2010 LSBC 18
Report issued: August 03, 2010
Oral Reasons: June 30, 2010
Citation issued: May 25, 2010

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

Christin Priscille Marcotte

Respondent

Decision of the Hearing Panel on Facts, Verdict and Penalty

Hearing date: June 30, 2010

Panel: David Renwick, QC, Single bencher panel

Counsel for the Law Society: Jaia Rai
Appearing on her own behalf:

Introduction

[1] The citation against Christin Priscille Marcotte (the " Respondent") was authorized by the Discipline Committee on March 30, 2010 and issued on May 25, 2010.

[2] The Schedule to the citation sets out the nature of the conduct of the Respondent to be inquired into:

> 1. In the course of an investigation by the Law Society of British Columbia (the " Law Society") of a complaint made by AB, 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 December 10, 2009 and reminder letters dated December 21, 2009, January 7, 2010, January 22, 2010, February 2, 2010, and/or February 17, 2010.
>
> 2. In the course of an investigation by the Law Society of a complaint made by IW, 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 January 18, 2010 and reminder letters dated February 17, 2010 and March 4, 2010.
>
> 3. In the course of an investigation by the Law Society of a complaint made by LP, 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 January 19, 2010 and reminder letters dated February 17, 2010 and March 4, 2010.

[3] The Chair of the Discipline Committee also ordered that the hearing proceed in accordance with Rule 4-24.1 of the Law Society Rules (" Rules"). This is a summary hearing that provides that evidence may be adduced by affidavit. Pursuant to Rule 5-2(2)(b)(1) of the Rules, the Respondent was to appear before a single bencher.

[4] The citation was served on the Respondent as required by the Rules on May 26, 2010. Service was admitted by the Respondent.

[5] At the outset of the hearing, the Respondent applied to have two former employees of hers, TV and CS, excluded from the public gallery. The Respondent described in detail the problems that these two former employees had caused her, which included calling the police on her, public ridicule, suggestions that they would ruin her reputation and hacking into her computer after they had left her employ. These events were extremely stressful for the Respondent. Counsel for the Law Society took no position on the application. Law Society hearings are to be open to the public unless there are circumstances present that would require certain members of the public to be excluded. The objective is to have a transparent process. There is, however, a balance that must be achieved such that the proceedings are fair to the Respondent as well as to the public. In the circumstances I was satisfied that, balancing the interests of the Respondent and the public, these two members of the public be excluded.

Background

[6] The evidence consisted of the affidavits of Anneke Driessen van der Lieck, a former staff lawyer with the Professional Conduct Department of the Law Society, and Michael Rhodes, a staff lawyer with the Professional Conduct Department of the Law Society. In addition, Mr. Rhodes testified, as did Larry Dirk, an investigator with the Law Society.

The AB Complaint

[7] AB was a divorce client of the Respondent who complained in late October 2009 that, after three years, there had been no progress made in his case and that the Respondent " continually ignored his phone calls and requests for information" and did not provide any progress reports, failed to attend at pre-arranged meetings, failed to respond and had been untruthful.

[8] In spite of the complaint, AB wished the Respondent to continue to act for him as he wanted to have his divorce issues resolved.

[9] By letter dated November 2, 2009, the Respondent was provided a copy of the complaint and was told that a staff lawyer would be in touch with her.

[10] By letter dated December 10, 2009, Ms. Driessen asked the Respondent to provide a written explanation relating to the complaint of AB, as well as the client file and a copy of the client ledger by January 5, 2010.

[11] A further letter dated December 21, 2009 was sent by Ms. Driessen to the Respondent, reiterating that she expected to hear from the Respondent by January 5, 2010.

[12] The Respondent did not reply as required, and Ms. Driessen sent a further letter on January 7, 2010 requesting a response no later than January 19, 2010.

[13] The Respondent, by letter of January 20, 2010, advised that her home office had been the subject of flooding over the past few weeks and that she was " trying to have AB's file contents dried as a priority in order to send a photocopy ... and that the file will be couriered ... in the next week."

[14] As a result of this response, Ms. Driessen, by letter of January 22, 2010, asked the Respondent to provide the original file no later than January 29, 2010. The Respondent was assured that the file would be returned within a day or two of receipt. Ms. Driessen again reiterated that she required a copy of the client's

ledger and a substantive response to the AB complaint.

[15] As no response was received to the January 22, 2010 letter, a further letter was sent on February 2, 2010, wherein Ms. Driessen advised that any failure to respond would result in the referral of the file to the Chair of the Discipline Committee. The Respondent was given until February 16, 2010 to respond.

[16] The Respondent failed to respond, and a further letter was sent February 17, 2010 advising her that, if a response was not forthcoming by February 24, 2010, the matter would be referred to the Discipline Committee or the Chair with a recommendation that a citation be issued.

[17] On February 17, 2010, the Respondent spoke with Ms. Driessen indicating that she could not give the original client file as she needed it for a Rule 18A application. Ms. Driessen indicated that a copy of the file would be adequate, but it was to be provided by February 24, 2010. The Respondent agreed.

[18] Neither the file, the client ledger, nor a substantial response was sent to the Law Society by February 24, 2010.

The IW Complaint

[19] On December 19, 2009, IW, a former client of the Respondent, complained to the Law Society about the way his divorce file was being handled. The complaint included allegations of delay, inadequate service, competency issues and failure to respond.

[20] By letter dated December 22, 2009, the Respondent was provided with a copy of the complaint and was told that a staff lawyer would be in touch with her.

[21] By letter dated January 18, 2010, Mr. Rhodes asked the Respondent to provide a written explanation relating to the IW complaint, together with the complete client file and the client trust ledger, by February 15, 2010.

[22] The Respondent did not reply and a letter dated February 17, 2010 was sent advising her that any failure to respond would result in a referral to the Chair of the Discipline Committee pursuant to the new Summary Hearing Rules. Mr. Rhodes expected a response by March 3, 2010.

[23] On March 4, 2010, Mr. Rhodes attempted to contact the Respondent by telephone but she was " not in" .

[24] On March 4, 2010, a further letter was sent by Mr. Rhodes asking the Respondent to respond by March 11, 2010. The Respondent did not provide any response by that date.

The LP Complaint

[25] On December 22, 2009, the Law Society received a complaint about the Respondent from LP, whose ex-wife was a client of the Respondent in a matrimonial action. The LP complaint alleges that the Respondent caused delays in the matrimonial matter and failed to respond to communications from LP's counsel.

[26] By letter dated December 22, 2009, the Respondent was provided with a copy of the complaint and was told that a staff lawyer would be in touch with her.

[27] On January 19, 2010, Michael Rhodes asked that she provide a written explanation in response to the LP complaint by February 15, 2010.

[28] The Respondent did not reply, and a letter dated February 17, 2010 was sent to the Respondent advising her that her failure to respond would result in a referral to the Discipline Committee pursuant to the new Summary Hearing Rules. A response was expected by March 3, 2010.

[29] The Respondent failed to reply and a further letter was sent March 4, 2010 giving her until March 11, 2010 to respond. The Respondent did not provide any response by that date.

[30] Larry Dirk testified that, on April 22 and 23, 2010, he together with Mr. Rhodes, attended a residential area in Abbotsford, BC, where the Respondent lived and had a home office on the lower level of the residence. Mr. Dirk was attending pursuant to a Rule 4-43 Order granted April 6, 2010 to investigate the books, records and accounts of the Respondent's law office. A copy of the Order was provided to the Respondent and the process was explained by Mr. Dirk.

[31] The Respondent spoke to her lawyer and agreed to cooperate in providing access to the information requested.

[32] During the course of the investigation, Mr. Dirk took photographs of the office area on his cell phone camera, which photographs were entered as exhibits. The photographs showed a number of files in boxes. As well, it was evident that there had been some water stains, particularly on the floor where floor covering had been removed. There was no way of telling when the water damage had occurred. As well, there was some water stains noted in part of the ceiling area; however, no photographs were taken of that damage. Mr. Dirk did not notice any water damage to any files.

[33] Mr. Rhodes also testified in relation to his attendance at the Respondent's home office. He asked the Respondent to provide him with copies of the IW and AB files. He did not see any evidence of water damage to either of those files, nor numerous other files he examined. He acknowledged, however, that he did not go through the entire AB file that consisted of two boxes. These were provided to the Law Society staff to copy. He did, however, see the water stain marks on the floor and ceiling.

[34] The Respondent testified that, in late December 2009, her home office was flooded as the gutters had been clogged by coniferous needles and a layer of ice that, when melted, found a way into the residence. This flooding was the subject of an insurance claim in early January 2010. The Respondent reviewed the photographs and explained the damage to the ceiling, walls, laminate floors and work areas. There were four other flooding events until late April 2010.

[35] The Respondent also provided background information with respect to her former law associate of 15 years who left in December 2009 and the problems she encountered in relation to that separation.

[36] The Respondent acknowledged that she should have responded to the Law Society and she provided no explanation for not specifically responding to the three complaints.

[37] The Respondent also indicated that she and her husband separated in July 2009. As well, in or around that time, her house and car were vandalized by a local gang of some notoriety and her step-son was involved with that gang. This created significant stress to her and her former husband as they tried to find other accommodation for him, as he apparently had a contract taken out on his life.

[38] As a result of these threats, the Respondent had difficulty sleeping. She tried to continue with her practice but was not doing a " good job" .

[39] The Respondent testified that she had great difficulties with the two staff members who were excluded from the public gallery. Her computers were accessed from a remote location by one of them, and that required her to employ a computer expert to deal with the problem at a great expense to her. These problems caused her billings to " plummet" .

[40] In cross-examination, the Respondent acknowledged that her problems pre-dated the complaints. For instance, the employees left in the fall of 2009, the property damage and events surrounding her former husband and step-son were in the summer of 2009. The Respondent also explained that she had difficulties in getting along with Ms. Driessen, but had " good rapport" with Mr. Rhodes. In spite of that, she still didn't respond because she was " overwhelmed" .

Discussion

[41] The test for professional misconduct is well-established and was discussed in the *Law Society of BC v. Martin*, 2005 LSBC 16 at para. [171]:

> The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from the conduct the Law Society expects of its members; if so, it is professional misconduct.

The Panel also noted at para [154]:

> ... The real question to be determined is essentially whether the Respondent's behaviour displays culpability that is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

[42] In *Re: Lawyer 10*, 2010 LSBC 02, the Review Panel further articulated the applicable test for professional misconduct established in *Martin*, in paragraphs [31] to [33]:

> [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. To put it more precisely, it may not be professional misconduct if one's conduct falls below the norm in a marked way if that occurs because of: a) events beyond one's control; or b) an innocent mistake.
>
> [32] A respondent must be culpable in order to have committed professional misconduct. The conduct must not only be a marked departure from the norm, but must also be blameworthy.
>
> [33] In order to determine whether the Applicant's conduct is both a marked departure from the norm and blameworthy, one needs to consider precisely what it is that he did wrong.

[43] Chapter 13, Rule 3 of the *Professional Conduct Handbook* places an obligation on a lawyer to reply promptly to any communication from the Law Society. In *Law Society of BC v. Dobbin*, [1999] LSBC 27 the Benchers said at para 25 of the majority decision:

> ... 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.

[44] *Dobbin* has been followed in *Law Society of BC v. Cunningham*, 2007 LSBC 17, and *Law Society of BC v. Tak*, 2009 LSBC 25.

[45] In *Dobbin*, the majority of the Benchers on the review held at paragraphs 20, 23 and 25:

> 20 ...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.

...

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 produces 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 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 on 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. ...

[46] The Benchers on the *Dobbin* review further held at paragraph 28 that, for a professional, one letter and one reminder from the Law Society should be sufficient in the absence of some explanation. If further time is required to respond, the onus must be on the lawyer to write explaining what time is needed and the reason for which it is needed.

[47] In *Cunningham,* (*supra*) the respondent testified that she was immobilized from responding. The panel held that to avoid a finding of professional misconduct, the respondent must show " an illness such as to incapacitate her to the extent of making her unable to answer correspondence." In that case, there was insufficient evidence to establish the incapacity as noted.

[48] Further in *Cunningham,* paragraph [22], the panel held:

[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 [Legal Services Society]. 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.

Decision

[49] I am satisfied that the evidence provided establishes on the balance of probabilities that the Respondent's conduct amounts to professional misconduct. I am further satisfied that the *Cunningham* test of incapacity has not been met by the Respondent. Although she was going through a difficult time, she did not provide any specific, meaningful explanation as to why she failed to respond. In fact, the totality of the evidence suggests that there were justifiable reasons for the client, former client and ex-spouse of a client to question her practice habits. This failure to respond appears to be just another symptomatic illustration of a deep rooted problem.

[50] The Respondent was given ample opportunity to respond. Even after the Law Society became aware of the flooding issue, the Respondent was given four additional opportunities to respond. Still she provided nothing. To date, she still has not provided a substantive response to the three complaints.

Penalty

[51] The Respondent's Professional Conduct Record was entered as an exhibit. A summary of the record shows:

(a) a Conduct Review in 1994 for breach of undertaking;

(b) a Conduct Review in 1999 for breach of undertaking;

(c) after a Practice Standards Review in December 2000, the Respondent agreed to not practise in the area of Wills and Estates;

(d) a Conduct Review for failing to provide adequate quality of service to a client in family law matters and delaying in responding to the Law Society's request. The Conduct Review Subcommittee wrote that the Respondent indicated that, " I recognize that I should have responded" and went on to explain that she was " paralyzed" . This appears to be the same response that she provided to me. In the Conduct Review, the Respondent indicated that she " recognized the need to respond expeditiously to Law Society correspondence."

(e) a Conduct Review in 2003 relating to three client complaints concerning delay to which the Respondent acknowledged her problems to be one with procrastination.

(f) the Practice Standards Committee made certain recommendations in 2006 and 2007.

(g) a Conduct Review in 2007 related to procrastination and delay in handling of client matters. The Conduct Review Subcommittee wrote that a further complaint based on delay or procrastination would unlikely result in any further Conduct Reviews.

[52] It is well established that the primary purpose of discipline proceedings is to fulfill the Law Society's mandate to uphold and protect the public interest in the administration of justice so that high professional standards are maintained and that the public's confidence in the legal profession is preserved.

[53] In determining the appropriate penalty, *Law Society of BC v. Ogilvie*, [1999] LSBC 17, sets out a

number of factors to be considered. In this case, the primary factors include the need for a specific deterrence, and the possibility of remediation, particularly in light of the Respondent's prior discipline record, as well as a general deterrence and the need to ensure the public's confidence and integrity of the profession.

[54] In *Dobbin,* (*supra*) the Benchers on review held at paragraph 20:

> ... The duty to reply to communication 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.

[55] As well, in *Law Society of BC v. Hall*, [2003] LSBC 11, the Panel commented at paragraph [2]:

> [2] ... it is essential for lawyers to respond to Law Society communications. Otherwise the Society cannot effectively discharge its responsibility of protecting the public interest in the administration of justice. It is simple: lawyers neither have the freedom not to respond nor the freedom to respond according to a schedule that suits them. They certainly cannot put their heads in the sand, as the Respondent said he did.

[56] I do not believe that a reprimand is appropriate, nor in these circumstances is a suspension warranted.

[57] Typically for a first citation, a fine in the neighborhood of $1,500 to $2,000 is the appropriate penalty. This range is established in *Law Society of BC v. Braker*, 2006 LSBC 7, *Law Society of BC v. Cunningham*, 2007 LSBC 47, *Law Society of BC v. Currie*, 2008 LSBC 21, *Law Society of BC v. Tak* [2009] LSBC 25 and *Law Society of BC v. Cuddeford*, 2010 LSBC 11.

[58] Although this is a first citation, the Conduct Record is a significant aggravating factor. Therefore, the fine needs to reflect the fact that in reality this is not a first instance. Furthermore, three complaints during the same time period and no response having been provided yet, necessitates a fine at the higher end of the range. I am mindful of the financial circumstances of the Respondent. Accordingly, as I indicated orally at the conclusion of the hearing, the penalty is as follows:

(a) a fine in the amount of $2,750, to be paid in full by December 31, 2010;

(b) the Respondent is to provide a substantial response to the Law Society for:

(i) the IW and LP complaints by July 21, 2010;

(ii) the AB complaint by July 28, 2010.

[59] The Law Society also sought an order that costs in the amount of $3,000 be awarded. The actual costs were approximately $8,000, and the Law Society submitted that 30% of the actual costs would be appropriate. Accordingly, I made an order that costs be set at $2,400, to be paid in full by December 31, 2010.