

2007 LSBC 35

Report issued: June 29, 2007

Oral Reasons: May 15, 2007

Citation issued: June 30, 2006

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

**Richard Nielsen**

Respondent

### **Decision of the Hearing Panel**

Hearing date: May 15, 2007

Panel: Joost Blom, Q.C., Chair, Thelma O'Grady, Kathryn Berge, Q.C.

Counsel for the Law Society: Jaia Rai

Counsel for the Respondent: Garth McAlister

## **Background**

[1] On June 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 directed that this Panel inquire into the Respondent's conduct as follows:

1. While acting for your client T.P.S., you altered an exhibit to your client's affidavit after your client swore the affidavit. You did this without your client's knowledge or consent. You then caused the affidavit with the altered exhibit to be filed with the Provincial Court of British Columbia as if it was genuine, when you knew it was not.
2. While acting for your client T.P.S., you submitted a consent order to the Provincial Court of British Columbia for entry knowing that your client had not consented to the order you submitted.

[2] This citation came before this Panel as a conditional admission of a disciplinary violation and consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The Respondent admitted that he had professionally misconducted himself and consented to the following disciplinary action:

- (a) a reprimand;
- (b) a fine in the amount of \$10,000; and
- (c) costs in the amount of \$5,000, both costs and fine to be paid within 2 years.

## Statement of Agreed Facts

[3] A Statement of Agreed Facts was filed as Exhibit 2 in these proceedings. The Statement of Agreed Facts provided as follows:

1. Richard Craig Nielsen (the " Respondent" ) was called to the Bar in British Columbia on September 5, 2001.
2. The Respondent was a practising lawyer at all material times.
3. In June, 2004, T.S. retained the Respondent with respect to custody and access issues in matrimonial proceedings involving his ex-wife, G.D.
4. Dipnarine Persad was counsel for G.D.
5. During the course of the retainer, T.S. resided in Ontario.
6. In the course of his representation of T.S. the Respondent entered into discussions with Mr. Persad concerning the preparation of a consent order relating to the custody of and access to T.S.'s son.
7. In order to obtain a consent order concerning custody or access without a hearing, the parties understood they were required to file affidavits setting out their consent to the order.
8. On or about November 9, 2004, the Respondent submitted documents to B.C. Provincial Court, Surrey Registry (the " Registry" ) for entry, including:
  - (a) the affidavit of G.D. sworn September 29, 2004 (" Sworn G.D. Affidavit" );
  - (b) the affidavit of T.S. sworn October 18, 2004 (" Sworn T.S. Affidavit" );
  - (c) a Provincial Court Consent form (the " Consent Form" );
  - (d) an Application to Obtain an Order dated October 28, 2004 (the " Application" ); and
  - (e) a draft order.
9. The Sworn T.S. Affidavit was filed on November 9, 2004 (" Filed T.S. Affidavit" ).
10. The Sworn G.D. Affidavit was delivered to the Respondent from Mr. Persad for filing with the Registry and was filed on November 9, 2004.
11. The Consent Form was signed by G.D. and T.S. separately and in the presence of witnesses and was filed with the Registry on November 9, 2004.
12. The Application was prepared by Mr. Persad who forwarded it to the Respondent for filing with the Registry. The Application was filed on November 9, 2004.
13. The draft order was prepared and submitted for entry by the Respondent (the " Final Order" ).

14. The Final Order was entered on November 9, 2004 (" Entered Order" )
15. On September 8, 2004, T.S. sent the Respondent an email setting out his instructions with respect to the terms of the consent order.
16. On September 9, 2004, the Respondent wrote to Mr. Persad with respect to the terms of the consent order.
17. On September 22, 2004, the Respondent faxed a draft copy of the consent order to Mr. Persad (" First Draft Order" ).
18. The First Draft Order:
  - (a) included a paragraph numbered 2 that stated, " the parties shall share joint custody of the Child" ;
  - (b) did not contain two paragraphs concerning (i) phone access and (ii) access when T.S. is in B.C. (" Additional Access Provisions" ) and
  - (c) included a paragraph permitting the child to travel to India for a total period of up to four months (" Initial India Visit Provision" ).
19. Mr. Persad revised the First Draft Order, by revising the Initial India Visit Provision to permit the Child to travel to India for a total period of four weeks, instead of four months (" Amended India Visit Provision" ), and sent a copy to the Respondent (" Second Draft Order" ).
20. On September 29, 2004, T.S.'s ex-wife swore an affidavit consenting to the terms of a draft order (" Third Draft Order" ). The Third Draft Order is in the form attached as an exhibit to the Filed G.D. Affidavit. It is also in the same form as the Entered Order which is in the same form as the Final Order submitted by the Respondent for entry.
21. The Third Draft Order:
  - (a) did not include Paragraph 2;
  - (b) did not include the Additional Access Provisions; and
  - (c) included the Amended India Visit Provision.
22. On or about October 13, 2004, the Respondent sent an affidavit to T.S. for swearing along with the Consent Form that had already been executed by G.D. for execution by T.S.
23. The unsworn affidavit sent to T.S. attached as an exhibit a draft order.
24. T.S. subsequently emailed the Respondent instructions for revisions to the draft order and the Respondent emailed a revised form of order to T.S.
25. A copy of the unsworn affidavit with exhibit that the Respondent says he ultimately sent to T.S. (" Fourth Draft Order" ) was attached to the Statement of Agreed Facts as attachment 11.
26. The Fourth Draft Order is in the same form as the First Draft Order and it:

- (a) included Paragraph 2;
- (b) did not include the Additional Access Provisions; and
- (c) included the Initial India Visit Provision.

27. A copy of the unsworn affidavit with exhibit that T.S. says the Respondent ultimately sent (" Fifth Draft Order" ) was attached to an email exchange.

28. The Fifth Draft Order:

- (a) included Paragraph 2;
- (b) included the Additional Access Provisions; and
- (c) included the Amended India Visit Provision.

29. On October 18, 2004, T.S. attended the office of Leslie J. Smith, a lawyer in Ontario, and swore his affidavit. He also executed the Consent Form, witnessed by Ms. Smith.

30. T.S. subsequently forwarded his sworn affidavit and executed Consent Form to the Respondent.

31. The draft order attached as an exhibit to the affidavit T.S. swore is in the same form as the Fifth Draft Order.

32. After receiving T.S.'s sworn affidavit, and prior to submitting it to the Registry for filing, the Respondent altered the exhibit, without T.S.'s knowledge or consent, by removing the second page of the draft order and replacing it with a different page.

33. The Respondent subsequently submitted T.S.'s sworn affidavit with the altered exhibit to the Registry for entry without T.S.'s knowledge or consent.

34. The effect of the Respondent's actions was that the draft order attached to the Filed T.S. Affidavit differed from the draft order attached to the affidavit T.S. swore in that the Additional Access Provisions had been deleted.

35. The Respondent also submitted the Final Order for entry. The Final Order and Entered Order:

- (a) did not include Paragraph 2;
- (b) did not include the Additional Access Provisions; and
- (c) included the Amended India Visit Provision.

36. The Final Order and Entered Order differed from the draft order attached as an exhibit to the Filed T.S. Affidavit in that they did not include Paragraph 2.

37. The Final Order and Entered Order differed from the draft order attached as an exhibit to the affidavit sworn by T.S. in that they did not include Paragraph 2 and did not include the Additional Access Provisions.

38. The Final Order and Entered Order was in the same form as the draft order attached as an

exhibit to the Filed G.D. Affidavit.

39. T.S. did not consent to the terms of the Final Order or Entered Order.

40. The Respondent submitted the Final Order to the Registry for entry without T.S.'s knowledge or consent.

41. The Respondent admits that, while acting for his client, T.S., he altered the exhibit to T.S.'s affidavit after T.S. swore the affidavit, without the knowledge or consent of T.S. and then caused the affidavit with altered exhibit to be filed with the Provincial Court of British Columbia as if it was genuine when he knew it was not and submitted the consent order to the Provincial Court of British Columbia for entry when he knew T.S. had not consented to the order he submitted.

42. The Respondent admits that his conduct in doing so amounts to professional misconduct.

[4] The Respondent testified that the circumstances at the time of the alteration were that the Respondent was working a day job witnessing mortgages, and worked on other files in the evening from his home. His home office was very unorganized and he did not always have the file he was working on in hand. In this case, he did not have hard copies of earlier versions of the affidavit in his file, and he had not recorded new instructions from his client. When the Respondent was getting ready to file the affidavit he realized that the exhibit and draft Order were inconsistent. He thought he was correcting a problem by making the exhibit consistent with the affidavit. He did not make the changes with any intention to mislead the Court, or for any personal gain.

[5] The Respondent further advised the Panel that his alteration to the affidavit's exhibit was improper. He has cooperated with his client's new counsel to ensure the Order was entered. Since the incident, he has obtained and put into practice law office management advice from the Law Society. He no longer acts as a signing officer during the day. He has limited the number and types of cases he handles. He has also developed relationships with senior lawyers who do Legal Aid work and act as a mentor to him. The Panel was assured the Respondent is unlikely to re-offend.

[6] After considering the circumstances set out in the Statement of Agreed Facts and having heard the submissions of counsel, the Panel accepts the admission and finds the Respondent guilty of professional misconduct.

[7] The Panel considered the factors to consider in professional misconduct cases set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, and penalties imposed in cases with similar facts:

(a) a \$10,000 fine and \$2,500 costs were awarded in *Law Society of BC v. Morris*, Discipline Case Digest 98/9, for altering an affidavit;

(b) a one month suspension, \$7,500 fine and Practice Review awarded in *Law Society of BC v. Marsden*, [2003] LSBC 47 for insufficient quality of service;

(c) a \$3,500 fine plus costs in *Law Society of BC v. Milne*, 2004 LSBC 19, for altering a document executed on behalf of Her Majesty the Queen in the Right of the Province of British Columbia; and

(d) a \$3,000 fine plus costs in *Law Society of BC v. Walters*, 2005 LSBC 39 for leaving dates blank in an affidavit so they could be inserted later.

[8] This Panel finds that the proposed penalty is within the range of previous penalties. It is accordingly ordered that the Respondent:

- (a) be reprimanded;
- (b) pay a fine in the amount of \$10,000; and
- (c) pay costs in the amount of \$5,000,

both costs and fine to be paid within two years.

[9] The Executive Director is instructed to record the Respondent's admission on the Respondent's Professional Conduct Record, to impose the disciplinary action proposed by the Respondent and accepted by the Panel and to inform the Respondent and the complainant of the disposition.

[10] There will be publication of this decision in the normal course.