2021 LSBC 22
Decision issued: May 28, 2021
Citation issued: October 30, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DANIEL MARKOVITZ

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	November 3, 2020
Panel:	Ralston S. Alexander, QC, Chair David Dewhirst, Public representative Thomas L. Spraggs, Lawyer
Discipline Counsel:	Morgan L. Camley
Counsel for the Respondent:	David G. Milburn Nicholas J. Preovolos

BACKGROUND

[1] On the direction of the Chair of the Discipline Committee, the Executive Director of the Law Society issued a citation (the "Citation") against the Respondent on October 30, 2019, pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules.

[2] The Citation, as amended on October 23, 2020, directed that this Panel inquire into the Respondent's conduct as follows:

1. You gave an interview to a reporter in which you disclosed confidential information of a former client that was contained in a Crown disclosure package, contrary to one or more of rules 3.3-1, 3.3-2, 7.5-1 and 7.5-2 of the

Code of Professional Conduct for British Columbia and in breach of the implied undertaking rule.

This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act.*

[3] This matter came on for disposition under Rule 4-30, "Conditional admission and consent to disciplinary action." The Panel received a joint application from the Respondent and the Law Society to conduct a hearing on the written record. The Panel considered the joint application and decided that this was an appropriate case to proceed on written materials only, without an oral hearing, in accordance with the Law Society's procedure for a "Hearing in Writing", pursuant to a Practice Direction issued on April 6, 2018. Under this procedure, a "Hearing in Writing" is still a "hearing" within the meaning of Rule 4-30.

[4] In reaching the conclusion that it was an appropriate circumstance to proceed without an oral hearing, the Panel considered whether it had questions about the facts of the matter that were not clearly answered in the Agreed Statement of Facts (the "ASF") provided by the parties. The Panel considered whether any credibility issues were presented by the ASF and determined that the written record was complete and that no additional useful information would be provided by an oral hearing. On that basis, the Panel agreed to proceed to conduct the Hearing without the need for an oral hearing.

[5] The Respondent made a conditional admission of professional misconduct and agreed to the proposed disciplinary action of a fine of $15,000. Rule 4-30 requires that a hearing panel consider whether the disciplinary action agreed to is appropriate for the professional misconduct that has been admitted conditionally.

PROCEDURE

[6] Under Rule 4-31, a conditional admission tendered under Rule 4-30 must not be used against a respondent unless the admission is accepted by the Discipline Committee and the admission and proposed disciplinary action are accepted by a hearing panel. If the panel rejects the respondent's proposed disciplinary action, it is the panel's responsibility to advise the Chair of the Discipline Committee of its decision. The panel may take no further action with respect to the hearing.

[7] After considering the circumstances set out in the ASF and reading the submissions of discipline counsel and the Respondent, the Panel accepted the admissions of professional misconduct. We determined that the Respondent's

conduct in this matter is culpable and a marked departure from the conduct that the Law Society expects of lawyers, which is the standard for professional misconduct set out in *Law Society of BC v. Martin*, 2005 LSBC 16.

FACTS

[8] The Respondent has been a member of the Law Society of British Columbia since May 14, 1993. At the time of the misconduct, the Respondent was practising as a sole practitioner exclusively in the area of criminal law. The Respondent was retained in a criminal matter on a pro bono basis pending a *Rowbotham* Application for a Court-ordered retainer. The Respondent did not intend to act for the accused on a pro bono basis for an indefinite period of time. The Respondent attended the accused's first Court appearance as counsel and, at that time, was provided with a package of disclosure material (the "Crown Disclosure") by Provincial Crown Counsel. The Crown Disclosure was, in these circumstances, provided to defence counsel subject to an implied undertaking to the Court that the contents of the Crown Disclosure would not be disclosed for any purpose other than making full answer and defence of the accused. The Crown Disclosure contained sensitive material particular to the case of the accused. The Respondent's retainer ended approximately one month after it began when the accused retained new counsel.

[9] Approximately one month later, while the Respondent was vacationing in Hawaii, he was contacted by a newspaper reporter seeking information from him about the accused whom he had previously represented. The Respondent advised the reporter that he was no longer counsel for the accused. The Respondent was caught "off guard" by the contact from the reporter and, because he was on vacation, was not specifically focused on his obligations as counsel.

[10] In the course of the interview with the reporter, the Respondent verified to the reporter information that could only be in his possession as part of the information contained within the Crown Disclosure. With that confirmation provided by the Respondent, it is clearly established that there was a breach of the implied undertaking to only use the Crown Disclosure material in the defence of his former client.

[11] Following the interview, the reporter published a story that identified the Respondent as being a source for the confirmation of information contained in the Crown Disclosure. As a consequence of that publication, Crown prosecutors and police were alerted to the breach by the Respondent of both the duty to retain the Crown Disclosure confidential and the implied undertaking to the Court with

respect to the contents of the Crown Disclosure. Crown Counsel complained to the Law Society, and following an investigation, the Citation in this matter was issued.

ANALYSIS

[12] The first task of the panel in a Rule 4-30 process is to ensure that the admitted behaviour meets the test for professional misconduct. The test for professional misconduct is well documented in Law Society jurisprudence. *Martin* describes a conclusion by a hearing panel that the test for professional misconduct is "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."

[13] The *Martin* panel expanded the consideration further by adding clarifying comments to the "marked departure test" as follows: "The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer."

[14] Subsequent decisions of hearing panels have determined that there is no requirement for the conduct to be the result of an intentional act of malfeasance by the respondent, but only that the conduct display gross culpable neglect of the lawyer's duties. The panel in *Law Society of BC v. Harding*, 2014 LSBC 52, clarified the obligations of a hearing panel when determining whether particular conduct rises to the level of professional misconduct. That panel stated at para. 79 as follows:

> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

[15] The Panel has determined that the conduct of the Respondent in disclosing the Crown Disclosure material in his possession and thereby breaching both the duty to preserve the confidential nature of that Crown Disclosure and the implied undertaking to the Court to only use the confidential information in the defence of the accused person, is a marked departure from the conduct that the Law Society expects of lawyers and is, therefore, professional misconduct.

[16] Having made the determination that the impugned conduct meets the requirements of professional misconduct, the Panel is then required to determine whether the proposed penalty is within a range of acceptable penalties for the professional misconduct identified.

[17] It is not the task of the Panel to second-guess the Discipline Committee in its recommendation that the Panel accept the recommended penalty. Moreover, it is not for the Panel to determine that this penalty is a penalty that the Panel would have imposed in the circumstances. It is the case that the Panel need only determine that the penalty is within a range of acceptable penalties that would be mandated for the misbehaviour identified.

[18] In that process, it is necessary for the Panel to consider the leading decisions on the factors to be considered to determine the appropriate discipline action, including: *Law Society of BC v. Ogilvie*, 1999 LSBC 17; *Law Society of BC v. Lessing*, 2013 LSBC 29 (on review); and *Law Society of BC v. Faminoff*, 2017 LSBC 04 (on review). *Lessing* suggested that the establishment of appropriate penalty should begin with a consideration of whether the proposed penalty does, in fact, meet the requirement of section 3 of the *Act*, which is to ensure that the Law Society is observing its statutory mandate to protect the public interest in the administration of justice. The Benchers in *Lessing* went on to note that an appropriate penalty must consider the following factors from the *Ogilvie* decision:

(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.

[19] The decision of the review board in *Faminoff* modified the global approach described in *Lessing* to specific consideration of the *Ogilvie* factors that are more relevant to the particular circumstances of the misconduct of the Respondent. The consideration of the *Ogilvie* factors, according to *Faminoff*, should be more of an individualized process weighing the relevant factors in the context of the particular circumstances of the lawyer and the conduct. The Law Society argued that of the *Ogilvie* factors in the matter before us, the following are the most significant:

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

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

(c) the impact upon the victim;

(d) the need for specific and general deterrence;

(e) the need to ensure the public's confidence in the integrity of the profession; and

(f) the range of penalties imposed in similar cases.

[20] It is the task of a hearing panel, after a determination that the facts supporting the admission of professional misconduct are made out, to ensure that the proposed disciplinary action is within the range of a "fair and reasonable disciplinary action in all of the circumstances" (*Law Society of BC v. Rai*, 2011 LSBC 02).

[21] The Respondent has acknowledged responsibility for the misconduct and cooperated with Law Society staff throughout.

Nature and gravity of the misconduct

[22] The Panel is satisfied that this disclosure of confidential information and the breach of the implied undertaking are serious incidents of professional misconduct. It is important both because it potentially undermines the confidence of the public in the nature of the confidentiality of information provided to lawyers and secondly, because it impairs the importance of the sanctity of the Crown Disclosure. The public must have confidence that lawyers will maintain client confidentiality and that the Crown will honour its disclosure obligations under *R. v. Stinchcombe*, [1991] 3 SCR 326. For the Crown to properly fulfill its disclosure obligations, counsel for the accused must adhere to the implied undertaking rule. To maintain public confidence in the *Stinchcombe* disclosure regime and the proper functioning of the criminal justice system, the importance of the implied undertaking rule must be emphasized to all counsel and the public.

Previous character and prior discipline

[23] The previous character and prior discipline of the Respondent is a significant characteristic of the *Ogilvie* considerations in this case.

[24] The Respondent has a significant professional conduct record. He has had numerous engagements with the Practice Standards Committee, several conduct reviews and a previous citation. Generally, in the circumstances, and paying due respect to the concept of progressive discipline, a significant penalty and probably a suspension from practice would follow.

[25] However, the Respondent's history with the Practice Standards Committee pre-dates by at least eight years the current circumstances and events, and he has had a relatively incident-free period of time in the interim. Also, these circumstances are dramatically different from and unrelated to the prior discipline history of the Respondent.

[26] The principle of progressive discipline does not require that subsequent events of misconduct are similar to the previous incidents. However, in all of the circumstances of this case, and particularly given the lapse of time that has transpired since the last engagement of the Respondent with either the Discipline Committee or the Practice Standards Committee, the Panel is satisfied that there is no need for a suspension in the circumstances of this case. Additionally, much

of the prior discipline history of the Respondent occurred at a time when he was engaged in a difficult matrimonial circumstance and was involved in some substance abuse issues, which appear to have been ameliorated in the interim.

Impact upon the victim

[27] In considering this *Ogilvie* factors, it appears that the disclosure of the confidential information could have an impact upon the Respondent's former client by impairing that client's entitlement to a fair trial if a jury pool was impacted by the knowledge made public by the Respondent. In the circumstances, it appears that that will not be the case and, in fact, the length of time between the disclosure and the trial is sufficiently long that any publicity surrounding the disclosure of the information appears to have diminished substantially.

Need for specific and general deterrence

[28] The Panel is of the view that, in the circumstances, the Respondent does not require specific deterrence given the inadvertent nature of the disclosure and the serious financial consequences visited upon him by the penalty to which he has agreed. The Respondent has also suffered considerable negative publicity and personal embarrassment. This incident will likely have an impact on his exclusively criminal law practice.

[29] More importantly, however, there is a need for a general deterrence message. The penalty imposed clearly must recognize the importance that the Law Society places on the confidentiality of client information. In addition, the importance of the integrity of the *Stinchcombe* disclosure obligation in the context of the orderly functioning of the criminal justice system must be recognized. Given the isolated nature of this disclosure, we believe that the penalty imposed is appropriately responsive to this consideration.

Public confidence in the integrity of the profession

[30] In the *Ogilvie* decision, the panel stated at para. 19:

> The public must have confidence in the ability of the Law Society to regulate and supervise the conduct of its members. It is only by the maintenance of such confidence in the integrity of the profession that the self-regulatory role of the Law Society can be justified and maintained.

[31] In considering this very important aspect of the *Ogilvie* factors, we note the need to communicate the extent to which the Law Society takes very seriously the preservation of client confidentiality and compliance with undertakings to the court. In that regard, we believe that the penalty imposed on this Respondent emphasizes the Panel's view that this is a matter of considerable significance. We also believe that the penalty imposed is of sufficient seriousness to ensure that the need to preserve public confidence in the integrity of the profession and its ability to regulate lawyers for incidents of misconduct is respected and communicated.

Range of penalties in similar cases

[32] A variety of cases were provided to the Panel to indicate the range of penalties for breach of confidential information. In most instances, the penalties imposed were a fine or a short suspension from practice. In all cases, the fines were of significantly less magnitude than that proposed to be levied in this case. The explanation for this larger fine is likely found in the fact that this breach of confidentiality also included a breach of an undertaking to the Court.

[33] On balance, the Panel is of the view that a fine of $15,000 is in a range of appropriate penalty having regard to the various factors cited to us for consideration in the *Ogilvie* realm.

PRIVILEGE AND CONFIDENTIALITY

[34] The Law Society applied for an order under Rule 5-8 limiting access to documents filed in this case to exclude matters subject to confidentiality or solicitor and client privilege. Recent amendments to Rules 5-8 and 5-9 make an order to protect solicitor and client confidentiality and privilege unnecessary. See *Law Society of BC v. Edwards*, 2020 LSBC 57, paras. 118 to 121. However, counsel have enumerated a number of instances involving the privacy of third parties, and we find it appropriate to make the requested order in that regard.

CONCLUSION

[35] Under the circumstances, as outlined in the ASF and as summarized above, the Panel has concluded that the proposed disciplinary action is a fair and reasonable disciplinary action in all of the circumstances and, accordingly, accepts the conditional admission and proposed disciplinary action pursuant to Rule 4-30 and

directs the Executive Director to record the Respondent's admission on his professional conduct record.

[36] The Panel makes the following orders:

(a) an Order under section 38(5)(b) of the *Legal Profession Act*, that the Respondent pay a fine in the amount of $15,000, to be paid in installments over an 18 month period commencing September 1, 2021; and

(b) an Order that the Respondent pay costs in the amount of $1,500 on or before March 1, 2022; and

(c) an Order under Rule 5-8(2)(a) of the Law Society Rules that 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 be redacted from the exhibit before it is disclosed to that person. We specifically order that the redactions include but are not limited to:

(i) The Respondent's conditional admission letter to the Law Society (Book of Exhibits, Tab 2), including but not limited to the following information:

a. any identifying information of the complainant in this matter;

(ii) the ASF, including but not limited to the following information:

1. the name of the Respondent's former client;

2. the court file number of the proceedings against the Respondent's former client and the location of the court at which the Respondent appeared on behalf of his former client;

3. any reference to the name of the victim in the crime alleged to have been committed by the Respondent's former client;

4. the definition and contents of the confidential information;1

5. identifying information of the reporter to whom the Respondent disclosed the confidential information and which news outlet the reporter worked for;

6. the title, author, and publisher of the article in which the Respondent confirmed the confidential information; and

7. any reference to the exact words of the media quote in which the Respondent confirmed the confidential information;

8. any identifying information of the complainant in this matter;

9. Tabs 2 and 3 of the ASF, to redact information about the date of the interview with the reporter and the initials of the Respondent's former client;

10. Tab 4 of the ASF, to redact identifying information of the accused and victim, the identity of the reporter, the confidential information, and other confidential and privileged information obtained during the Law Society investigation;

11. Tab 5 of the ASF, to redact the identity of the complainant, the contents of the media quote that confirmed the confidential information, and identifying information of the accused and the victim;

12. Tab 6 of the ASF to redact excerpts from the transcript of the Law Society interview of the Respondent, in which they discuss the confidential information, for identifying information of the accused and the victim, and other confidential and privileged information;

13. Tabs 7, 8, 9 and 10 of the ASF, to redact news publications on the case for references to the confidential information and identifying information of the accused and victim;

14. Tab 11 of the ASF, to redact identifying information of the complainant in this matter, the contents of the media quote that confirmed the confidential information, identifying information of the accused and victim, and other confidential information in the course of the Law Society investigation;

15. Tab 12 of the ASF, to redact identifying information of the complainant in this matter and other confidential information in the course of the Law Society investigation;

(iii) the written submissions of the Law Society and the Respondent, including but not limited to the following information:

a. the name of the Respondent's former client;

b. the court file number of the proceedings against the Respondent's former client and the location of the court at which the Respondent appeared on behalf of his former client;

c. any reference to the name of victim in the crime alleged to have been committed by the Respondent's former client;

d. the definition and contents of the confidential information;

e. identifying information of the reporter to whom the Respondent disclosed the confidential information and which news outlet the reporter worked for;

f. the title, author, and publisher of the article in which the Respondent confirmed the confidential information;

g. any reference to the exact words of the media quote in which the Respondent confirmed the confidential information; and

h. any identifying information of the complainant in this matter.