

2022 LSBC 05
Hearing File No.: HE20200004
Decision Issued: January 26, 2022
Citation Issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

AHPING ADENA LEE

RESPONDENT

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

Hearing date: December 15, 2021

Panel: Jennifer Chow, QC, Chair
Karen Kesteloo, Public representative
Bruce LeRose, QC, Lawyer

Discipline Counsel: Michael D. Sherriff
Greg Cavouras

Counsel for the Respondent: Mary Clare Baillie

Written reasons of the Panel by: Jennifer Chow, QC

OVERVIEW

- [1] In our Decision on Facts and Determination dated July 22, 2021, the Panel found that the Respondent had committed professional misconduct by misleading the court about the mortgagors being properly served with her client's application to have funds paid out in a foreclosure proceeding. Further, the Panel found that the Respondent committed two breaches of the Law Society Rules when she failed to report two income tax-related matters to the Executive Director as required by the Rules.
- [2] Based on the Respondent's financial difficulty and on all of the circumstances, the Panel has determined that the following disciplinary actions are appropriate: (a) a fine of \$2,500 in regard to Allegation 1; (b) a reprimand in regard to Allegations 4 and 5; and (c) costs in the total amount of \$2,500 inclusive of disbursements. All monetary amounts are to be paid within one year of the date of this decision or such other date as agreed to between the parties in writing.

THE PARTIES' POSITIONS

- [3] Based on all of the circumstances, the Law Society seeks a suspension in the range of six to eight weeks. The Law Society also seeks costs in the amount of \$8,729.40 inclusive of disbursements based on the tariff in Schedule 4.
- [4] The Respondent submits that she lacks the means to pay any fine in addition to the costs order sought by the Law Society and that being required to do so would be "crushing". The Respondent further submits that she would support a departure from the precedents that have imposed a fine, and would accept the imposition of a brief two-week suspension. Alternatively, the Respondent submits that the precedents support an order of a \$5,000 fine as appropriate disciplinary action.

DISCUSSION

- [5] The Panel has had the benefit of hearing the Respondent's testimony at both the Facts and Determination stage and the Disciplinary Action stage. Overall, we found the Respondent's testimony to be honest, forthright, credible and reliable.

The *Ogilvie/Dent* factors

- [6] The purpose of this Hearing is to determine the appropriate disciplinary action to be imposed regarding the proven misconduct. We have kept in mind that appropriate disciplinary action upholds and protects the public interest in the administration of

justice by ensuring the independence, integrity, honour and competence of lawyers in British Columbia (section 3 of the *Legal Profession Act*, SBC 1998, c. 9).

- [7] In determining the appropriate disciplinary action, the panel is to assess the allegations on a global basis, taking into account all of the circumstances of the proven misconduct: *Law Society of BC v. Gellert*, 2005 LSBC 15, at para. 22.
- [8] The list of factors to be considered in determining the appropriate disciplinary action were first set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, followed by *Law Society of BC v. Lessing*, 2013 LSBC 29 (on review) and *Law Society of BC v. Dent*, 2016 LSBC 05. In line with the modern approach, we have applied the *Dent* framework in regard to the *Ogilvie* factors.
- [9] Starting with *Ogilvie*, hearing panels began to consider 13 distinct factors in determining appropriate disciplinary action. After *Lessing* and *Dent*, the modern approach is to group the various factors under four headings, recognizing that many of the *Ogilvie* factors overlap. Additionally, the modern approach recognizes two particular concerns: (a) the protection of the public, including public confidence in the disciplinary process and the legal profession; and (b) rehabilitation of the lawyer. Where those two concerns conflict, the protection of the public prevails.
- [10] In considering all of the circumstances, we have considered the four broader categories set out in *Dent*, namely:
- (a) nature, gravity and consequences of conduct;
 - (b) character and professional conduct record of the respondent;
 - (c) acknowledgement of the misconduct and remedial action; and
 - (d) public confidence in the legal profession including public confidence in the disciplinary process.

Nature, gravity and consequences of conduct

- [11] The seriousness of the misconduct is often the prime determinant of the disciplinary action to be imposed (*Law Society of BC v. Edwards*, 2020 LSBC 57, at para. 18; *Dent*, at para. 20).

Misleading the court

- [12] Misleading the court is always serious misconduct, whether done intentionally or unintentionally. The court system functions in part because lawyers are officers of

the court and the court is able to rely on the submissions made by lawyers in court, as well as the documents filed in support of their court appearances.

- [13] It is important that lawyers not mislead the court. Lawyers have an overriding duty to ensure that they provide accurate information to the court, opposing counsel and self-represented litigants (*Law Society of BC v. Nejat*, 2014 LSBC 51, at para. 37; *Law Society of BC v. Botting*, 2000 LSBC 30, at para. 60; *Law Society of BC v. Batchelor*, 2014 LSBC 11, at para. 20; *Law Society of BC v. Samuels*, 1999 LSBC 36; *Law Society of BC v. Galambos*, 2007 LSBC 31, at para. 6). As explained in *Nejat*, at para. 37, “A legal system in which the courts and other actors cannot trust a lawyer to be accurate in his or her representations cannot hope to achieve justice or maintain the respect of the public.”
- [14] In our Decision on Facts and Determination, the Panel found that the Respondent did not intentionally mislead the court. This is a mitigating factor when considering the appropriate disciplinary action (*Nejat*, at para. 50). We agree with the panel in *Law Society of BC v. May*, 2021 LSBC 35, at para. 173, that the absence of an intention to mislead is not a dispositive factor when deciding an appropriate disciplinary action.
- [15] The court relied on the Respondent’s misleading materials and representations about service to order payments out of funds held in court in a foreclosure proceeding without notice to the foreclosed mortgagors. The court issued an order to the potential prejudice of the foreclosed mortgagors in part relying on the Respondent’s misleading representations that those parties had been properly served. The Panel notes that no evidence was before us about the actual effect of the order, if any, on the foreclosed mortgagors.
- [16] The Respondent submits that her conduct in misleading the court was a one-time, isolated incident. She also submits that no personal benefit was sought or obtained by her in this incident.
- [17] The Respondent relies on *Law Society of BC v. Martin*, 2007 LSBC 20, *Law Society of BC v. Chiang*, 2013 LSBC 28, at para. 27, *Law Society of BC v. Tak*, 2014 LSBC 57 (“DA”), at para. 39 and *Law Society of BC v. Ahuja*, 2017 LSBC 26, at paras. 25 and 26, which distinguish between unintentional and intentional incidents of misleading the court to support a lesser sanction, such as a fine. We agree that unintentional incidents of misleading the court may attract a lesser sanction, as in this case.

Failure to report income tax-related matters

- [18] The rules requiring lawyers to report any outstanding judgments against them are important to the Law Society's broader public interest mandate. The purpose of having a lawyer report any financial difficulties is to engage the Law Society's mandate to protect the public. As discussed in *Law Society of BC v. Spears*, 2017 LSBC 29, at para. 70, if lawyers are having financial difficulties evidenced by an outstanding judgment against them, then the Law Society should be concerned about broader issues involving the lawyer's practice and whether client trust funds are adequately protected (see also *Law Society of BC v. Tak*, 2014 LSBC 27 ("*F&D*"), at paras. 209 and 210; *Lessing*, at para. 89).
- [19] As discussed in *Tak F&D*, at para. 206, the Law Society as a regulator "attempts to ensure that its members at all times remain of good character and repute, act with honour and integrity, and remain competent. Failure to report criminal charges promptly prevents the Law Society from taking steps necessary to protect the public from a member in free fall. Failure to file income tax returns, GST returns, and to pay the taxes due under the Canadian legislative system is not an honourable act.
- [20] While the Respondent did report the income tax-related judgment in her annual practice declarations, she did not report it separately in writing to the Executive Director, as required by the Rules. The Respondent's rule breaches occurred over many years and were identified by the Law Society in the course of its investigation. Although the Respondent did not report her charge and conviction for income tax-related offences to the Executive Director as required by the Rules, she did, for three years, report the judgment obtained against her and the fine of \$1,000 in her annual practice declarations.
- [21] We find that the Respondent's breach of the Rules arose from substantially a single matter. The Respondent testified that the offence giving rise to the charge and summary judgment was related to a single instance of failing to file a tax return for a taxation year ten years earlier in which she had no taxable income.
- [22] We also find that when specifically asked about outstanding judgments in her 2016, 2017 and 2018 annual practice declarations, the Respondent disclosed the income tax information. The Respondent paid the summary income tax administrative charge of \$1,000 within the time allotted.

Character and professional conduct record of the respondent

- [23] The Respondent was called and admitted to the British Columbia Bar in 1992. At the time of the misconduct, the Respondent was between 24 to 26 years of call.
- [24] The Respondent initially practised at a firm in northern British Columbia for about five years. In March 1998, she joined her current law firm, Faley Law Corporation, which, at that time, was known as Benedict Lam Law Corporation. The Respondent is currently the only lawyer at Faley Law Corporation, where she has a mixed litigation and solicitor's practice ranging from family law to wills and estates and commercial matters.
- [25] The Respondent is a seasoned practitioner who is expected to have more knowledge and experience about procedural and substantive matters than recent or junior lawyers. Where lawyers facing disciplinary matters have lengthy experience practising law, that experience has been considered to be an aggravating factor (*Law Society of BC v. Wilson*, 2020 LSBC 20, at para.17). We agree that the Respondent's lengthy experience in the practice of law is an aggravating factor.
- [26] Until the Citation, the Respondent practised law without disciplinary blemish.
- [27] The Respondent submitted four character references from various work colleagues. The Panel has reviewed those letters and note that all the referees expressly referenced the Panel's Decision on Facts and Determination. The referees all regarded the Respondent's misconduct as being out of character. They all attested to the Respondent's character as honest, kind and generous.

Acknowledgement of the misconduct and remedial action

Misleading the court

- [28] The Respondent acknowledged the gravity of her failure to fulfil her responsibilities in that regard. The Respondent readily admitted that she was negligent in her application materials and submissions to the court about service of her client's materials on the foreclosed mortgagors. The Respondent admits that with her age and experience, she should have done better in the preparation and presentation of her application materials. She agrees that this is an aggravating factor.
- [29] The Respondent admitted that she was required to apply more scrutiny and care in her materials and submissions, which resulted in the court being misled. The

Respondent also submits that she failed to exercise due care and attention rather than knowingly or recklessly lying to the court.

- [30] The Panel notes that we have no evidence before us regarding the actual impact, if any, of the Respondent's misconduct on the foreclosed mortgagors. Accordingly, we have no evidence of the actual prejudice, if any, resulting from the payment out of court of funds without notice to the mortgagors.
- [31] As set out in our Decision on Facts and Determination, we found that the Respondent did not intentionally mislead the court. The Respondent has readily admitted that she exercised insufficient care in the preparation of her materials. We find however that the Respondent exercised some care and did not make a conscious decision to skip required steps or otherwise skirt the applicable Supreme Court Rules
- [32] The Respondent testified that she did not become aware of the deficiencies in her application materials, or about her misleading the court, until she was interviewed by the Law Society on July 10, 2019. The Respondent further submits that until July 2019, she was not aware of the deficiencies in her application materials or that she had misled the court and thus could not have corrected the record earlier.
- [33] After she became aware of the deficiencies and of her misleading the court, the Respondent testified that she attempted to apologize to the applications judge directly by letter. However, the court registry rejected that letter because it was not filed and served on all parties. The Respondent testified that in that letter, she unequivocally apologized to the applications judge and the public.

Failure to report income tax-related matters

- [34] The Respondent readily admitted that she should have reported her income tax-related matters to the Executive Director in writing. The Law Society agrees that the Respondent's failure to comply was an oversight on her part.
- [35] The Respondent submitted that she would not make any of these errors again.

Public confidence in the legal profession including public confidence in the disciplinary process

- [36] As set out in *Dent*, at para. 23, the panel may consider three factors under this category:

- (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 legal profession?
- (c) Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

[37] Central to the Law Society's mandate is the maintenance of public confidence and the protection of public interest in the administration of justice. As an administrative tribunal, we are not bound by past cases in the same way a court may be; however, we are to consider whether the proposed disciplinary action falls within the range of sanctions previously ordered in similar cases (*Dent*, at para. 39).

[38] Based on the following cases, the Law Society seeks a suspension in the range of six to eight weeks. The Law Society relies on:

- (a) *Law Society of BC v. Vlug*, 2018 LSBC 26, in which the review board ordered a global suspension of four months on the basis of several findings of misconduct including misleading the court;
- (b) *Galambos* in which the panel ordered a suspension of one month after finding that the respondent had misled the court and did not return to court to advise of his error; and
- (c) *Law Society of BC v. Albas*, 2016 LSBC 36, in which the panel ordered a global suspension of four months after, among other things, finding that the respondent had failed to disclose material facts in a motion and supporting affidavit and failed to correct the record.

[39] The Law Society distinguished *Nejat* in which the panel ordered a \$5,000 fine for misleading opposing counsel and the court and failing to correct the record regarding trust funds. The respondent in that case was a recent call: he had no intention to mislead; he had no professional conduct record; and he admitted his misconduct. The Respondent however, submits that this case is the most compelling and applicable of all the cases. The conduct in *Nejat* involved five occasions spanning ten months where the respondent failed to disclose material information or failed to correct the record. She submits that the hearing panel in *Nejat*, at para. 50, considered similar mitigating factors: no relevant professional conduct record; no intention to mislead; early admission of misconduct;

conveyance of deep contrition for his actions; and steps taken to prevent such errors from happening again.

- [40] The Law Society submits that in cases involving misleading the court, only a few decisions have involved a disciplinary action of a fine. In *Law Society of BC v. Jackson*, 2016 LSBC 27, at para. 36, the panel ordered a \$15,000 fine against the respondent noting that “in most circumstances, misleading a court should result in a suspension.”
- [41] To the contrary, the Respondent submits that the distinction between intentional and unintentional misleading of the court is an important one when considering the appropriate disciplinary action. She relies on *Chiang*, at para. 27, and *Tak DA*, at para. 39, where the panels appear to draw a clear distinction between cases involving intentional and unintentional misleading of the court. Those cases, the Respondent submits, suggest that fines are the more appropriate sanction in cases where unintentional misleading occurs.
- [42] Finally, the Respondent submits that in *Martin*, the review panel identified three primary factors to be addressed in considering the appropriateness of a suspension: (a) elements of dishonesty; (b) repetitive acts of deceit or negligence; and (c) significant personal or professional conduct issues. None of those factors, the Respondent submits, apply here.
- [43] The Panel finds that this case falls within the range of cases that have imposed reprimands or fines where counsel has intentionally or unintentionally misled the court:
- (a) In *Law Society of BC v. MacKinnon*, 2001 LSBC 38, the lawyer misled the court registry by advising that an adjournment was made by consent and later confirming that the adjournment was made by consent, when in both cases, opposing counsel either did not consent or was opposed to the adjournment. The panel took into account the lawyer’s remorse, admission to the misconduct, his overall good character and that the misconduct was considered to be at the minor end of the scale. The lawyer was ordered to pay a \$1,500 fine and \$1,000 in costs.
 - (b) In *Law Society of BC v. Lowther*, 2002 LSBC 05, the lawyer, among other things, misled the court registry about opposing counsel’s availability to attend a proposed hearing on short notice. With regard to the lawyer misleading the court registry and breaching the consent order to endorse those orders, the panel imposed a reprimand.

- (c) In *Law Society of BC v. Antle*, 2005 LSBC 45, the lawyer failed to disclose four material facts to the court on an ex parte application. The panel found that the lawyer, a seasoned commercial litigator who was a 14 year call, did not intend to mislead. He had also made a conditional admission, which was accepted by the panel. The lawyer was ordered to pay a \$10,000 fine and \$5,000 in costs.
- (d) In *Law Society of BC v. Cranston*, 2011 LSBC 24, the lawyer acting as defence counsel made several misrepresentations in court and missed court appearances in seven criminal matters. The panel found that the lawyer did not intend to mislead and that he had incompetently performed his duties as a lawyer. The lawyer agreed to an agreed statement of facts. The panel noted that the discipline violations were serious and significant in number and length of time in which they occurred. However, the panel also found that the lawyer did not act dishonestly and did not intentionally mislead the court. The lawyer was ordered to pay a \$10,000 fine and \$10,000 in costs.
- (e) In *Jackson*, the lawyer swore an affidavit when she knew there was uncertainty on whether a court order required a client to produce certain keys. The panel found that, among other things, the lawyer knew her affidavit was misleading. The panel found that her misconduct was serious but an isolated incident. Additionally, the lawyer had apologized to the court, paid special costs without an order, had a “neutral” professional conduct record and provided 18 character letters to support her misconduct as being out of character. The panel ordered a \$15,000 fine and \$6,000 in costs.

[44] There are few other reported disciplinary decisions involving an isolated breach of Rules 3-50(1) or 3-97(2). In terms of cases dealing with a failure to report a judgment, panels have generally ordered a fine rather than a suspension. We find that the Respondent’s misconduct falls within the range of cases that have imposed a reprimand or a fine:

- (a) In *Law Society of BC v. Tungohan*, 2016 LSBC 45, the lawyer failed to report a monetary judgment and breached a number of trust accounting rules. The review board ordered a fine of \$3,000 and costs of \$29,000.
- (b) In *Re: A Lawyer*, 2002 LSBC 11, a lawyer was reprimanded for failing to report a \$73,881.15 judgment plus specials costs. The lawyer had paid the judgment before the Law Society had contacted her. The panel

found that the public interest in having financially responsible lawyers was met.

- (c) In *Re: A Solicitor*, 1998 LSBC 18, a lawyer was reprimanded for not reporting or paying two judgments against him.

[45] The Law Society submits that past decisions involving a failure to report a judgment have generally resulted in a fine. The Law Society accepts that the Respondent's failure was likely an oversight on her part. The Law Society submits that the Respondent did report the judgment but in "an inadequate way" which "arguably indicates that she was not actively trying to hide the judgment." The Respondent submits that the range of disciplinary action applicable to an isolated incident of unintentional misleading of the court ranges from a reprimand to a \$10,000 fine. The Respondent further submits that the cases relied on by the Law Society for a suspension in regard to misleading the court have only been ordered where the lawyer intentionally misled the court.

DECISION ON DISCIPLINARY ACTION

[46] As the allegations are completely unrelated in substance, the Panel has decided to treat the two main allegations separately, namely, misleading the court and the two income tax-related allegations.

Misleading the court

[47] The Respondent misled the court as to whether the mortgagors in a foreclosure proceeding had been properly served with her client's application for funds to be paid out of court. That is serious misconduct. The Respondent is a seasoned practitioner. That is an aggravating factor.

[48] The Panel agrees with the Respondent that the *Nejat* case is an appropriate precedent on which to base our order. In *Nejat*, the lawyer failed to disclose material information to the court over a period of several months. He also failed to correct the record when there were opportunities to do so. The lawyer in *Nejat* also had five occasions over a span of ten months to disclose material information or correct the record. He also was able to pay his modest account sooner than if he had kept the funds in his trust account as required. However, the hearing panel in *Nejat*, at para. 50, considered several mitigating factors: no relevant professional conduct record; no intention to mislead; early admission of misconduct; conveyance of deep contrition for his actions; and steps taken to prevent such errors from happening again.

- [49] We have considered similar mitigating factors. The Respondent did not intentionally mislead the court. The Respondent attempted to correct the record by providing a letter to the applications judge, which was rejected by the court registry. The Panel notes that no evidence of actual prejudice to the mortgagors was presented to the Panel. Up until now, the Respondent's disciplinary record has been unblemished. This was a single incident. The Respondent did not seek or realize any benefit. She admitted to misleading the court and failing to report her two income tax-related matters to the Executive Director.
- [50] The Respondent testified that because of her precarious financial situation, she would rather be suspended for two weeks as she is unable to pay a fine plus the costs sought by the Law Society. The Respondent testified and provided evidence that her professional income is modest and she has no savings. COVID-19 has had an adverse effect on her practice and possibly the publicity surrounding the Citation and the Decision on Facts and Determination. The Respondent testified further that her practice is modest and her billable time is balanced with her management of the Faley Law Corporation's Richmond office for which she receives a modest fixed stipend. She also continues to provide *pro bono* and unbundled legal services to individuals who would not otherwise be able to afford a lawyer. She provides mentorship to articled students and young lawyers in her spare time.
- [51] Based on all of the circumstances, including the Respondent's financial circumstances, the Panel considers a \$2,500 fine to be appropriate disciplinary action as it would uphold public confidence in maintaining the integrity of the legal profession, it compares to similar cases and it would act as a specific deterrent to the Respondent and as a general deterrent to the legal profession.
- [52] The Panel orders that the Respondent pay a fine of \$2,500 in regard to Allegation 1 of the Citation, payable within one year of the date of this decision or such other date as agreed to between the parties in writing.

Failure to report income tax-related matters

- [53] The Respondent failed to report to the Executive Director of the Law Society of British Columbia an income tax judgment which resulted in a \$1,000 fine. The fine was paid by September 30, 2016. While the Respondent did not comply with the proper rules and report her income tax-related charge to the Executive Director, she did advise the Law Society in writing in her annual practice declarations. As discussed above, the Law Society accepts that the Respondent was not actively hiding the judgment or fine since she reported them in her annual practice

declarations for three years. Further, the Law Society accepts that the Respondent's rule breaches were an oversight on her part.

- [54] The failure to report income tax-related matters, in our view, is misconduct at the more minor end of the spectrum of seriousness that in these circumstances, justifies the imposition of a reprimand, particularly since the Respondent did, in fact, report the income tax-related matters to the Law Society in her annual practice declarations.
- [55] In our view, public confidence in the disciplinary process would not be eroded by ordering that the Respondent be reprimanded in regard to her failure to report the two income tax-related matters to the Executive Director, when she had reported them in her annual practice declarations.
- [56] We order that the Respondent be reprimanded in regard to Allegations 4 and 5 of the Citation.

COSTS

- [57] Given the Respondent's ready admissions made regarding the Citation, we are not prepared to order the amount of costs sought by the Law Society. We also note that the Respondent cooperated with the Law Society regarding a partial Agreed Statement of Facts.
- [58] The Panel has reviewed the tariff in Schedule 4 and the Bill of Costs submitted by the Law Society. We note that the main reason the hearing on Facts and Determination occurred was to test the Respondent's credibility and address the issue of whether the Respondent intentionally or unintentionally misled the court. We found in favour of the Respondent. Second, the failure to report income tax-related matters, in our view, is minor misconduct that did not warrant being addressed as part of a disciplinary hearing.
- [59] We have considered Rule 5-11(4), which permits the panel to make an order that the Law Society recover costs in an amount other than that permitted by the tariff in Schedule 4.
- [60] We order that the Respondent pay costs to the Law Society of British Columbia in the total amount of \$2,500 inclusive of disbursements, payable within one year of the date of this decision or such other date as agreed to between the parties in writing.