2010 LSBC 15
Report issued: May 26, 2010
Oral Reasons: May 18, 2010
Citation issued: February 25, 2010

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

Marianne Walters

Respondent

Decision of the Hearing Panel

Hearing date: May 18, 2010

Panel: Bruce LeRose, QC, Chair, Joost Blom, QC, E. David Crossin, QC

Counsel for the Law Society: Maureen Boyd
Appearing on her own behalf: Marianne Walters

Background

[1] The citation in this matter was authorized by the Discipline Committee on December 10, 2009 and was issued against Marianne Walters (the " Respondent") on February 25, 2010. The Schedule to the citation sets out the nature of the conduct of the Respondent to be inquired into:

> 1. In representing your client AB in a family law matter, you were bound by an undertaking imposed on you by Rory Krentz in a letter dated May 7, 2009, by which certain documents, including a consent order to reduce child support, were sent to you:
>
> > ... on your undertaking that you will forthwith release the CPL that was registered by your client in the Land Title Office on June 26, 2008 under number [number]and provide [to Mr. Krentz] written confirmation that it has been released.
>
> You breached this undertaking on or about May 19, 2009 when you filed in court the consent order to reduce child support, at which time you had not released the CPL and did not do so until on or about June 12, 2009 when you submitted the release of the CPL to the Land Title Office for registration.

[2] The citation was served on the Respondent, as required by the Rules.

[3] This matter came before the Panel pursuant to Rule 4-22 which provides for, *inter alia*, the Discipline Committee to accept a conditional admission of a discipline violation and proposed disciplinary action. That Rule requires a hearing panel to consider the proposal and impose the proposed disciplinary action if it

agrees that it should be accepted.

[4] In this case, the Respondent made a conditional admission of professional misconduct and proposed a fine of $3,500 and costs of $1,500. The Discipline Committee accepted the admission and proposed disciplinary action.

[5] At the hearing, an Agreed Statement of Facts was marked as an Exhibit, as was a letter dated May 7, 2010, from the Respondent in which she admitted the discipline violation and consented to the proposed disciplinary action.

[6] The relevant facts set out in the Agreed Statement of Facts are as follows:

1. The Respondent was admitted to the bar of the Province of British Columbia on August 1, 1985.

2. The Respondent practises law as a sole practitioner in Abbotsford and has done so since August 2004. The Respondent has been a practising member of the Law Society of British Columbia (the " Law Society") since her date of call, with the exception of the period between January 1, 2001 and May 23, 2003. During some of that period, the Respondent temporarily practised in the Province of Alberta.

3. At all material times, the Respondent represented AB (the " Husband") in a matrimonial action against JC (the " Wife"). The Wife was represented by Rory W. Krentz.

4. In or about March 2008, the Respondent was retained by the Husband to commence Supreme Court proceedings for divorce, division of assets and debts, child support, and primary or shared residence of " A" , the youngest child (the " Child").

5. The Wife was a registered owner of real property in Chilliwack, identified by P.I.D. No. [number] (the " Property").

6. On June 26, 2008, the Respondent filed a certificate of pending litigation (the " CPL") against the Property, which was registered in the Land Title Office as No. [number].

7. On April 23, 2009, the Respondent received a letter from Siebenga & King requesting a payout statement to discharge the CPL for the purpose of refinancing the Property. Siebenga & King Law Offices (" Siebenga & King") acted for the Wife in respect of this intended refinancing of the Property.

8. On April 27, 2009, the Respondent wrote to Mr. Krentz proposing to release the CPL on two conditions:

(a) the Wife consent to an Order varying and reducing the child support payable by the Husband in respect of the Child from $887 per month to $300 per month, until that matter could be determined by the Court (the " Consent Order"); and

(b) the Wife immediately sign a passport application for the Child, with the issue of how the passport would be held to be canvassed at the Family Case Conference or on May 5, 2009.

9. On April 30, 2009, Mr. Krentz telephoned the Respondent to discuss the Respondent's proposal. After this call, the Respondent spoke by telephone with the Husband to obtain instructions and then again spoke with Mr. Krentz by telephone. Following this conversation, the Respondent believed that it was agreed that she would not release the CPL until she received the completed passport application for the Child and the Consent Order had been entered. The Respondent took notes of these conversations.

10. The refinancing of the Property did not proceed, and on or about May 2, 2009 the Property was listed for sale. On or about May 15, 2009, the Wife entered into a contract of purchase and sale to sell the Property, with a completion date of July 15, 2009. Although the Respondent was aware by April 30, 2009 the refinancing was not proceeding, she was not aware of this pending sale prior to mid-June, 2009, when she obtained a release of the CPL.

11. On May 7, 2009, Mr. Krentz wrote to the Respondent enclosing the Consent Order duly signed by him and the passport application for the Child, on the following undertaking:

> The above documents are forwarded to you on your undertaking that your office (not [the Husband]) will forward the passport application to the Passport Office using your office as the mailing address so that the passport is returned to your office. Upon receipt of the passport you further undertake to hold the said passport at your office unless [sic] and not release the same unless with the written consent of both parties or a Court Order. The above documents are also forwarded to you on your undertaking that you will forthwith release the CPL that was registered by your client in the Land Title Office on June 26, 2008 under number [number] and provide to me written confirmation that it has been released.
>
> (the " Undertaking").

Although the passport application for the Child was enclosed, the two pieces of identification required to submit the passport application were not enclosed with the letter.

12. The Respondent admits that she received the undertaking letter and that she read it. She further admits that she received the Consent Order and passport application, understood that those two documents were the subject of the Undertaking and she admits that by retaining and using these documents, she was bound by the Undertaking. The Respondent further admits that, although the terms of the Undertaking did not accord with her understanding of the agreement with Mr. Krentz, she did not return the documents. The Respondent further admits that she did not take any timely steps to seek to amend the terms of the Undertaking to conform with the terms that she believed had been agreed to by Mr. Krentz in the conversation on April 30, 2009.

13. On May 19, 2009, the Respondent submitted the Consent Order (along with the required Consent to an Order duly signed by both counsel) for entry and it was entered by the Court on May 19, 2009.

14. On May 21, 2009, the Respondent attempted to speak by telephone with Mr. Krentz regarding the terms of the Undertaking, but she was advised that he was away on vacation. The Respondent left a message asking Mr. Krentz to call her upon his return about the matter of the release of the CPL and the passport application.

15. On May 21, 2009, the Respondent provided to Mr. Krentz by fax a copy of the entered Consent Order.

16. On May 26, 2009, while attending Court on an application on behalf of the Husband and Wife, respectively, Mr. Krentz spoke with the Respondent and asked about the release of the CPL. The Respondent informed Mr. Krentz that his client did not provide the two pieces of identification for the Child required in order for the passport application to be submitted.

17. Also on May 26, 2009, Mr. Krentz wrote to the Respondent. In this letter, Mr. Krentz wrote:

> Lastly, we confirm that pursuant to your undertaking as set out in my letter of May 7, 2009 you will forthwith file a release of the CPL and provide to us written confirmation that it has been released.

Mr. Krentz also agreed to provide the required pieces of identification for the Child.

18. On June 2, 2009, Mr. Krentz wrote to the Respondent and enclosed copies of the two pieces of identification required for the passport application for the Child. In this letter, Mr. Krentz wrote:

> We once again remind you that you have undertaken to provide a filed release of the CPL.

19. On June 8, 2009, the Respondent spoke by telephone with Mr. Krentz and advised him that the original pieces of identification had to be submitted with the passport application for the Child, and that a copy of the identification which he had provided was not sufficient. The CPL was not discussed.

20. On June 10, 2009, Mr. Krentz wrote to the Respondent and enclosed the original identification required in order to file the Child's passport application. In this letter, Mr. Krentz wrote:

> We again remind you that you are on an undertaking to remove the CPL on our client's property once you were in receipt of the signed passport application. We confirm that the signed passport application has been in your possession for some time now and you have failed to meet your obligation to remove the CPL from our client's property. As such, we formally demand that you forthwith provide to us proof of the removal of the CPL.

21. On Friday, June 12, 2009, the Respondent submitted to the Land Title Office a release of the CPL. On Monday, June 15, 2009, the CPL was cancelled by the Land Title Office under number [number].

22. On June 13, 2009, the Respondent wrote to Mr. Krentz and enclosed an invoice from a registry services agency as proof the CPL had been submitted for filing.

23. On June 16, 2009, the Respondent wrote to Mr. Krentz and enclosed the registered cancellation of the CPL.

24. On July 6, 2009, the Respondent wrote to Mr. Krentz and apologized for her " delay in fulfilling [the] undertaking" .

25. The delay in releasing the CPL did not result in any harm to the Wife in respect of the intended refinancing or the sale of the Property.

26. The Respondent admits that she received an executed Consent Order and a passport application sent to her on an undertaking that she forthwith release a Certificate of Pending Litigation, that she retained and used the subject matter of that Undertaking and that she was bound by it. She further admits that, on or about May 19, 2009, she breached the Undertaking as alleged in the citation when she used the Consent Order for the benefit of her client but did not take any steps to release the Certificate of Pending Litigation until June 12, 2009. The Respondent admits that her conduct in breaching the Undertaking constitutes professional misconduct.

Issue

[7] Pursuant to Rule 4-22, the Panel needs to determine whether to accept the Respondent's admission of a discipline violation and the proposed disciplinary action.

Discussion

[8] Both counsel for the Law Society and the Respondent submit that the Panel should accept the admission that the Respondent's conduct in respect of the allegation set out in the Schedule to citation constitutes professional misconduct.

[9] The test for professional misconduct is well established in *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph [171], which states:

> The test that this Panel finds is appropriate 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.

[10] The test set out in *Martin* was recently discussed in *Re: Lawyer 10*, 2010 LSBC 02, where the Review Panel further articulated the tests at paragraph [31]:

> The formulation of the marked departure test developed in *Hops* and *Martin* is complete only if one adds the factor that the conduct must be culpable or blameworthy. Both decisions make findings that the conduct in question was a marked departure from the norm and that the member was culpable. ...

[11] This Panel has no difficulty in finding that the breach of undertaking in this case is a clear, marked departure from that conduct the Law Society expects of its members and that the Respondent is culpable.

[12] In this case the Respondent received certain documents, including a Consent Order to reduce child support payments and a passport application for that child, subject to a trust condition. The trust condition was set out in a letter dated May 7, 2009 from opposing counsel.

[13] The Respondent breached that undertaking on May 19, 2009 when she submitted the Consent Order for filing, without having taken any steps to release the CPL. She did not submit for registration a discharge of the CPL until June 12, 2009.

[14] Chapter 11 of the *Professional Conduct Handbook* sets out the obligations of lawyers with respect to undertakings, and in particular the following obligations in Rule 7 and Rule 7.1:

7 A lawyer must

(a) not give an undertaking that cannot be fulfilled,

(b) fulfill every undertaking given, and

(c) scrupulously honour any trust condition once accepted.

7.1 Undertakings and trust conditions should be

(a) written, or confirmed in writing, and

(b) unambiguous in their terms.

[15] The legal effect of an imposed undertaking was considered by the Benchers in *Law Society of BC v. Richardson*, 2009 LSBC 07 in which the Benchers on Review stated:

> [23] In summary, the combined effect of the written ethical guidelines for lawyers together with the case law is that no distinction can or should be drawn between the effect of an imposed trust condition and a solicitor's undertaking; they are equivalent. An undertaking is not a contract. It need not be supported by consideration; it cannot be overridden by instructions from the client; and it remains binding and enforceable until satisfied or until the parties mutually agree to modify the undertaking or it is otherwise withdrawn. The lawyer cannot reject or repudiate an undertaking while retaining or using the subject of it.

[16] It is well recognized that compliance with undertakings is a matter of fundamental importance to the profession. The Court of Appeal commented on this importance in *Law Society of BC v. Heringa*, 2004 BCCA 97, in which it cited with approval the following statement made by the Law Society hearing panel:

> Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

[17] The factors to be considered in assessing penalty are set out in the 1999 decision in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, as follows:

> (a) the nature and gravity of the conduct proven;
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> (b) the age and experience of the respondent;
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> (c) the previous character of the respondent, including details of prior discipline;
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> (d) the impact upon the victim;
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> (e) the advantage gained , or to be gained, by the respondent;
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> (f) the number of times the offending conduct occurred;
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> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
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> (h) the possibility of remediating or rehabilitating the respondent;
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> (i) the impact upon the respondent of criminal or other sanctions or penalties;
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> (j) the impact of the proposed penalty on the respondent;
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> (k) the need for specific and general deterrence;
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> (l) the need to ensure the public's confidence in the integrity of the profession; and
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> (m) the range of penalties imposed in similar cases.

[18] A breach of undertaking is treated as a serious form of misconduct. In this case, however, there are some mitigating factors:

(a) The Respondent had previously discussed the terms on which the documents would be sent, and had expected the terms would be different than the terms set out in the letter dated May 7, 2009.

(b) The Respondent did rectify the breach and comply with the terms of the undertaking when she submitted the discharge of the CPL for filing on June 12, 2009 and the next day provided to Mr. Krentz proof the discharge had been submitted.

(c) No harm resulted from the breach.

(d) The Respondent took steps to comply with the terms of the undertaking prior to being aware that a complaint had been made to the Law Society.

[19] The Respondent's Professional Conduct Record consists of two Conduct Reviews in 2002 and 2005, and one citation in which a finding of professional misconduct was established for administering the oath to her client on an affidavit in 2002, while leaving the dates of swearing the document blank so the date could be inserted later. The Respondent admitted the conduct and that it constituted professional misconduct. The penalty was a fine of $3,000.

[20] The Respondent's Professional Conduct Record is an aggravating factor.

[21] The case law generally supports a small fine in respect of a first breach of undertaking. In *Law Society of BC v. Richardson*, 2008 LSBC 05 the hearing panel reviewed a number of prior cases and commented:

> The recent decisions suggest that a fine is the more appropriate penalty, rather than a reprimand. It is the Panel's view that the public interest is best served by imposing a penalty similar to those imposed in other cases.

[22] In *Law Society of BC v. Clendening*, 2007 LSBC 10, the panel accepted a Rule 4-22 conditional admission in respect of two allegations: a breach of undertaking in a real estate transaction and a failure to respond to communications from the notary public about the undertaking. The panel accepted that a prior Conduct Review concerning compliance with undertakings was " unquestionably" an aggravating factor. The panel ordered a fine of $7,500.

[23] In *Law Society of BC v. Hill*, 2007 LSBC 02 the panel accepted a Rule 4-22 resolution of a fine of $2,500. In that case, the respondent had breached an undertaking to pay outstanding taxes as a condition of receipt of mortgage proceeds. The respondent wrongly believed that the outstanding taxes had been paid, and did not promptly take steps to rectify the breach when the mortgagee's lawyer brought the breach to his attention nearly four months later, on the basis that he believed the taxes would be paid as part of a refinancing.

[24] In *Law Society of BC v. Lee*, [2002] LSBC 29, the respondent breached an undertaking given in a matrimonial matter, which required her to provide the opposing counsel a series of post-dated cheques by a particular date and also a filed copy of the Notice of Withdrawal. The respondent used the documents subject to the trust condition, but there was a delay of several months before the undertaking was fulfilled. The respondent had been subject to a Conduct Review approximately five years earlier regarding a " common theme ... [of] disregard of procedural rules and ethical standards in the advancement of her client's causes." (para. 18) The panel accepted a Rule 4-22 admission with a fine of $2,000.

[25] In *Law Society of BC v. McLellan*, [2003] LSBC 40 the lawyer breached an undertaking given in a

matrimonial matter, and he claimed he did so because he was motivated to protect the interests of the other party. By means of a Rule 4-22 admission, a fine of $3,000 was imposed.

[26] In *Law Society of BC v. Richardson* (*supra*), the panel imposed a fine of $2,500 on the respondent, who had received funds on a trust condition with which he did not agree, and then used those funds while purporting to refuse to accept the trust condition.

Decision

[27] The Panel accepts the admission that the Respondent's conduct amounts to professional misconduct, and we also accept the proposed disciplinary action and impose the following:

(a) a fine in the amount of $3,500 payable by September 30, 2010; and

(b) costs in the amount of $1,500 payable by December 31, 2010.

[28] The Executive Director is instructed to record the Respondent's admission on the Respondent's Professional Conduct Record.

[29] The Panel would also like to extend its gratitude to Law Society counsel for her very helpful submissions and able presentation.