2009 LSBC 25
Report issued: September 2, 2009
Oral Reasons: July 21, 2009
Citation issued: May 25, 2009

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

Bradley Darryl Tak

Respondent

Decision of the Hearing Panel on Facts, Verdict and Penalty

Hearing date: July 21, 2009

Panel: Bruce LeRose, QC, Chair, Dr. Maelor Vallance, Herman Van Ommen

Counsel for the Law Society: Eric Wredenhagen
Appearing on his own behalf:

Introduction

[1] The citation in this matter was authorized by the Discipline Committee of the Law Society on May 7, 2009. It was issued on May 25, 2009 and served on the Respondent on May 27, 2009. The Respondent acknowledges service.

[2] The Schedule to the citation contains one count, which reads as follows:

> In an investigation commenced by the Law Society on or about August 19, 2008 in respect of unsatisfied judgments against you, you failed to respond to communications from the Law Society, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular, you failed to provide a substantive response to a letter dated March 19, 2009 and a voicemail message dated April 20, 2009.

Summary Hearing

[3] The Law Society wishes to proceed with this hearing pursuant to Rule 4-24.1 which states:

> **4-24.1**(1) This Rule may be applied in respect of the hearing of a citation comprising only allegations that the respondent has done one or more of the following:
>
> (a) breached a Rule;
>
> (b) breached an undertaking given to the Society;
>
> (c) failed to respond to a communication from the Society.

(2) Despite Rule 4-27(5), the Bencher presiding at a pre-hearing conference may order that the conference not consider any or all of the matters referred to in that subrule.

(3) Unless the panel rules otherwise, the respondent and discipline counsel may adduce evidence by

(a) affidavit, or

(b) an agreed statement of facts.

(4) Despite Rules 4-34 and 4-35, the panel may consider facts, verdict, penalty and costs and make one decision respecting all aspects of the proceeding.

[4] In this case, the citation clearly only contains one allegation that the Respondent failed to respond to communications from the Law Society. Therefore, this hearing may proceed pursuant to that Rule.

[5] The Rule contemplates that the hearing would proceed by way of affidavit evidence or an agreed statement of facts unless the Panel rules otherwise. In this case, the Law Society, with the Respondent's agreement, proceeded by way of affidavit evidence. As a result, it was unnecessary for this Panel to make any determination as to when and in what circumstances it might not be appropriate to proceed by way of affidavit evidence under this Rule.

Oral Reasons

[6] At the conclusion of the hearing on July 21, 2009, the Panel gave brief oral reasons, and made certain orders that are described below, reserving the right to provide fuller reasons in writing.

Onus and Standard of Proof

[7] The onus is on the Law Society to prove the allegations on a balance of probabilities. This is the standard set out by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, and adopted in *Law Society of BC v. Schauble*, 2009 LSBC 11.

Facts

[8] The Respondent advised the Panel that he admits the allegation regarding the failure to respond.

[9] On August 19, 2008, the Law Society wrote to the Respondent asking him about his failure to report certain judgments to the Law Society within seven days of the date of entry of those judgments. It appeared that those judgments remained unsatisfied contrary to Law Society Rule 3-44(1).

[10] In the letter to the Respondent, Law Society staff characterized a builders lien that had been filed against the Respondent's property as a judgment. Clearly it is not; it is only a claim. However, the other three are properly considered judgments pursuant to Rule 3-44.

[11] The Respondent left a voicemail message on September 2, 2008 asking for additional time to respond. The Law Society followed-up with further letters dated September 29, 2008, November 3, 2008 and then again on December 3, 2008.

[12] In the December 3, 2008 letter to the Respondent, the Law Society wrote:

> The Discipline Committee has directed that when a member fails to respond to communications from the Law Society, the member's attention be drawn to Chapter 13, Rule 3 of the *Professional Conduct Handbook* which reads:
>
> A lawyer must reply promptly to any communication from the Law Society.
>
> This is our third and final request. In the event a response is not received within ten days of the date of this letter, this matter will be referred to the Professional Conduct Department.

[13] In January 2009, the file was referred to the Professional Conduct Department and an investigator telephoned the Respondent on January 13, 2009 leaving a voicemail message asking him to respond.

[14] The Respondent did not respond to that voicemail and the investigator wrote to the Respondent on January 22, 2009 requesting that he provide a response by no later than February 5, 2009.

[15] The investigator left another voicemail message with the Respondent on February 6, 2009 and also wrote a further letter dated February 6, 2009. In that letter the investigator wrote:

> In the event your full response to the complaint in this matter is not received by **February 11, 2009**, this matter will be referred to the Discipline Committee or its Chair pursuant to the summary hearing process with a recommendation that the Chair issue a citation for your failure to respond to Law Society's correspondence.

[16] The Respondent finally responded by letter dated February 11, 2009. His response was substantive, but did not answer all the questions completely and other issues were raised that required follow-up questions.

[17] On February 12, 2009, the investigator wrote to the Respondent asking for clarification of specified matters and answers to additional questions. In that letter the Respondent was requested to respond by February 26, 2009.

[18] After a further exchange of voicemails, the Respondent provided a second response on March 5, 2009. Again the Respondent's response was substantive, but his response left questions open that required follow-up.

[19] The Law Society investigator wrote to the Respondent on March 19, 2009 asking follow-up questions. The Respondent did not respond to the March 19, 2009 letter despite the issuance of a citation. As at the hearing on July 21, 2009, he had still not provided answers to the questions in the March 19, 2009 letter.

[20] We find that the Law Society has proven the allegation in the Schedule to the citation that the Respondent failed to provide a substantive response to a letter dated March 19, 2009. As noted previously, the Respondent admitted that was true.

Verdict

[21] The Law Society submitted that the evidence established that the Respondent's conduct amounts to professional misconduct.

[22] " Professional misconduct" is not a defined term in the *Legal Profession Act*, the *Law Society Rules* or *Professional Conduct Handbook*. In *Law Society of BC v. Martin*, 2005 LSBC 16, the hearing panel concluded that the test is " whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[23] The *Professional Conduct Handbook*, Chapter 13, Rule 3 places an obligation on a lawyer to reply promptly to any communication from the Law Society.

[24] A lawyer's failure to respond to queries from the Law Society impairs the Law Society's ability to govern its members effectively.

[25] The Benchers on Review in *Law Society of BC v. Dobbin*, [1999] LSBC 27 wrote as follows at paras. 19-21, 23, 25:

> 19. Not all Rules in the *Professional Conduct Handbook* are created equal. ...
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> 20. The duty to reply to communications from the Law Society is in yet another category. While it is true that the duty to reply is only found explicitly set out in Chapter 13, Rule 3, of the *Professional Conduct Handbook* it is a cornerstone of our independent, self-governing profession. If the Law Society cannot count on **prompt**, **candid**, and **complete replies** by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.
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> 21. As Bencher Gerald Lecovin, sitting as a one Bencher Hearing Panel, wrote, in Reasons dated April 15, 1999, in the case of *MacDonald,* [1999] LSBC 20, page 3:
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> > Failing to respond 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 OR (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**
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> ...
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> 23. The Benchers are well aware that responding to Law Society communications may be irksome or burdensome. For overworked and highly stressed professionals, the task of picking up a file, often a closed or neglected file, and responding to the Law Society is a thankless, unpaid, and, often, time-consuming task. Many times the burden will be compounded by the knowledge that the letter which must be sent will reveal that the lawyer has behaved in a sub-standard or unprofessional way. For many lawyers, the duty to respond clashes with values they apply every day in their practices: the privilege against self-crimination and the right to remain silent. That clash sometimes presents resentment and a temptation to stick one's head in the sand. While the Benchers understand that those sorts of equivocations or rationalizations sometimes paralyze practitioners who are under a duty to respond to the Law Society, the **Benchers wish to ensure that members are under no illusions as to their duty to respond nor as to how the Benchers will deal with a failure to discharge that duty: we repeat, responding promptly, candidly and completely to Law Society communications is the cornerstone of our right to self-govern**.
>
> ...

25. Frequently, the member's failure to respond to Law Society communications is a sequel to a prior, frustrating failure to respond to client communications or to other lawyers' communications. Procrastination in responding to the Law Society, or wilful failure to respond to the Law Society, may be symptomatic of other practice problems involving delay in files or other dereliction of professional duty. **The Law Society is put in an impossible position in dealing with disgruntled clients, or disgruntled other lawyers, by a member's intransigent failure to respond. There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute**. 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. The circumstances which led the member to fail to respond are peculiarly within his or her means of knowledge. It cannot be a part of the evidentiary burden of the Law Society to show both that the member persistently failed to respond and the reasons for that failure.

[emphasis in bold added]

[26] The Respondent did not seek to provide evidence to excuse his conduct, although he did describe to the Panel the background circumstances that existed. The Respondent explained that he failed to respond to the Law Society's inquiries because of time pressures brought on by his busy practice and some unusual health problems suffered by his father and his mother-in-law. His mother-in-law's diagnosis with terminal cancer also created a health concern for his wife. As a result of these matters, his obligations at home were increased. Since both his father and mother-in-law reside out of the Province, this necessitated additional travel, time and expense. For those reasons, he did not give the Law Society correspondence the attention it required. He did not suggest that those circumstances excused his conduct.

[27] Accordingly, this Panel finds that the Respondent committed professional misconduct by failing to respond to the Law Society correspondence of March 19, 2009.

Penalty

[28] The Law Society sought a penalty that consisted of:

(a) a fine of $2,500 to $3,000;

(b) costs of $2,000; and

(c) an order requiring the Respondent to provide a complete substantive response to the March 19, 2009 letter within 21 days of the date of the hearing, and, secondly, an order requiring the Respondent to respond substantively to any other communication from the Law Society within 21 days.

[29] It is accepted that the primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate, as set out in Section 3 of the *Legal Profession Act,* to uphold and protect the public interest in the administration of justice.

[30] *In Lawyers and Ethics: Professional Regulation And Discipline,* McKenzie wrote at page 26?1:

The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

In cases in which professional misconduct is either admitted or proven, the penalty should be

determined by reference to these purposes.

[31] There are numerous cases dealing with failing to respond to the Law Society. At the bottom end of the spectrum there are three cases in which a reprimand was issued. At the other end of the spectrum there are four cases in which suspensions ranging from one week to 45 days have been imposed. The more serious cases involving suspension had aggravating factors not applicable to this case.

[32] In the five cases in which fines were imposed, the fines ranged from $1,000 to $3,000. Those cases are:

Law Society of BC v. Plested, 2007 LSBC 45 -$1,000 fine

Law Society of BC v. Currie, 2008 LSBC 21 - $1,500 fine

Law Society of BC v. Braker, 2006 LSBC 02; 2006 LSBC 47 - $1,500 fine

Law Society of BC v. Cunningham, 2007 LSBC 17; 2007 LSBC 47 - $2,000 fine

Law Society of BC v. Kruse, [2002] LSBC 15 - $3,000 fine

[33] In the case of *Plested* where a fine of $1,000 was imposed, the Respondent provided evidence that he earned, net after tax, an income of about $30,000 to $40,000 per year. That modest income was taken into account by the Panel in determining the appropriate monetary penalty.

[34] The Respondent advised the Panel of his net after tax income, which was more than the amount in the *Plested* case but not so high that a fine of $2,000 plus costs would not result in a significant financial impact on him.

[35] The Panel considered that a $2,000 fine was appropriate in this case rather than a reprimand because:

(a) until the day before the hearing the Respondent did not contact Law Society staff to advise that he would not contest the citation; this necessitated unnecessary preparation of affidavits of service; and

(b) he had not, even on the hearing date, provided a substantive response to the March 19, 2009 letter.

Costs

[36] The Law Society provided a Bill of Costs showing that its total disbursements were $907.50 and counsel fees were $3,150. It sought for counsel fees and disbursements the sum of $2,000. The Panel ordered the Respondent to pay costs of $2,000.

[37] The Respondent was given four months from the date of the hearing to pay the fine and costs.

Ancillary Orders

[38] The Law Society sought specific orders requiring the Respondent to provide substantive responses to the March 19, 2009 letter. The Panel ordered the Respondent to provide a substantive response to that letter within 21 days.

[39] The Law Society sought a further order that the Respondent provide substantive responses to future inquiries from the Law Society within 21 days. The Panel declined to give such an order except in the context of this particular investigation. The Panel ordered that with respect to further communications arising out of his response to the March 19, 2009 letter the Respondent is to provide substantive responses within 21 days.