

2007 LSBC 17

Report issued: April 10, 2007

Oral Reasons: January 11, 2007

Citation issued: August 30, 2006

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Heather Catherine Cunningham

Respondent

**Decision of the Hearing Panel
on Facts and Verdict**

Hearing date: January 11, 2007

Panel: Gordon Turriff, Q.C., Chair, Gerald Lecovin, Q.C., Dirk Sigalet, Q.C.

Counsel for the Law Society: Jaia Rai

Counsel for the Respondent: F.A. Schroeder

Background

[1] On August 30, 2006, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation, as amended at the hearing of this matter, directed that this Panel inquire into the Respondent's conduct as follows:

1. Your failure to respond to the Law Society of British Columbia for purposes of setting a date for your Conduct Review, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular your failure to respond to:
 - (a) Letters dated April 13, 2006, May 2, 2006, May 15, 2006 and June 20, 2006; and
 - (b) Telephone messages on May 1, 3 and 10, 2006, June 8, 19 and 29, 2006, and July 10, 2006.
2. Your failure to respond to communications from the Legal Services Society in connection with their investigation of N.I.'s complaint against you, and in particular your failure to respond to:
 - (a) Letters dated August 16, 2005 and September 6, 2005;
 - (b) Letter dated September 28, 2005, contrary to Chapter 11, Rule 6 of the *Professional*

Conduct Handbook; and

(c) Letter dated October 6, 2005, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook*.

[2] The requirements for service of this citation upon the Respondent, pursuant to Rule 4-15, were admitted by the Respondent.

Statement of Agreed Facts

[3] Counsel submitted a Statement of Agreed Facts, which was filed as an Exhibit. The Statement of Agreed Facts set out the following.

1. Heather Catherine Cunningham (the " Respondent") was called to the Bar in British Columbia on June 1, 2001.
2. The Respondent is, and was at all material times, a practising lawyer.
3. The Respondent practises in the area of family law.
4. In the course of her practice, the Respondent represents clients receiving legal aid.
5. Lawyers representing clients receiving legal aid bill the Legal Services Society of British Columbia (" LSS") and receive payment for services rendered in accordance with the contractual relationship between the lawyer and LSS (" LSS Retainer").

LSS Complaint Process

6. One of the functions of LSS is to investigate complaints against lawyers who provide services to clients pursuant to an LSS retainer.
7. The investigation of the complaint is conducted by the Audit & Investigation Department of LSS.
8. Margaret Currie is the current Manager of Audit & Investigation. She has been the Manager since October 3, 2005.
9. Prior to Ms. Currie, Edward Tanaka was the Manager of Audit & Investigation.
10. Both Ms. Currie and Mr. Tanaka are, and were at all material times, practising lawyers.
11. In addition to investigating complaints, the Audit & Investigation Department is responsible for monitoring quality control and ensuring that the quality of service provided by lawyers to clients pursuant to an LSS retainer meets the standard expected of lawyers.
12. When a quality of service complaint is made against a lawyer by his or her client, LSS investigates the complaint as follows:

- a) LSS seeks a waiver from the client in order to require the lawyer to respond to the complaint.
- b) The waiver permits LSS to forward the complaint to the Law Society of British Columbia ("LSBC") if warranted.
- c) LSS seeks a response from the lawyer.
- d) If the response received is not responsive or raises other issues requiring a response, LSS seeks a further response.
- e) The investigation proceeds with a system of correspondence exchanged between LSS and the lawyer, similar to the investigation of complaints by LSBC.
- f) Prior to September 2006, when a staff lawyer joined the Audit & Investigation Department, the initial investigation (including the exchange of correspondence) was conducted by an investigator who is not a lawyer. If the lawyer complained of failed to respond to correspondence from the investigator, the matter would be referred to the Manager of Audit & Investigation, who is a lawyer.
- g) If the lawyer failed to provide a response to the Manager of Audit & Investigation, the Manager would consider referring the matter to LSBC.

13. A lawyer's obligation to respond to LSS is based in part on the contractual relationship between the lawyer and LSS. The duty to respond is set out in the General Terms and Conditions in the Guide to Legal Aid Tariffs.

The Respondent's Failure to Respond to LSS

14. In 2005, the Respondent was providing services to clients pursuant to LSS Retainers and had been issued a vendor number.

15. N.I. was one of the Respondent's clients on an LSS Retainer.

16. N.I. made a quality of service complaint to LSS against the Respondent and the complaint was investigated by then Assistant Investigator, Christine Frandsen. At one point during the investigation, Ms. Frandsen referred the complaint to Mr. Tanaka, then Manager of Audit & Investigation.

17. Ms. Frandsen's evidence concerning her involvement in the investigation of the complaint is referenced in her affidavit sworn November 1, 2006.

18. Mr. Tanaka's evidence concerning his involvement in the investigation of the complaint is referenced in his affidavit sworn October 30, 2006.

19. The Respondent received the letters dated August 16, 2005, September 6, 2005 and September

28, 2005, attached to the affidavits of Ms. Frandsen and Mr. Tanaka, but failed to provide a response.

20. In October, 2005, Ms. Currie took over the position of Manager of the Audit & Investigation Department and conducted a file review.

21. In the course of her file review, Ms. Currie determined that the Respondent had not responded to correspondence from Ms. Frandsen and Mr. Tanaka concerning N.I.'s complaint.

22. Ms. Currie wrote to the Respondent on October 6, 2005, enclosing the prior correspondence and requesting a response within 15 days.

23. The Respondent received the letter from Ms. Currie referenced in the above paragraph but failed to provide a response.

24. On December 7, 2005, Ms. Currie made a complaint to LSBC concerning the Respondent's failure to respond.

25. As of October 11, 2006, the Respondent had still not responded to LSS concerning N.I.'s complaint. As a result, LSS deactivated the Respondent's LSS vendor number.

Failure to Respond to LSBC

26. LSS's complaint against the Respondent was investigated by Anneke Driessen, Staff Lawyer in the Professional Conduct Department.

27. On January 18, 2006, Ms. Driessen wrote to the Respondent enclosing a copy of the complaint and requesting her to response to LSS.

28. On February 8, 2006, Ms. Driessen wrote to the Respondent enclosing a copy of her letter to Ms. Currie of same date.

29. On February 21, 2006, Ms. Driessen wrote to the Respondent enclosing a copy of a letter from Ms. Currie dated February 13, 2006.

30. On March 8, 2006, Ms. Driessen wrote to the Respondent again.

31. The Respondent received the correspondence from Ms. Driessen referenced in paragraphs 27 to 30 above but failed to respond to LSS as requested by LSBC.

32. As of March 29, 2006, the Respondent had still not responded to LSS. Therefore, Ms. Driessen wrote to her advising her that the complaint was being referred to the Discipline Committee.

First Consideration by Discipline Committee - Conduct Review Ordered Concerning LSS Complaint

33. On April 6, 2006, the Discipline Committee considered the LSS complaint and Ms. Driessen's investigation of it. The Chair of the Discipline Committee directed that the Respondent appear before

the Conduct Review Subcommittee to discuss the matter.

LSBC Attempts to Schedule Conduct Review

34. On April 13, 2006, Stuart Cameron, Director of Professional Regulation, wrote to the Respondent advising her of the Chair's direction and requesting that she contact Kathy Copak to schedule a date for the Conduct Review.

35. The Respondent received Mr. Cameron's letter but did not contact Ms. Copak or anyone at LSBC to schedule the Conduct Review.

36. Ms. Copak left messages on the Respondent's voicemail on May 1, 2006, May 3, 2006, and May 10, 2006 requesting that the Respondent call her.

37. The Respondent received the voicemail messages referenced in the above paragraph but did not return the calls.

38. Ms. Copak wrote to the Respondent on May 2, 2006, requesting a response to Mr. Cameron's letter dated April 13, 2006.

39. Ms. Copak wrote to the Respondent on May 15, 2006 requesting a response to the letters dated April 13, 2006 and May 2, 2006. The letter with enclosures were sent via mail and email.

40. The Respondent received the correspondence from Ms. Copak referenced in paragraphs 38 and 39 above but did not respond.

41. On May 17, 2006, Paul Willms, Investigator with LSBC, personally served the Respondent with correspondence from LSBC.

Second Consideration by Discipline Committee - Citation Authorized for Failing to Respond to LSBC Concerning Scheduling of Conduct Review

42. On June 6, 2006, the Discipline Committee considered the LSS complaint and the investigation of it for the second time. The Chair of the Discipline Committee directed the issuance of a citation against the Respondent for her conduct in failing to respond to LSBC concerning the scheduling of the Conduct Review. The Chair also directed that staff continue to attempt to seek the Respondent's dates in order to schedule the Conduct Review.

43. Mr. Cameron wrote to the Respondent on June 9, 2006 advising her of the Chair's direction to issue the citation.

Subsequent Attempts by LSBC to Schedule Conduct Review

44. Ms. Copak telephoned the Respondent and left messages on her voicemail on June 8, 2006, June 19, 2006, and June 29, 2006 requesting that the Respondent call her.

45. The Respondent received the messages referenced in the above paragraph but did not return the calls.

46. Ms. Copak wrote to the Respondent on June 20, 2006 requesting that the Respondent contact her to schedule the Conduct Review.

47. The Respondent received Ms. Copak's letter referenced in the above paragraph but did not contact Ms. Copak.

48. Ms. Copak telephoned the Respondent and left a message on her voicemail on July 10, 2006 requesting that the Respondent call her.

49. The Respondent received the message referenced in the above paragraph but did not return the call.

Third Consideration by Discipline Committee - Conduct Review Rescinded and Citation Authorized for Failing to Respond to LSS

50. On July 13, 2006, the Discipline Committee considered the LSS complaint and the investigation of it for the third time. The Chair of the Discipline Committee ordered that the Conduct Review be rescinded and directed that the citation previously authorized be amended to include an additional count for the Respondent's failure to respond to LSS. The Chair further directed that the citation previously authorized for the Respondent's failure to respond to LSBC be amended to include the latter attempts made by Ms. Copak to contact the Respondent to schedule the Conduct Review.

The Citation

51. A citation was issued against the Respondent on August 30, 2006.

52. The citation was delivered to the Respondent by registered mail with a cover letter from Mr. Cameron dated August 30, 2006.

53. The Respondent admits service of the citation and schedule.

54. On October 19, 2006, the schedule to the citation was amended pursuant to Rule 4-31 of the Law Society Rules and a copy delivered to the Respondent.

55. The Respondent admits service of the amended citation.

56. On November 2, 2006, the schedule to the citation was further amended pursuant to Rule 4-31 of the Law Society Rules and a copy delivered to the Respondent's counsel.

57. The Respondent admits service of the further amended citation.

58. The Respondent admits that she failed to respond to the communications from LSS and LSBC as particularized in the further amended citation.

Decision

[4] Counsel for the Respondent has agreed that there is no difference in the law applying to failure to respond to a lawyer and failure to respond to a non-lawyer acting on behalf of the Legal Services Society.

[5] There are two matters to be considered. Firstly, whether failure to respond is professional misconduct, conduct unbecoming a lawyer, a contravention of the *Legal Profession Act* or Rules made under it, or merely a matter of incompetence.

[6] This matter was decided by a quorum of 11 Benchers sitting on Review in *Law Society of BC v. Dobbin*, [1999] LSBC 27 wherein the Benchers stated at paragraph 25

As a result, it is the decision of the Benchers that unexplained persistent failure to respond to Law Society communications will always be *prima facie* evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct.

[7] The second question to be answered is whether the Respondent has met this burden on the evidence.

[8] In the summer of 2002, the Respondent took on a family law Legal Aid matter under an Emergency Service Retainer for client N.I. It was her services or lack thereof to this client that formed the basis of a complaint by the client to the LSS on March 30, 2005. On April 28, 2005, correspondence to the Respondent was commenced by the LSS, asking her to deal with the allegations in N.I.'s complaint. An answer was not sent by the Respondent until June 16, 2005. Further correspondence was sent requesting details of the matters set out in the Respondent's letter, but these were never answered.

[9] On December 7, 2005, the LSS made a complaint to the LSBC concerning the Respondent's failure to respond. The LSBC sent correspondence to the Respondent from January 18, 2006, but no reply to its various letters was received.

[10] As a result, on April 6, 2006, the Discipline Committee ordered the Respondent to appear before a Conduct Review Subcommittee to discuss the matter. There were further letters sent to the Respondent, which went unanswered. As a result, on June 6, 2006, the Discipline Committee considered the matter a second time and directed the issuance of a citation against the Respondent for her conduct in failing to respond to the LSBC concerning the scheduling of the Conduct Review. As a result of this, further correspondence was sent to the Respondent and was unanswered.

[11] On July 13, 2006, the Discipline Committee considered the matter for a third time and ordered that the Conduct Review be rescinded and directed that the citation previously authorized be amended to include an additional count for the Respondent's failure to respond to the LSS.

[12] All in all, there were from both the Legal Services Society and the Law Society 15 communications, either written or messages left on the telephone, that went unanswered.

[13] The Respondent had been under stress since the death of her father in December 2003. The Respondent says she experienced a sense of being overwhelmed; she exhibited inappropriate reactions to minor matters; she experienced shortness of breath, racing thoughts, and would be driven to instant anger. In May 2004, she consulted with Interlock and had five sessions with a counsellor. In July 2004 the Respondent consulted her physician about this matter, stating that, despite counselling, her symptoms of depression persisted and in fact were increasing. A mild antidepressant medication was prescribed, proved

successful, and she has been taking it ever since.

[14] In the meantime, the Respondent continued to act for N.I. until February 2005, when the latter moved her file to another law firm.

[15] In the fall of 2005, a fellow lawyer with whom the Respondent shared space was diagnosed with pancreatic cancer. He entered the hospital on December 9, 2005 and died on January 7, 2006. During his period in the hospital, the Respondent visited him several times during the first week, and on return from holiday went to the hospital first thing in the morning and last thing in the evening each day for periods of two-and-a-half to three hours at a time to spell off the friend's wife so that the latter could be at home to minister to her children. This placed more stress upon her.

[16] In June 2006, the Respondent spoke to a Bencher about the Law Society inquiries and was advised to respond to them immediately and to follow-up with a letter to the Legal Services Society. The Respondent did not do so. She says she felt immobilized. She went into work each day intending to do something about the matter, but could not bring herself to do so.

[17] The Respondent acknowledged that she knew she was required to respond. She acknowledged that, during the period of time in question, she was also running a full practice with a load of 25 files. She continued to take on cases, although not from LSS, to bill clients and to perform every other facet of a law practice, including answering correspondence. She had no explanation as to why this particular matter immobilized her. In fact, when a later complaint was made by another client, she responded immediately.

[18] The position of the Law Society is that to avoid a finding of professional misconduct a lawyer must show illness such as to incapacitate her to the extent of making her unable to answer correspondence.

[19] The degree of incapacitation necessary to form a defence was dealt with in the matter of the *Law Society of BC v. MacDonald*, [1999] LSBC 20. We quote portions of that decision:

The defence to this allegation was that the member's medical condition was such that he was unable to form the intention not to correspond with the Law Society and that this Rule requires that the intention be proven. The example given was that of a person in a coma not knowing of the correspondence or that of a person who never received the letters requiring the correspondence. And in such case, I agree, as did, I understood, counsel for the Law Society, that under such circumstances a member would not be guilty of that offence. But such cases are rare, and I should be disappointed if the Law Society were to bring one before the Benchers. In many respects, failing to correspond promptly is akin to the offence of overtime parking, you either did or your (sic) didn't, and one's intentions are irrelevant. The person who overparks because of an appointment that took more time than anticipated is no less guilty than a person who overparked because in the interim he had a heart attack and was taken off to the hospital. But there the similarity ends.

Failing to correspond promptly is a grave matter, and as has been pointed out, our Rules are there to protect the public. We are a self-governing society, this is a rare privilege which must be constantly earned. To protect the public requires an investigative process which mandates prompt replies from members to inquiries made by the Law Society. The *Peters* case quoted refers to *Artinian v. the College of Physicians and Surgeons* (1990), 73 O.R. (2d) 204, as authority for the proposition that every professional has an obligation to cooperate with his or her self-governing body in an investigation into their affairs.

The facts of this case do not support the scenario required in order to form the defence which the

respondent relies upon.

During the period of time that is pertinent, the period of time of the correspondence, there is absolutely no question that the respondent was in tremendous mental distress brought about by family and medical problems. I do not need to discuss them in detail at this point. However, serious as they were, he was cognizant of the fact that he received correspondence from the Law Society and was obliged to reply to it. In fact, he undertook to do so on more than one occasion. He didn't do so, as he said, because he set the matter aside and dealt with more pressing matters. This was a conscious decision and may, under the circumstances, have been the right decision. That again is a matter to be canvassed under the question of appropriate penalty. Notwithstanding his very serious psychiatric problems at the time, the respondent admits that he had good days and bad days. The good ones permitted him to direct the activities of his business ventures, to complete a complex memorandum for a share offering, and to attend a Conduct Review at the Law Society.

While it is argued that some of these activities required less effort by the member and so were within his capability at the time, I find that they negate the condition of mind necessary to make his state of mind at the time a defence. It is not, in my opinion, necessary for the Law Society to prove that a member deliberately intended not to correspond promptly. Intention is not a gravaman of the offence.

I am supported in my belief by the *Tyhurst* case, where the member was found guilty of the same offence, i.e. delaying and failing to respond to the Law Society. He too suffered from clinical depression and was unable to function to the extent of not paying his utility bills and so suffering from them being cut off. Such was his disability that he did not open the Law Society correspondence until months after the letters had been sent, and then only apparently on intervention of a psychiatrist.

In the case of the member *Peters*, she was cited for the same offence. She too consciously decided that correspondence with the Law Society was low on her priorities. Her mental problems at this time were such that her priorities consisted of not committing suicide and in keeping a roof over her head. The Panel found that she had made a conscious decision not to respond to the Law Society's correspondence, and in doing so was guilty of the offence. It did not, therefore, on those facts, accept that her illness made her incapable of managing her affairs, which was the defence put forward. I find these cases are similar to the case at bar.

[20] We find on the evidence in the present case no incapacity sufficient to form a defence to the citation. While the Respondent suffered several traumatic experiences before and during the period of the Law Society's correspondence, she was able to run her practice and deal with a good-sized case load and everything that is required thereby. The fact of her conversation with the Bench, and her admissions that she realized she had to deal with the correspondence, shows she was aware of the problem. Her doctor's report indicated that her depression and anxiety were being successfully dealt with by medication. The Respondent was unable to give any explanation as to why she was immobilized when dealing with this one matter. Her doctor's statement that " what the patient described, in particular, her attempt to block the matter out of her mind, can be a reaction for someone who suffers from depression and anxiety. As a protective mechanism, anxiety producing events can be repressed and completely forgotten in some

instances," falls short of supporting the Respondent's allegation that she was immobilized by reason of her depression and anxiety. The rest of her behaviour during the pertinent period of time does not support this defence.

[21] In these circumstances, we find the Respondent guilty of professional misconduct. Accordingly, this Panel finds that the facts alleged constitute professional misconduct and that the Respondent is guilty thereof.

[22] It is hardly necessary for us to repeat what many panels before us have said, which is that the LSBC cannot satisfactorily discharge its function of over-seeing the conduct of its members unless the members respond as required to LSBC investigations. The same must be said about inquiries concerning member conduct initiated by the LSS. The LSBC must remain vigilant. If members of the public were to come to think that the LSBC pursues its investigations casually, by not requiring those under investigation to respond promptly and comprehensively, it might be thought that someone other than lawyers should govern the legal profession. If self-governance were lost, lawyer independence, of which self-governance is an essential element, would be lost as well, and that loss would be contrary to the public interest.