesser extent, her prior disciplinary record, are aggravating factors. Finally, as noted, her lack of responsibility for her actions is very concerning.

[45] This brings the Panel to the issue of deterrence. While the fact that the Respondent gave up her Law Society membership and no longer practises may reduce the significance of specific deterrence, the Panel concludes that her lack of insight about her actions requires us to include it as a consideration in our decision.

[46] There is a heavy element of general deterrence at play here, both in terms of the message that our decision sends to the profession more broadly, and whether it instills public confidence in the legal profession and its integrity.

[47] With respect to the profession as a whole, we quote from *Law Society of BC v. McGuire*, 2006 LSBC 20 (aff'd 2007 BCCA 442) on why disbarment may be a necessary message:

> The second reason relates to the protection of the public. We accept that disbarment is a penalty that should only be imposed if there is no other penalty that will effectively protect the public. Protecting the public, however, is not just a matter of protecting the Respondent's clients in future. Even if the latter could properly be done by imposing restrictions on the Respondent's use of his trust account, we do not think that such a measure adequately protects the public in the larger sense. Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards.

[48] The Panel finds that public confidence in the legal profession and its integrity also leads to a conclusion that disbarment is appropriate. As noted earlier, the Law Society's mandate in section 3 of the *Act* includes the requirement to uphold and protect the public interest in the administration of justice which, in turn, includes ensuring the integrity, honesty and competence of lawyers, regulating the practice of law and supporting lawyers in fulfilling their duties in the practice of law. To simply let the Respondent agree not to practise again does nothing to uphold that mandate. It is also arguably not an option open to us under section 38(5) of the *Act*.

[49] In the result, the Panel finds that disbarment of the Respondent is the only proper disciplinary action.

[50] In making this finding, we have considered cases with similar facts where disbarment was ordered. While we are not bound by them, they provide useful guidance. The most similar cases considered are *Law Society of BC v. Ali*, 2007 LSBC 57 and *Law Society of BC v. Chaudhry*, 2018 LSBC 31. *Ali* is particularly close on the facts. As summarized in *Chaudhry*:

> In *Ali*, the respondent committed professional misconduct by misappropriating approximately $4,250 in client funds, failing to pay practice debts, using funds collected for GST, PST and employee income tax for personal matters, failing to respond to the Law Society, failing to keep adequate trust and general accounting records and not reporting an unsatisfied judgment. She had no prior record of misconduct and appears to have repaid most, or perhaps even all, of the misappropriated funds (*Ali* (F & D), at paras. 15, 18, 23). However, most of the instances of

misappropriation had been deliberate (*Ali* (F & D), at paras. 84, 87, 90, 96). The respondent had ceased to be a member of the Law Society for failure to pay her fees and, while not appearing at the hearing, had sent a letter apologizing for her "many mistakes" and expressing an intention to resign. There was no evidence of exceptional circumstances justifying a remedy short of disbarment for misappropriating the funds. The hearing panel therefore disbarred the respondent.

[51] When it comes to payment of costs, the Panel recognizes that any order for costs, payable on almost any timeframe, will be very difficult for the Respondent to discharge.

[52] Again, however, there must be a general message to the profession and the public that actions have consequences. In this case, the recordkeeping disaster that met the auditors, and the vast amount of time that they had to spend in recreating records and in investigating what had occurred as a result of the Respondent's misconduct, should not be borne by the profession as a whole.

[53] Under Rule 5-11 we must have regard to the tariff of costs and order payment on that tariff unless we find it reasonable and appropriate to depart from the tariff.

[54] Given all these factors, it is only appropriate to order costs payable on the tariff as presented. It is for the Respondent and the Law Society to determine how and when they get paid. We will order that she will have 120 days to pay.

NON-DISCLOSURE ORDER

[55] The Law Society requests an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public.

DECISION ON DISCIPLINARY ACTION, COSTS AND NON-DISCLOSURE

[56] The Panel orders that:

1. Pursuant to section 38(5) of the *Act*, the Respondent be disbarred;

2. Pursuant to Rule 5-11 of the Rules, the Respondent pay costs to the Law Society in the sum of $10,289.04 within 120 days of the date of this decision; and

3. In order to prevent the disclosure of confidential or privileged information to the public, we order under Rule 5-8(2) that if a member of the public requests copies of the exhibits or transcripts in these proceedings, those exhibits and transcripts must be redacted for confidential or privileged information before being provided to the public.