HE20200090
2021 LSBC 39
Decision Issued: October 8, 2021
Citation Issued: October 6, 2020

LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

WILLIAM THOMAS CLARKE

RESPONDENT

DECISION OF THE HEARING PANEL

Written materials:	July 12, 2021
Additional written submissions:	August 30, 2021
Panel:	David Layton, QC, Chair Brendan Matthews, Public representative Heidi Zetzsche, Bencher
Discipline Counsel:	Barbara Lohmann
Counsel for the Respondent:	William Smart, QC

INTRODUCTION

[1] In early 2019, the Respondent was convicted of threatening his former intimate partner. He was later sentenced to a 12-month conditional discharge. The Respondent's conviction appeal was dismissed by a judge of the Supreme Court of British Columbia ("BCSC"). His application for leave to appeal that judge's ruling to the Court of Appeal for British Columbia ("BCCA") was also dismissed.

[2] The Law Society subsequently issued a citation ("Citation") alleging that the Respondent's criminal offence constitutes conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act* ("*Act*").

[3] The Respondent and the Law Society have submitted to the Panel a joint submission under Rule 4-30 of the Law Society Rules ("Rules"), pursuant to which the Respondent admits the allegation in the Citation and the parties ask us to impose a $12,000 fine as a disciplinary action. They also seek an order that the Respondent pay costs of $1,000.

[4] The parties have also filed an Agreed Statement of Facts ("ASF") containing the evidence that they rely on in support of their joint submission.

[5] At the request of the parties, this matter was heard in writing only.

[6] We accept the ASF and the Respondent's admission to the allegation in the Citation, and conclude that the Respondent committed conduct unbecoming the profession. We also conclude that accepting the disciplinary action jointly proposed by the parties would not be contrary to the public interest in the administration of justice as that phrase is used in Rule 4-30(6)(b). We thus order that the Respondent pay a fine of $12,000 and costs of $1,000.

[7] Our reasons for coming to these conclusions are set out below.

Preliminary issue relating to reasonable apprehension of bias

[8] As noted, the Respondent appealed his conviction to the BCSC and after his appeal was dismissed, he brought an unsuccessful application for leave to appeal to the BCCA. On that leave application, the respondent Crown was represented by counsel from the 14-lawyer indictable appeals section of the British Columbia Prosecution Service ("BCPS Appeals Section").

[9] The Panel received the parties' written materials on July 12, 2021. To that point, the Panel had only seen the Citation. It was only on reviewing the written materials that the Panel realized that the Respondent had sought leave to appeal in the BCCA. This information was of note because the chair of the Panel is the head of the BCPS Appeals Section and in that capacity, he had reviewed a draft of the written argument filed by another lawyer for the BCPS Appeals Section opposing the Respondent's leave to appeal application.

[10] At the Panel's request, the Law Society hearing administrator emailed a memo to the parties on July 13, 2021. The memo informed the parties of the information set out in paragraph 9 above. It also asked that the parties provide their positions on the issue of whether or not a reasonable apprehension of bias existed with respect to the chair so as to disqualify him from continuing to sit as a Panel member. The

memo stated that, depending on the parties' positions, the Panel might make a further request for written submissions on the issue.

[11] Later that same day, the parties emailed the hearing administrator stating that they had no concerns about the chair continuing to sit as a Panel member.

[12] The chair then determined that he need not recuse himself because no reasonable apprehension of bias existed. His colleagues agreed with this conclusion. The Panel therefore proceeded to decide the matter.

[13] In this respect, the question arises as to who decides whether there exists a reasonable apprehension of bias where, as here, the adjudicator whose continued involvement is potentially in issue is a member of a collegiate tribunal and the parties' submissions have been made to the entire tribunal.

[14] In *R. v. Anderson*, 2017 BCCA 154, at paras. 3 and 4, Justice Groberman approved of the procedure set out by Justices Greer and Macdonald in *SOS-Save Our St. Clair Inc. v. Toronto (City)* (2005), 78 OR (3d) 331 (Div. Ct.), at paras. 1 and 19 to 21. See also *Taucar v. Human Rights Tribunal of Ontario*, 2017 ONSC 2603 (Div. Ct.), at paras. 8 to 10; *Law Society of BC v. Boles*, 2014 LSBC 47, at paras. 18 to 21.

[15] Under this procedure, the parties' submissions on the bias issue are made to the tribunal as a whole. The adjudicator whose continued participation is in issue treats the submissions as though made to that adjudicator individually. The adjudicator prepares and circulates reasons to the other tribunal members. If the other members disagree with their colleague's decision to remain on the case, being of the view that a reasonable apprehension of bias exists, they can themselves decide to stand down. If this occurs, the panel must be struck and a new panel constituted to hear the matter afresh.

[16] We did not strictly follow this procedure, insofar as the chair did not circulate reasons to the other Panel members prior to those members indicating their agreement with his decision not to recuse himself. This deviation was justified because neither party was alleging bias and, as described below, the arguments against recusal were compelling. This somewhat summary procedural approach is similar to that taken in *Law Society of BC v. Rea*, 2012 LSBC 22, at paras. 2 to 7. In any event, the chair's written reasons for concluding that no reasonable apprehension of bias exists, with which the other Panel members agree, are set out in the remainder of this section of our reasons.

[17] There is a strong presumption of impartiality on the part of adjudicators, which will only be overcome where a reasonable person, informed of all the relevant circumstances, would conclude that it is more likely than not that the adjudicator in question would, whether consciously or unconsciously, not decide the matter fairly. See *Wewaykum Indian Band v. Canada*, 2003 SCC 45, at paras. 59 to 60, 73 and 76; *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at paras. 20 to 26.

[18] In this case, the high threshold for establishing a reasonable apprehension of bias is not met for three main reasons.

[19] First, the issue in dispute in the Respondent's application to the BCCA was whether the test for granting leave to appeal had been met. This issue is not at all in dispute in this disciplinary matter. To the contrary, in these discipline proceedings, the Respondent accepts that he has been convicted of the charged offence. Neither his guilt nor any circumstance relating to the offence is the subject of disagreement between the parties. The issues in these discipline proceedings are thus entirely different from the issue that arose on the leave to appeal application before the BCCA.

[20] Second, the Respondent has admitted the alleged discipline violation and he and the Law Society are advancing a joint submission as to the appropriate disciplinary action. There is no dispute between the parties in this matter. Indeed, as explained further below, the test that must be met before a panel can reject a joint submission is very high. All things being equal, it will be rare for a panel to reject a joint submission. And before doing so, the panel must give the parties an opportunity to make submissions regarding the disciplinary action that the panel is considering imposing instead. If that were to happen, one or both of the parties could seek leave to raise the bias issue again on the basis that the circumstances had materially changed.

[21] Third, having been advised of the chair's role in the leave to appeal application before the BCCA, neither party sought to have the chair recuse himself. Granted, the determination as to whether a reasonable apprehension of bias exists is made from the perspective of a reasonable person informed of all the relevant circumstances, and not from the perspective of one or other of the parties. But the parties' consent to the chair continuing to sit on the Panel is a factor that a reasonable person would view as militating against a finding of reasonable apprehension of bias, at least in the circumstances of this case.

Hearing on written materials only and request for additional written submissions

[22] By Notice of Application dated July 9, 2021, the parties requested that this matter be heard in writing only, pursuant to the Practice Direction dated April 6, 2018 and entitled "Application for a Hearing in Writing". Filed along with this application were all of the documents needed to conduct a hearing on written materials only.

[23] We granted the application to conduct the hearing on written materials only, on the basis that there was no fact or legal issues on which we required oral submissions or testimony in order to do justice between the parties. We have, therefore, marked the exhibits submitted and proceeded to decide the matter on the basis of written materials only. See *Law Society of BC v. Lebedovich*, 2018 LBSC 17, at paras. 4 to 6.

[24] We subsequently sought, and received, additional written submissions from the parties regarding two matters that were not addressed in the materials initially filed. Nothing in the additional written submissions led us to change our view that the hearing could be conducted on written materials only.

RELEVANT FACTUAL FINDINGS FROM ASF

[25] The Respondent was called and admitted as a member of the Law Society on May 17, 1996. He practises full-time in a small law firm in Kelowna, primarily in family law, although he previously practised criminal law.

[26] The Respondent and LC, his former spouse, were married in 1998. They have one child. Their marriage ended in 2015 and since then, they have shared custody of their child.

Respondent's criminal charge: procedural history and elements of the offence

[27] On March 28, 2018, the Respondent was charged under s. 264.1(1)(a) of the *Criminal Code* with knowingly uttering a threat to LC to cause her death or bodily harm. The charge stated that the offence was committed on December 16, 2017.

[28] The *actus reus* for the offence of uttering threats requires proof beyond a reasonable doubt that a reasonable person, fully aware of the circumstances in which the words were uttered, would have perceived them to be a threat of death or serious bodily harm. The Crown need not prove that the recipient of the threat was intimidated by the threat or took it seriously. See *R. v. McRae*, 2013 SCC 68, at paras. 10 to 16.

[29] The *mens rea* for the offence requires proof beyond a reasonable doubt that the accused intended the words to intimidate or be taken seriously. While the test is subjective, in order to determine what was in the accused's mind, a court will often have to draw reasonable inferences from the words and circumstances, including how the words were perceived by those hearing them. See *McRae*, at paras. 17 to 23.

[30] The Respondent pleaded not guilty and was tried in Provincial Court in Kelowna before Judge Meyers. Evidence was heard on October 22 and 26, 2018, including from LC and the Respondent. Closing submissions were subsequently made in writing.

[31] The key issue at trial was whether, as the Respondent claimed in his testimony, he had not intended to intimidate LC, or for her to take his words seriously, but rather was engaging in a jesting, joking or humorous rant.

[32] In his reasons for judgment delivered January 28, 2019, Judge Meyers rejected this defence and concluded that the *actus reus* and *mens rea* of the charged offence were established. He therefore found the Respondent guilty as charged.

[33] Later that same day, Judge Meyers sentenced the Respondent to a 12-month conditional discharge.

[34] The Respondent appealed his conviction to the BCSC. The appeal was dismissed by Justice Macintosh on October 18, 2019.

[35] The Respondent then applied to the BCCA for leave to appeal from the decision of Justice Macintosh. That application was dismissed by Justice Fitch on July 10, 2020.

[36] By this time, the Respondent had successfully completed his period of probation, at which point the discharge of his conviction had become absolute.

Circumstances surrounding the Respondent's criminal offence

[37] The circumstances surrounding the Respondent's offence are set out as follows in Judge Meyer's reasons for conviction.

[38] At the time of the trial, the Respondent predominantly practised family law but had also practised criminal law. He was articulate, and thought before he spoke, but he was also a "joker" who enjoyed making people laugh. LC was a calm, non-emotional and self-confident person. She was strong and physically fit, and was not a fearful person.

[39] Following their separation in September 2015, the Respondent and LC kept their communication channels open and their conversations amicable for the sake of their child who lived with LC but with whom the Respondent had extensive parenting time. Their separation agreement, which governed custody and child support, and provided for a 50/50 division of assets, was generally being followed.

[40] It nonetheless annoyed the Respondent that, under the settlement agreement, he had been forced to give LC title to a rental condominium he owned in Ontario. Despite signing the agreement, the Respondent had strongly believed that the condominium should not have been classified as a family asset. He continued to harbour resentment and be irritated by this fact.

[41] The Respondent owned several firearms that he had left in the family home when he moved out. Sometime after the separation, LC asked one of their mutual friends to collect the firearms and store them at his house, as she did not want to keep them or give them back to the Respondent. LC did not tell the Respondent that she was moving the firearms to the friend's house.

[42] While the charged offence arose from phone conversations occurring on December 16, 2017, the context for Judge Meyers' findings of fact regarding these conversations included two prior communications between LC and the Respondent.

[43] The first prior communication occurred sometime in 2016 or 2017. LC had read a comment on the Respondent's Facebook page in which he wrote about "killing his past and maybe getting 25 years". The next day, he called LC and said "I bitterly hate you". When she asked why, the Respondent stated that she kept taking their child away from him and said "That is why spouses hate each other and kill each other when they are deprived of the parenting rights they believe they are entitled to." Judge Meyers rejected the Respondent's testimony that, in making these comments, he was not intending to frighten, intimidate or scare LC, and concluded that the Respondent had spoken these words in anger and had deliberately intended to scare her.

[44] The second prior communication took place on April 9, 2017. The Respondent sent an email to LC in which he said "You may want to take a different approach. I saw you waving at the window today. I want you dead." In his testimony, the Respondent said that he had made this comment because he felt he was paying too much for child support and was being shortchanged on parenting time. Judge Meyers concluded that, in sending this email, the Respondent had intended to scare, intimidate and threaten LC. It was a blatant and clear threat. Judge Meyers also held that LC was shaken and upset by the email, as reflected in a response that she had sent to the Respondent. The Respondent then replied to LC stating that his

comment had been over the line and inappropriate. LC chose not to go to the police just yet. Judge Meyers accepted that the Respondent called LC the next morning and apologized.

[45] It is in the context of these two prior communications that the incident that was the subject of the criminal charge took place on the morning of December 16, 2017. The Respondent called LC to discuss arrangements regarding their child. The conversation was amicable until LC asked about the condominium in Ontario. She questioned why there had been a delay in the sale and her receiving the proceeds, and also asked why she was not getting the rental money while waiting for the sale to take place.

[46] In his reasons for conviction, Judge Meyers described the ensuing conversation and expressly rejected the Respondent's testimony that during that conversation, he was not angry and was simply embarking on a humorous rant. In particular, Judge Meyers found that:

(a) The Respondent called LC a "greedy guts" for wanting more money than she deserved, given that he had paid for repairs to the condominium plus lawyer fees.

(b) The Respondent said that the Ontario lawyer was letting him down and was "an f'ing jerk", which was unusual language for him to use, and talked about putting bullets into the lawyer's head.

(c) The Respondent went on to talk about a former criminal client who could solve problems by menacing, intimidating, hurting people, or just making them disappear.

(d) The Respondent said something about how people who were within six or two degrees of separation of them, could end up with bullets in them, and said that LC should beware, be careful or be warned. LC did not know whether the Respondent was referring to her, her family, her lawyer or somebody else, but she took his rant as very threatening.

(e) The Respondent mentioned not caring if he ended up spending the rest of his life in an eight-by-eight jail cell.

[47] Justice Meyers concluded that the Respondent's rant was angry and scary. Although the Respondent was not screaming, his words were delivered in a cold, cool and angry manner so as to frighten, intimidate and threaten LC. As Judge Meyers asked rhetorically, "why on earth would he be telling her all of these awful

things if not to scare the living daylights out of her?" That this was the Respondent's intention was evident given that the condominium was a lingering sore spot for him and in light of his Facebook comment from 2016 or 2017, when he said he bitterly hated LC, and his April 9, 2017 email in which he had said that he wanted her dead. Judge Meyers stated that these two previous communications were "extremely relevant" in assessing the Respondent's intentions during the December 16, 2017 phone call.

[48] Very shortly after the December 16, 2017 phone call ended, the friend to whom LC had given the Respondent's firearms phoned to tell her that the Respondent had just called to say that he was coming over to pick up his guns. The timing of this call was, of course, frightening to LC. She then received a call from the Respondent who asked if she had just spoken to the friend about him going there to pick up his firearms. The Respondent made this second call to LC even though he apparently already knew that the friend had called and spoken to LC. The timing and rapid sequence of these calls from the friend and the Respondent sent LC into a panic, which Judge Meyers held was consonant with the Respondent's intention to scare, intimidate and threaten her.

[49] LC sought legal advice and called her boyfriend. She tried without success to reach the RCMP Head of Firearms for advice. As he was off duty, she reported the matter to the RCMP.

[50] In finding that the Respondent had intended to threaten LC, Judge Meyers rejected as unbelievable his testimony that, by pure coincidence, he was arranging to pick up the guns that day to take advantage of a sale on gun storage boxes. This explanation was rejected because the guns had been out of his care for almost two years and he had sought to get them back on the same day as he made this "nasty" call to LC.

Law Society investigation

[51] The Respondent self-reported his criminal charge to the Law Society on April 24, 2018, which was less than one month after the charge was laid. The Law Society commenced an investigation.

[52] Prior to Judge Meyers' decision finding him guilty, the Respondent sent the Law Society two letters in which he asserted that he did not commit the charged offence.

[53] On July 10, 2020, the same day the Respondent's application for leave to appeal was dismissed in the BCCA, he emailed the Law Society to inform them of the result. In this email he continued to assert his innocence, stating that LC did not lie

but that she had misunderstood what was happening because she had not known the details of events on the day of the incident. The Respondent also said that he had completed his probation and had taken a counselling program from which he had learned many things. He indicated that he and LC had been having good conversations, both in person and by phone, and that he had told her he thought she had been mistaken as opposed to having lied.

[54] On September 8, 2020, the Respondent again wrote the Law Society. In this letter he stated that he did not threaten LC and had testified honestly at his trial, but he recognized that Judge Meyers had concluded otherwise. He explained that the incident had occurred during a time of tension in his co-parenting relationship with LC, but that they generally got along and were cordial with one other.

[55] In this same letter, the Respondent recounted the life-altering effect of being arrested, handcuffed, strip-searched, charged and tried in a criminal court, given that he was a lawyer living in a small community. His reputation had suffered and he recognized that he had harmed the reputation of lawyers more generally. The Respondent further acknowledged that his actions had adversely impacted LC. He described the benefits of sincerely participating in "respectful relationships" and "relationship violence prevention" programs, and of receiving counselling from a psychologist. He had learned to better listen, appreciate and understand other perspectives, to better communicate in relationships, and was applying what he had learned in his co-parenting relationship with LC. The Respondent said that they were again speaking in friendly ways and had apologized to each other for how things had transpired. He stated that he was determined to ensure that his past negative actions were not repeated.

LAW SOCIETY HAS ESTABLISHED THE ALLEGED DISCIPLINE VIOLATION

[56] The Citation sets out the following allegation against the Respondent:

> On January 28, 2019, you were found guilty of knowingly uttering or conveying a threat to LC to cause death or bodily harm to LC on December 16, 2017, contrary to s. 264.1(1)(a) of the *Criminal Code of Canada*, for which you received a 12-month conditional discharge. The conviction was upheld on appeal by the Supreme Court of British Columbia on October 18, 2019, and by the Court of Appeal of British Columbia on July 10, 2020.

> This conduct constitutes conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*.

[57] As explained below, based on the facts in the ASF, and given the Respondent's admission that his actions in threatening LC as charged constitute conduct unbecoming the profession, we conclude that he committed the discipline violation alleged in the Citation.

Legal test for conduct unbecoming the profession

[58] Section 38(4)(b)(ii) of the *Act* gives the Law Society the authority to discipline a lawyer for "conduct unbecoming the profession" (*Law Society of BC v. Suntok*, 2005 LSBC 29, at para. 15).

[59] The Law Society has the onus of proving a discipline violation, including conduct unbecoming the profession, on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, at paras. 40 and 44; *Foo v. Law Society of BC*, 2017 BCCA 151 ("*Foo (BCCA)*"), at para. 63; *Law Society of BC v. Ranspot*, 2021 LSBC 24, at para. 28).

[60] Section 1 of the *Act* defines "conduct unbecoming the profession" to include conduct that is considered, in the judgment of the benchers, a panel or a review board, "to be contrary to the best interest of the public or of the legal profession" or "to harm the standing of the legal profession". As stated in *Law Society of BC v. Berge*, 2007 LSBC 07, at para. 38, conduct unbecoming includes "any act of any member that will seriously compromise the body of the profession in the public estimation."

[61] Unlike professional misconduct, which relates to a lawyer's conduct in practising law, conduct unbecoming involves matters in the lawyer's non-professional life (*Law Society of BC v. Riddell*, 2021 LSBC 32, at para. 20; *Law Society of BC v. Kang*, 2021 LSBC 23, at para. 35; *Ranspot*, at para. 33). The Law Society's responsibility to regulate lawyers' non-professional lives in this respect can be traced to s. 3(b) of the *Act*, which provides that the Law Society has a duty to protect the public interest in the administration of justice by, among other things, ensuring the integrity and honour of lawyers (*Berge*, at para. 39; *Suntok*, at paras. 15 and 18).

[62] The rationale for according the Law Society the power to discipline lawyers for matters not involving the practice of law can be discerned in Commentaries 2 to 4 to rule 2.2-1 ("Integrity") of the *Code of Professional Conduct for British Columbia* ("*BC Code*"). They recognize that public confidence in the integrity of the administration of justice and the legal profession may be eroded by a lawyer's

dishonourable, irresponsible or questionable conduct, even where it occurs outside of the professional sphere. If the conduct would likely impair the lawyer's trustworthiness in the eyes of clients or other justice system participants, the Law Society may be justified in taking disciplinary action. But the Law Society will generally not be concerned with purely private or extra-professional conduct that does not bring into question the lawyer's professional integrity. See also *Berge*, at para. 38 and *Suntok*, at paras. 16 and 18.

[63] It has been said that conduct unbecoming includes "the obvious example of criminal conduct", no doubt because one of a lawyer's most fundamental obligations is to maintain the integrity of the state and its law, and to avoid aiding, counselling or assisting any person to contravene the law (*Berge*, at paras. 34, 35 and 38; *Ranspot*, at paras. 34 and 37; *BC Code*, rule 2.1-1).

[64] However, we need not decide whether criminal conduct *always* constitutes conduct unbecoming (*Law Society of BC v. Markovitz*, 2012 LSBC 11, at paras. 11 and 12). It is enough to conclude, as we do, that the Respondent's violation of the criminal law by threating LC reflected adversely on public confidence in the administration of justice and the legal profession, and thus constitutes conduct unbecoming the profession. Our reasons for so concluding are reflected in the discussion of the gravity of the offence at paragraphs 89 to 96 below.

JOINT SUBMISSION ON DISCIPLINARY ACTION SHOULD BE ACCEPTED

[65] Having concluded that the Respondent's criminal offence constitutes conduct unbecoming the profession, the question becomes whether we should impose a fine of $12,000 as a disciplinary action as proposed by the parties in their joint submission.

[66] In answering this question, we will begin by briefly reviewing some general principles governing the imposition of disciplinary actions. We will then canvass the principles that apply where a panel is asked to impose a disciplinary action pursuant to a joint submission. Finally, we will address whether, in light of these principles, the joint submission for a fine of $12,000 should be accepted in the circumstances of this case.

General principles governing the imposition of disciplinary actions

[67] The disciplinary action imposed by a panel must be consistent with and further the Law Society's obligation to uphold and protect the public interest and confidence in the administration of justice. See *Law Society of BC v. Gellert*, 2014 LSBC 05,

at para. 36; *Law Society of BC v. Lessing*, 2013 LSBC 29, at paras. 54 and 55; *Faminoff v. The Law Society of British Columbia*, 2017 BCCA 373, at para. 37.

[68] The factors to consider in determining the disciplinary action that best accomplishes this goal will depend on the circumstances of the case. A long list of factors is provided in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, at para. 10. However, this list is not meant to be exhaustive. Not all of the listed factors will apply in every case and some factors will attract more weight depending on the nature of the proceedings. See *Law Society of BC v. Faminoff*, 2017 LSBC 04, at paras. 81 to 86.

[69] Here, the factors most relevant to a determination of the appropriate sanction are:

(a) the nature and gravity of the misconduct;

(b) the Respondent's previous professional conduct record and his character more generally;

(c) the presence or absence of other mitigating or aggravating factors; and

(d) the range of sanctions imposed in similar cases.

Principles applicable to joint submissions under the amended Rule 4-30

[70] The parties' joint submission for a fine of $12,000 is advanced under Rule 4-30.

[71] Rule 4-30 was amended in March 2021. Prior to the amendment, Rule 4-30 permitted a respondent to make a conditional admission and propose a disciplinary action to the Discipline Committee. If the Discipline Committee accepted the proposal, it would instruct discipline counsel to recommend to the panel that it accept the proposal. Cases such as *Law Society of BC v. Rai*, 2011 LSBC 02, at paras. 6 to 8, provided that, before accepting the proposal, the panel had to be satisfied of two things: first, that the proposed admission to the disciplinary violation was appropriate; and second, that the proposed penalty was within the range of fair and reasonable disciplinary actions in the circumstances.

[72] Importantly, under the *Rai* test, the panel's task was not to decide whether it would have imposed exactly the same disciplinary action had the matter come before it on a contested hearing. Rather, the public interest required that the panel accord deference to the parties' proposed disciplinary action. This was so for a number of reasons. According deference gives the parties a degree of certainty that encourages settlements and concomitantly reduces the time and cost required for a contested hearing. Reducing the number of contested hearings also spares

witnesses the need to testify, including former clients who may find it stressful. According deference further allows the parties to craft creative and fair settlements, such as where potential weaknesses in the Law Society's case make a finding of discipline violation less than certain. The *Rai* test nonetheless limits the extent of the deference accorded so as to ensure that lawyers who have engaged in discipline violations receive penalties that are fair and reasonable in the circumstances. See *Law Society of BC v. Bronstein*, 2021 LSBC 19, at paras. 191 to 193.

[73] The amended Rule 4-30 is different from the pre-amendment version in some significant respects, two of which are particularly important here.

[74] First, the amended Rule 4-30(1) provides that the parties may jointly submit to the hearing panel an agreed statement of facts, together with the respondent's admission of a discipline violation and consent to a specified disciplinary action. Unlike under the pre-amendment scheme, the proposal is not approved in advance by the Discipline Committee and the respondent's admission is not conditional on the proposed disciplinary action being accepted. Rather, Rule 4-30(5)(b) states that if the panel accepts the agreed statement of facts and the respondent's admission of a discipline violation, it must find that the respondent has committed the discipline violation and impose disciplinary sanction.

[75] Second, the amended Rule 4-30(6) provides that the panel must not impose disciplinary action that is different from that consented to by the respondent unless: (a) the parties have been given an opportunity to make submissions respecting the disciplinary action to be substituted; and (b) imposing the specified disciplinary action consented to by the respondent would be "contrary to the public interest in the administration of justice."

[76] In the case before us, the parties take the position that the phrase "contrary to the public interest in the administration of justice" in Rule 4-30(6)(b) should be defined to impose the level of deference described in *R. v. Anthony-Cook*, 2016 SCC 43, which sets out the threshold that must be met before a sentencing judge can reject a joint submission proposed by the Crown and an accused in a criminal proceeding.

[77] *Anthony-Cook* holds that a joint submission can only be departed from by a sentencing judge where its acceptance would bring the administration of justice into disrepute or otherwise be contrary to the public interest. This will only happen where the joint submission is so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable persons aware of all the circumstances, including the importance of providing certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down (*Anthony-Cook*, at paras. 33 and 34).

[78] The policy considerations that justify adopting the *Anthony-Cook* test in the criminal law context (*Anthony-Cook*, paras. 35 to 44) are closely analogous to those underlying the *Rai* test used for conditional admissions made under the pre-amendment Rule 4-30. See the discussion at paragraph 72 above.

[79] Yet *Anthony-Cook* arguably applies a greater level of deference than that provided for under *Rai*. The difference may not be substantial and in most instances, the same result will be reached regardless of which test is employed. But one can conceive of cases where a panel would conclude that a proposed disciplinary action falls outside the range of fair and reasonable disciplinary action in the circumstances, and so would reject it under the *Rai* test, yet that same panel would accept the proposal under the *Anthony-Cook* test because it is not so unhinged from the circumstances of the disciplinary violation and the respondent that its acceptance would lead reasonable persons aware of all the circumstances, including the importance of providing certainty in resolution discussions, to believe that the proper functioning of the discipline system had broken down.

[80] In this jurisdiction, some panels have applied the *Rai* test to joint submissions made prior to the March 2021 amendment to Rule 4-30. That is, the joint submissions were not made under Rule 4-30, which had not yet been amended, and therefore only allowed for a proposal for a disciplinary action based on a conditional admission. For instance, *Law Society of BC v. Di Bella*, 2019 LSBC 32, at paras. 56 and 57, applies the *Rai* test in this context, albeit without addressing whether the *Anthony-Cook* test might be preferable.

[81] Other pre-amendment Law Society Tribunal decisions have found it unnecessary to determine whether the *Rai* or the *Anthony-Cook* tests should apply to joint submissions, as opposed to conditional submissions under the pre-amendment Rule 4-30. See, for example, *Law Society of BC v. Gounden*, 2021 LSBC 07, at paras. 69 to 73; *Law Society of BC v. Laughlin*, 2020 LSBC 47, at paras. 33 to 39.

[82] Also worth mentioning is *Law Society of BC v. Becker*, 2021 LSBC 11, at paras. 4, 5 and 18, in which the panel appears to have applied the *Anthony-Cook* test in considering whether to accept the proposed disciplinary action advanced as part of a conditional admission under the pre-amendment Rule 4-30.

[83] While in most cases the distinction will have no bearing on the outcome, in our view, the more stringent *Anthony-Cook* test should be used in determining whether to accept a joint submission made under the amended Rule 4-30. We come to this conclusion primarily for the following three reasons.

[84] First, the respondent's admission is not conditional and, so unlike under the pre-amendment Rule 4-30, if the proposed penalty is rejected by a panel, the matter will not be set for a hearing before another panel. Rather, the panel will accept the respondent's admission but impose a different penalty. Because the respondent's admission is no longer conditional, the repercussions of a proposed disciplinary action being rejected are more significant for the parties. Increasing the level of deference by adopting the *Anthony-Cook* test reduces the risk that parties will, as a result, be less inclined to resolve matters by way of a joint submission at an uncontested hearing. The public interest in encouraging such resolutions is thus maintained at an appropriate level.

[85] Second, the wording in Rule 4-30(6)(b) is similar to the language used in *Anthony-Cook*. To repeat, Rule 4-30(6)(b) permits a panel to reject a joint submission only where it is "contrary to the public interest in the administration of justice." *Anthony-Cook* holds that a joint submission must be accepted unless it is "contrary to the public interest", which includes "bringing the administration of justice into disrepute" (paras. 5, 29, 32, 55, 63 and 67). The language in Rule 4-30(6)(b) thus suggests an intention to adopt the *Anthony-Cook* test. It does not mirror the wording used in the *Rai* test.

[86] Third, the *Anthony-Cook* test has been adopted by most Canadian law societies in relation to joint submissions. See, for example, *Law Society of Alberta v. Morales*, 2018 ABLS 23, at paras. 21 and 22; *Law Society of Saskatchewan v. Blenner-Hassett*, 2018 SKLSS 06, at paras. 33 and 34; *Law Society of Manitoba v. Soper*, 2017 MBLS 10, at paras. 17 and 18; *Law Society of Upper Canada v. Archambault*, 2017 ONLSTH 86, at paras. 15 and 16; *Barreau du Québec (assistant syndic) c. Gadler*, 2021 QCCDBQ 16, at paras. 23 to 33; *Law Society of New Brunswick v. Burke*, 2016 NBLSB 10, at para. 13; *Re: Myers*, 2017 CanLII 20439 (NL LS), at para. 13; *Re Wallbridge*, 2021 CanLII 31525 (NWT LS). The *Anthony-Cook* test has also been applied in other regulatory contexts. See, for example, *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303, at para. 14; *Ontario (College of Massage Therapists of Ontario) v. Dingman*, 2021 ONCMTO 16, footnote 3; *Saskatchewan College of Pharmacy Professionals v. Dufour*, 2019 SKCPPDC 7.

[87] In sum, we conclude that the *Anthony-Cook* test should be used in determining whether to accept a joint submission made under Rule 4-30. Accordingly, a joint submission will only be "contrary to the public interest in the administration of justice", within the meaning of Rule 4-30(6)(b), where it is so unhinged from the circumstances of the discipline violation and the respondent that its acceptance would lead reasonable persons aware of all the circumstances, including the

importance of providing certainty in resolution discussions, to believe that the proper functioning of the discipline system had broken down.

Application of the principles governing joint submissions in this case

[88] The factors most relevant to assessing the parties' joint submission for a disciplinary action of a $12,000 fine have already been set out at paragraph 69 above. We will address each factor in turn, after which we will determine whether, in light of these factors, the joint submission should be accepted.

Nature and gravity of the misconduct

[89] As noted in *Gellert*, at para. 39, the nature and gravity of the misconduct is a prime determinant of the disciplinary action to be imposed:

> We have taken the *Ogilvie* factors into account in the Respondent's case. But not all of the factors deserve the same weight in all cases. For instance, the nature and gravity of the misconduct will usually be of special importance (MacKenzie, p. 26-1; *Law Society of BC v. Williamson*, 2005 LSBC 19, para. 36; *Law Society of BC v. Harder*, 2006 LSBC 48, para. 9; *Law Society of BC v. Goulding*, 2007 LSBC 39, para. 4; *Law Society of BC v. Skogstad*, 2009 LSBC 16, para. 6; *Law Society of BC v. McRoberts*, 2011 LSBC 4, para. 29), not only because this factor in a sense encompasses several of the others, but also because it represents a principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession. Indeed, this key objective is the prism through which all of the *Ogilvie* factors must be applied, a message that shines through clearly in the discussion in *Ogilvie* itself at paras. 9 and 10, and has since been affirmed in other decisions such as *Lessing*, at paras. 57 to 61.

[90] We conclude that the gravity of the misconduct underlying the Respondent's disciplinary violation is significant for the following five reasons.

[91] First, threatening death or serious bodily harm against a current or former intimate partner is a serious breach of the criminal law. Indeed, s. 718.2(a)(ii) of the *Criminal Code* provides that abuse of an intimate partner, defined in s. 2 to include a former intimate partner, is an aggravating factor at sentencing. While the version of s. 718.2(a)(ii) in effect when the Respondent committed his offence did not encompass former intimate partners, the same principle had been extended to cover

former intimate partners at common law (*R. v. Cuthbert*, 2007 BCCA 585, at paras. 57 and 58; *R. v. C.R.S.*, 2020 BCSC 1932, at para. 37).

[92] Second, lawyers who practise family or criminal law, as has the Respondent, should know all too well the trauma that threats directed against a current or former intimate partner can cause. Where, as here, the threat references the possible use of firearms, even if only implicitly, and those firearms exist and appear to be accessible by the Respondent, the seriousness of the criminal conduct is accentuated.

[93] Third, the Respondent's troubling conduct was not confined to a sudden outburst. Rather, he went on a rant while on the phone with LC and then called their mutual friend to ask for the firearms, after which he called LC to tell her that he had just spoken to the friend.

[94] Fourth, the Respondent's conduct unbecoming on December 16, 2017 was part of a pattern of unacceptable behaviour directed at LC. He had sent the email to LC in April, 2017, seven months before, in which he said that he had seen her from her window and wanted her dead. Plus, in the phone call sometime in 2016 or 2017, the Respondent told LC that he bitterly hated her and that her attempts to take their child away from him is "why spouses hate each other and kill each other". Judge Meyers held that by sending this email, the Respondent intended to scare, intimidate and threaten LC, and that in making these comments during the phone call, he intended to scare her.

[95] It is true that the allegation in the Citation references Judge Meyers' finding that the Respondent was guilty of threatening LC on the date set out in the criminal charge, namely, December 16, 2017. It does not reference these two previous incidents. Nonetheless, at the disciplinary action stage of the process, a panel is generally entitled to consider similar conduct that is revealed in the evidence properly before it (*Bronstein*, at para. 217). Doing so is particularly appropriate here because Judge Meyers correctly relied on the Respondent's words and intention regarding the two previous incidents in finding that the *actus reus* and the *mens rea* of the charged offence were made out (see *R. v. Clarke*, 2019 BCSC 2171, at paras. 12 to 25, leave refused, *R. v. Clarke* (July 10, 2020), Vancouver CA46508 (CA), at paras. 8 to 10 and 32 to 37).

[96] Fifth, and finally, the gravity of the Respondent's criminal offence is underlined by its significant impact on LC. She perceived his rant and follow-up phone call as very threatening, which is understandable given that he intended to frighten, intimidate and threaten her.

Respondent's previous professional conduct record and character more generally

[97] At the time of the offence, the Respondent had been a lawyer for 21 years.

[98] He has a prior professional conduct record ("PCR") consisting of two conduct reviews and a referral to the Practice Standards Committee in 1999.

[99] The first conduct review took place in 1997 and related to events that occurred when he was only a two-month call. The main concern arose in relation to a conflict of interest, and the deficiencies in his approach appear to have been in significant part the result of very poor mentorship by a senior lawyer in the Respondent's firm.

[100] The referral to the Practice Standards Committee occurred in 1999. The information available to us is limited. We only know that there was insufficient evidence to warrant any action and that the file was thus closed.

[101] The Respondent's second conduct review took place in 2012, after he had inadvertently accepted an aggregate of $8,000 cash in relation to a client matter, which exceeded by $500 the limit permitted by what was then Rule 3-51.1 (now Rule 3-59).

[102] Given the nature of the three incidents comprising the Respondent's PCR, as well as the fact that they are dated, we accord them little weight in considering whether to accept the parties' joint submission.

[103] More generally, there can be no doubt that, apart from his criminal conduct in relation to LC, the Respondent has a reputation as a person of good character in the legal profession and in the broader community as well.

[104] In this respect, in imposing sentence, Judge Meyers noted that the Respondent has no prior criminal history and performed well while on bail pending his trial. He is a good father and has worked actively in the community, including with the British Columbia and Canadian Bar Associations. The Respondent has received commendations for his voluntary support of other lawyers in British Columbia and "has a lot of people in his background who support his character."

[105] The Respondent has submitted numerous character reference letters, including letters from individuals who work in the same office space and lawyers who practise in the jurisdiction, including in the family law area. The writers of the letters are all aware of the Respondent's criminal conviction and sentence. They uniformly describe his criminal conduct as completely out of character and attest to

his good reputation as a family law lawyer and general contributor in the Okanagan community.

Other aggravating or mitigating factors

[106] Given that the Respondent had satisfactorily completed programs and counselling for stress and impulse control, Judge Meyers concluded that the likelihood of him repeating his criminal conduct was very small.

[107] Furthermore, as described in one of the Respondent's letters to the Law Society, he has acknowledged the adverse impact of his conduct on LC and has fully apologized to her. We accept his statements that, through counselling and self-reflection, he has learned from his mistakes and that he and LC now have an amicable relationship.

[108] The Respondent also recognizes and has apologized for the adverse impact that his criminal conduct has had on the administration of justice and the legal profession.

[109] The Respondent abided by all probation terms during his 12-month sentence, as a result of which his conviction has been discharged.

[110] The Respondent has also cooperated with the disciplinary process and admitted the facts set out in the ASF.

[111] These are all mitigating factors. Taken together, they satisfy us that specific deterrence is not a real concern in the Respondent's case.

Range of sanctions in previous cases

[112] A review of the range of fit disciplinary actions in previous cases is usually helpful in deciding whether to accept a joint submission. It may otherwise be difficult to determine whether the joint submission is so unhinged from the circumstances of the discipline violation and the respondent that its acceptance would lead reasonable persons aware of all the circumstances, including the importance of providing certainty in resolution discussions, to believe that the proper functioning of the discipline system had broken down. It is worth stressing, however, that in assessing the range of sanctions in other cases, a panel must also properly and fully consider the benefits and advantages of the joint submission process to the discipline process in the context of the case before it. See *R. v. C.R.H.*, 2021 BCCA 183, at paras. 54 to 91.

[113] The parties initially referred us to two Tribunal decisions from British Columbia involving lawyers who were found to have committed conduct unbecoming after being convicted for assaulting their current or former intimate partners.

[114] In *Suntok*, the respondent, then a Crown prosecutor in Victoria, engaged in a phone argument with his intimate partner soon after she had broken off their relationship. He immediately travelled by helicopter and cab to the home in North Vancouver where she was staying alone. He entered the home uninvited, and thus unlawfully, and unplugged the phone. He grabbed the victim by her neck with enough force to leave marks, threatened to kill her and punched and kicked her in the head several times as she lay on her back. He ran away after a neighbour intervened, but then re-entered the residence and threw a coffee table into a grandfather clock. He was charged and released on bail, following which he breached his bail by attending an event at which the victim was present. The respondent pleaded guilty to assault and uttering threats and was ultimately given a three-year suspended sentence. He had previously been convicted of assaulting a different intimate partner and received a conditional discharge, which had resulted in him being admitted to the Law Society's articling program on a condition that he continue with counselling. However, after a period of time, he stopped the counselling. His victim remained fearful and traumatized. A panel suspended the respondent for three months and further stipulated that on his return to practice, he provide undertakings directed at assisting his rehabilitation from overuse of alcohol.

[115] We agree with the parties that *Suntok* can be distinguished from the Respondent's case on a number of bases, including that: the respondent unlawfully entered his victim's residence and committed serious physical assaults against her; he had travelled from Victoria to North Vancouver to confront his victim; he subsequently breached his bail order; he did not receive a conditional discharge; he had a prior criminal record for intimate partner violence; and as held by the panel, he was "manipulatively compliant" and continued to display "emotional arrogance", which created a need for specific deterrence.

[116] The second case referred to us by the parties is *Law Society of BC v. Chow*, 2021 LSBC 18, where the respondent had physically assaulted AA, his intimate partner, at the culmination of a three-day argument. He threw a tube of baby food at AA and she poured the baby food on his computer keyboard. He grabbed AA by the wrist, wrapped both arms around her, dragged her into the bedroom, pushed her on the bed so that she was lying on her back, straddled her and held down her hands for a period of time. He let AA go when she began to scream. The respondent was found guilty of assault after a contested trial in which he testified and claimed self-defense. He was sentenced to a 12-month conditional discharge. He was an 11-

year call with no previous professional conduct record. He had attended counselling and expressed remorse for his actions. His conduct was out of character. The panel accepted a conditional admission to conduct unbecoming the profession and a $12,000 fine under the pre-amendment Rule 4-30.

[117] We also asked for, and received, additional written submissions from the parties regarding a third case, *Kang*. There, the respondent returned home from a social function, where he had consumed alcohol, and got into a verbal altercation with AB, his intimate partner. The argument escalated. He forcefully grabbed AB's arms and legs and struck her in the back of the head two or three times, all the while using profane and abusive language. AB suffered no injuries. The respondent was charged with assault and mischief, but entered into a six-month peace bond, and in doing so, accepted that his role in the incident amounted to a breach of peace. He complied with the peace bond, after which the charges were stayed by the Crown. The incident was a one-time aberration and he had expressed shame and remorse for his conduct. The respondent had no previous professional conduct record and had contributed to the legal profession and to society broadly. A panel accepted the respondent's conditional admission under the pre-amendment Rule 4-30 to conduct unbecoming the profession and a two-month suspension, noting that the suspension signaled to the public that the profession does not tolerate intimate partner violence.

[118] The level of violence in *Kang* appears to significantly exceed that in *Chow*. This may largely account for the different outcomes in the two cases. There may be other factors, not evident in the reported decisions, which explain why the specific proposals were advanced by the parties under the old Rule 4-30. In particular, the citation in *Kang* contained five allegations, but the Law Society only proceeded with one. It may be that the Law Society agreed to drop four of the allegations in exchange for the respondent agreeing to a sanction at the higher end of the range for the fifth. In any event, what is clear is that the panels in both *Chow* and *Kang* accepted the proposals as falling within the range of fair and reasonable discipline outcomes in the circumstances of each case.

[119] The parties have also referred us to a number of discipline cases from other Canadian jurisdictions involving lawyers who have been criminally convicted for assaulting intimate partners or others: *Law Society of Upper Canada v. Lalonde*, 2006 ONLSHP 99; *Law Society of Manitoba v. Bjornson*, November 26, 1996, Discipline Case Digest, Case 96-25; *Law Society of Alberta v. Abbi*, [1995] LSDD No. 291; *Law Society of Upper Canada v. Ranieri*, 2009 ONLSHP 68; *Law Society of Upper Canada v. Robinson*, 2013 ONLSHP 12; *Re Morgan*, 1998 CanLII 2446 (ON LST). We appreciate the parties bringing these cases to our attention, given

the relative paucity of BC cases in which a lawyer has been disciplined for threatening or assaulting an intimate partner.

[120] That said, some of these cases are distinguishable because they involve serious physical assaults, numerous associated offences and/or more than one victim (*Ranieri*, *Lalonde*, *Bjornson*, *Robinson*, *Morgan*). Others arguably underplay the importance of general deterrence in ensuring that lawyers do not commit criminal offences against intimate partners, and/or they could be viewed as out of step with current views regarding the seriousness of such offences and the significant harm to the administration of justice and the legal profession that occurs when these offences are committed by a lawyer (*Lalonde*, *Bjornson*).

[121] We note that there are also BC cases where lawyers have been given short suspensions for making highly intemperate remarks regarding possible violence to third parties in the course of their legal practice. Although the remarks did not amount to threats in the criminal sense, because the necessary intent was lacking, and were not directed at current or former intimate partners, the impugned conduct was very serious for other reasons. Furthermore, the respondents' professional conduct records were significantly aggravating and the panels concluded that there was a need for specific deterrence. Finally, the penalties were not based on Rule 4-30 proposals but, rather, were imposed after contested hearings. See *Law Society of BC v. Foo*, 2014 LSBC 21 (two-week suspension), application for review dismissed, 2015 LSBC 34, appeal dismissed, *Foo (BCCA)*; *Law Society of BC v. Harding*, 2018 LSBC 09 (three-week suspension).

[122] Having considered the cases mentioned above and, in particular, *Chow*, we conclude that the $12,000 fine proposed by the parties in their joint submission falls within the range of disciplinary actions for the Respondent's conduct unbecoming.

Determination that parties' joint submission should be accepted

[123] Given the circumstances set out above, in our view, the parties' joint submission for a $12,000 fine is not so unhinged from the circumstances of the discipline violation and the Respondent that its acceptance would lead reasonable persons aware of all the circumstances, including the importance of providing certainty in resolution discussions, to believe that the proper functioning of the discipline system had broken down.

[124] We come to this conclusion, despite the serious nature of the conduct, because the Respondent's PCR is minor and dated and does not show a pattern of similar problematic conduct. Moreover, he is of good character and we have no real

concern that he may engage in such conduct in the future. Finally, the joint submission is not markedly out of line from the range of disciplinary actions imposed in cases of comparable seriousness involving the abuse of present or former intimate partners.

COSTS

[125] We conclude that this costs order is reasonable, having had regard to the Tariff at Schedule 4 of the Rules, including Item 25 and the factors mentioned therein.

CONCLUSION AND ORDER

[126] We conclude that the Respondent has committed conduct unbecoming the profession by knowingly threatening his former intimate partner, for which he was criminally convicted under s. 264.1(1)(a) of the *Criminal Code*, and we accept the parties' joint submission for a $12,000 fine.

[127] We therefore order that the Respondent pay a fine in the amount of $12,000 and costs in the amount of $1,000, and that both amounts be paid within three months of the issuance of this decision.