2010 LSBC 27
Report issued: December 16, 2010
Citation issued: March 4, 2010

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

George Coutlee

Respondent

Decision of the Hearing Panel on Facts, Verdict and Penalty

Hearing date: October 5, 2010

Panel: Bruce LeRose, QC, Chair, Ralston S. Alexander, QC, Leon Getz, QC

Counsel for the Law Society: Maureen Boyd
Appearing on his own behalf:

Background

[1] By citation dated March 4, 2010, this Panel was directed to inquire into the conduct of the Respondent with respect to matters set out in a schedule to the citation, which provided as follows:

> In or about 2006 and 2007, you provided legal services to CG and GG in a wills and estates matter and engaged in the practice of law, contrary to the order of a disciplinary hearing panel made on January 13, 1997, by which you were suspended pursuant to section 46(1)(d) from the practice of law in all fields except for defending persons in the field of criminal law and personal injury claims in the field of civil litigation.

[2] The citation was entered as Exhibit 1 in the proceedings.

[3] The parties filed an Agreed Statement of Facts as Exhibit 2 in the proceedings. The relevant parts of the Agreed Statement of Facts (redacted in part to protect solicitor/client privilege), are attached as Appendix 1 to this decision.

[4] The effect of the Agreed Statement of Facts is that the allegations set out in the schedule to the citation are acknowledged as having been made out by the Law Society. The Respondent acknowledges that his behaviour with respect to circumstances alleged in the citation amounts to professional misconduct.

Factual Overview

[5] In 1995, as a result of a decision of a Law Society hearing panel, the permitted practice areas of the Respondent were restricted as follows:

> Pursuant to section 46(1)(d)(i) George Coutlee ... is hereby immediately suspended from the practice of

law in all fields, except for defending persons in the field of criminal law and personal injury claims in the field of civil litigation.

[6] On or about July 26, 2006, the Respondent met with GG and was retained to provide legal services and representation to GG and his sister, CG, with respect to the will of a deceased relative. There was a dispute among the beneficiaries as to the proper administration of the estate and as to the validity of the will.

[7] The Agreed Statement of Facts describes in some detail the circumstances of the disputed estate and the various steps taken by the Respondent on behalf of his clients GG and CG.

[8] For the purposes of our decision, it is sufficient to note that the Respondent took a number of steps on behalf of his clients that were consistent with the theory and fact that he was representing their legal interests in the estate matter on which he had taken their instructions to represent them. A full description of the services rendered appears in the Agreed Statement of Facts.

[9] The Respondent admits that, at the time he was retained by GG and his sister and all material times thereafter, he knew that the matter related to a wills and estates matter and that he was precluded from practising on such matters by the practice restriction imposed upon him by the 1997 Hearing Panel.

Decision

[10] The Respondent acknowledged that the conduct described in the schedule to the citation had been proven, and that he had professionally misconducted himself in respect of the matters therein described. The Panel acknowledged the Respondent's admission and confirmed their finding that the Respondent had committed professional misconduct.

Discussion Regarding Penalty

[11] As permitted by the Rules, and with the consent of the Respondent, the hearing continued following the determination of professional misconduct to consider the matter of penalty.

[12] The 1999 decision in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, sets out a non-exhaustive list of factors that may be considered by a hearing panel in determining the appropriate penalty:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(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;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[13] We will consider these characteristics in the context of the professional misconduct that has been acknowledged in this hearing.

[14] Regarding the nature and gravity of the conduct proven, the blatant disregard of a restriction on practice imposed by a hearing panel must be regarded as misconduct of a most serious nature. It goes to the heart of the ability of the Law Society to impose and enforce discipline on lawyers. The passage of time between the imposition of the restriction and the breach is in no way a mitigating factor.

[15] Regarding the age and experience of the Respondent, it is presumed that the intention of this *Ogilvie* consideration was to give the benefit of the doubt to a junior inexperienced member of the Law Society. This Respondent gets no help here - he is senior and experienced.

[16] As to prior discipline, there is a conduct history for this Respondent. In addition to the hearing from which the restriction on practice was ordered, there are several other incidents of misconduct that are not similar to that before this Panel. However, the earlier discipline outcomes do indicate that the more benign penalties imposed were not sufficient to effect a modification of this Respondent's behaviour. The penalty result in this matter is in part a reflection of that reality.

[17] These circumstances did have an impact upon the victim of the misconduct, but the impact was not of a sufficiently serious or durable nature to suggest that a more severe penalty should be imposed.

[18] There was no advantage gained by the Respondent in the result, although that outcome is more likely the result of the decision of one of the offended clients to file a complaint rather than a determination of the Respondent to forego a fee that had been negotiated for the unauthorized practice.

[19] The improper behaviour was confined to the single instance of a breach of the practice condition that was before the Panel and, although the Respondent initially attempted to divert the investigation by suggesting that his involvement with the work was as mediator (in which role the Respondent has experience), he did ultimately cooperate with the Law Society by acknowledging the misconduct and agreeing to the statement of facts.

[20] There is likely little need for a further rehabilitation of the Respondent. Given the significant unpleasantness for him that has accompanied this process, it is the view of the Panel that there is no likelihood of a recurrence of the offending behaviour. Despite that comfort, there is a need to communicate a condemnation of this behaviour for the benefit of those who might consider restrictions on practice areas to be more in the nature of guidelines than of prohibitions. There is a significant need to protect the public interest when restrictions on practice are imposed, and lawyers must be clear that breaches of those prohibitions will be treated seriously.

[21] There must also be a response to these facts that respects the public interest in lawyers responding appropriately to discipline orders from the Law Society. The need for this response in the public interest is canvassed above.

[22] The final *Ogilvie* consideration is the nature of penalties imposed in similar circumstances. The Panel was provided with a range of similar situations that had previously been the subject of Law Society discipline decisions. There were no decisions that were precisely on point, and the range of penalty in

somewhat similar circumstances ranged from modest fines to periods of suspension up to three months. Generally, more extensive suspensions were reserved for more egregious demonstrations of professional misconduct.

[23] The Law Society submits that the appropriate disciplinary action in this case is a one month suspension, having regard to the following key factors:

(a) the serious nature of a failure to comply with a hearing panel order;

(b) the Respondent's admission that, at all materials times, he knew that the matter related to a wills and estates matter and that he was precluded from practising in that area by the practice restriction;

(c) the continuing nature of the misconduct over a period of approximately five months;

(d) the Respondent's professional conduct record; and

(e) the need for both specific and general deterrence;

weighed against,

(f) the fact that this matter is the only evidence of a breach of an order made in 1997.

Decision

[24] The Panel has agreed with the submission of the Law Society as to the duration of the required suspension. The circumstances of the misconduct are serious, but the Respondent has cooperated and deserves some credit for that. A more extensive suspension would have been imposed in the absence of those mitigating factors.

[25] In the result the Panel orders that:

(a) the Respondent be suspended from practice for one month, commencing on the first day of the next month following the completion of the hearing.

(b) the Respondent pay costs of $5,000 to the Law Society by April 30, 2011.

(c) publication of this outcome be provided in the normal course.

APPENDIX 1

Personal Background

1. George Coutlee (the "Respondent") was admitted to the bar of the Province of British Columbia on January 10, 1978.

2. The Respondent practises in Kamloops, British Columbia.

Citation

3. The Respondent admits that, on March 9, 2010, he was personally served with the citation in accordance with the requirements of Rule 4-15 of the Law Society Rules.

Practice Restriction

4. In 1995, the Law Society issued a citation against the Respondent. A hearing was held before a panel on July 31, 1995 and January 13, 1997, following which the Panel issued a written decision on February 9, 1997.

5. In its decision, the Hearing Panel made the following order restricting the Respondent's practice (the "Practice Restriction"):

> Pursuant to section 46(1)(d)(i), George Coutlee ... is hereby immediately suspended from the practice of law in all fields, except for defending persons in the field of criminal law and personal injury claims in the field of civil litigation.

The Respondent has been and continues to be bound by this Practice Restriction from February 9, 1997 to date.

6. At all material times, the Respondent understood the scope of the Practice Restriction and that he was subject to it.

Background Facts re Estate Matter

7. On or about July 26, 2006, the Respondent met with GG and was retained to provide legal services and representation to GG and his sister, CG, with respect to the will of LG (the "Deceased"), dated October 1, 1982 (the "Will"). There was a dispute among some of the beneficiaries under the Will as to the proper administration of the estate and the validity of the Will.

8. The Deceased was the stepfather of GG and CG. The Deceased had one biological child, BG, who is the half-sister of GG and CG. The Deceased's Will left significant assets to be divided equally between GG, CG and their half-sister BG.

9. The executor appointed under the Will was Charles Albas, a lawyer, who was represented by Richard Covell. During the material time, BG was represented by Daniel Carroll, a lawyer practising in Kamloops.

10. The Deceased was a member of an Indian Band, and, pursuant to the provisions of the *Indian Act*, R.S.C. 1985, c. 1-5, the Minister of Indian and Northern Affairs Canada has jurisdiction to approve a will made by an Indian and confirm the appointment of an executor to administer the estate. On March 11, 2002, the Minister approved the probate of the Will and the appointment of Mr. Albas as executor. In or about April 2006, BG advised Indian and Northern Affairs Canada ("INAC") that she intended to seek to have the Will voided on the basis of lack of testamentary capacity and, subsequently, also on the basis of the alleged forgery of the Deceased's signature on the Will.

11. On July 26, 2006, Daniel Carroll provided written submissions to INAC on behalf of BG. In or about August 2006, the Respondent received and read a copy of these submissions.

12. On September 19, 2006, Laurie Charlesworth, an employee of INAC, wrote to the heirs of the estate of the Deceased and to the executor, Mr. Albas, that " ... because of the complexity of [the Deceased's estate], I will be requesting that the Minister direct that jurisdiction over the administration of the estate be transferred to the provincial court." The Respondent received and read a copy of this letter within a few days of September 19, 2006.

13. On December 20, 2006, the Minister of INAC transferred jurisdiction over the estate of the Deceased to the Supreme Court of British Columbia pursuant to section 44(1) of the *Indian Act*.

Provision of Legal Services to CG and GG

14. By letter dated July 17, 2006 from INAC, GG and CG were advised that INAC expected that their half-sister BG would make an application to void the Will. GG provided a copy of this letter to the Respondent in late July, 2006.

15. The Respondent admits that, at the time he was retained by GG and his sister and at all material times thereafter, he knew that the matter related to a wills and estates matter, and that he was precluded from practising in that area by the Practice Restriction.

16. Between July 26, 2006 and January 26, 2007, the Respondent provided legal services to GG and CG and took the following steps on their behalf:

(a) On or about July 26, 2006, the Respondent spoke by telephone with Laurie Charlesworth of INAC.

(b) On or about July 26, 2006, GG executed an authorization in favour of the Respondent authorizing INAC "to discuss all issues involving the [Deceased's Estate] including providing all documents regarding his estate file to my lawyer George Coutlee." The Respondent prepared this authorization and GG executed it before the Respondent's assistant, WH.

(c) The Respondent received from GG and his sister a number of documents relating to the Deceased's assets and personal and legal affairs.

(d) On or about August 17, 2006, the Respondent prepared a draft letter to INAC, which included comments regarding the legal issues in respect of the challenge of the Will by BG.

(e) On or about August 22, 2006, the Respondent wrote to INAC seeking a 60-day extension of the time period in which to provide submissions.

(f) On or about September 18, 2006, the Respondent spoke with Mr. Covell by telephone, who advised the Respondent that he had received no response to his suggestion that the beneficiaries of the estate of the Deceased mediate the dispute and that INAC was going to transfer the file to the Supreme Court.

(g) The Respondent gave legal advice to GG and CG.

(h) The Respondent prepared the affidavit of AG, the mother of GG and CG, and AG swore this affidavit before him on December 1, 2006. On December 6, 2006, the Respondent faxed this affidavit to Mr. Covell.

(i) The Respondent prepared the affidavit of AE, and AE swore this affidavit before the Respondent on December 20, 2006.

(j) In or about December 2006, the Respondent prepared draft submissions for INAC setting out the factual background and the law with respect to Indian custom adoption in the Band.

(k) The Respondent met with GG and his sister on several occasions. The Respondent met with GG on January 14, 2007.

(l) The Respondent spoke by telephone with Richard Covell on approximately 12 occasions between the fall of 2006 and March 14, 2007.

(m) On or about December 23, 2006, the Respondent sent by fax to INAC a response dated December 22, 2006 on behalf of GG and CG as his clients.

17. On or about December 15, 2006, the Respondent met with GG and CG and took instructions from

them.

18. On or about January 2, 2007, the Respondent received and read a letter from Mr. Covell. In this letter, Mr. Covell wrote:

> I correspond with you now in order to encourage your respective clients to make a bona fide attempt to settle this matter, once and for all - either through direct negotiations or with the assistance of a mediator or Indian band elders, as the case may be ...

19. Although CG and GG were interested in resolving the dispute with their half-sister BG by mediation, no mediation occurred while the Respondent was involved in this matter. Further, during the period the Respondent was involved in this matter, there were no negotiations between counsel in which any proposal to settle the dispute over the Will was made.

20. On or about January 26, 2007, CG wrote to the Respondent to advise that they would no longer require his help and asked the Respondent to give their file to their new lawyer, Philip Ransome.

21. The Respondent did not advise GG or his sister at any time during the retainer between July 2006 and January 26, 2007 that he was subject to the Practice Restriction.

Contingency Fee Agreement

22. On or about July 26, 2006, when GG first met with the Respondent, he explained to the Respondent that he and his sister did not have any money at that time to pay any legal fees. The Respondent told GG words to the effect of not to worry, and that payment could be looked at a later date. A factor in the decision of GG and his sister to retain the Respondent was that he did not require payment of a retainer.

23. From time to time thereafter, CG asked the Respondent about payment for the services the Respondent was providing to her and GG.

24. At some point, the Respondent advised GG and CG that his fees were usually $300 per hour.

25. On or about November 18, 2006, the Respondent met with GG and his sister regarding obtaining evidence from elders regarding custom adoption. During that meeting, the Respondent recorded a note that he had explained "expert + elder fee @ LSS rate 10 hr. @ $126."

26. On or about December 20, 2006, the Respondent gave GG and CG a contingency fee agreement that he prepared, made as of September 1, 2006 (the "Contingency Fee Agreement"). At that meeting, GG initialed each page and signed the agreement. The handwritten changes were made by the Respondent during that meeting.

27. CG refused to sign the Contingency Fee Agreement.

28. In his written response to the Law Society dated February 20, 2007, the Respondent provided his explanation regarding the purpose, preparation, and execution of the Contingency Fee Agreement, which explanation included the following paragraph:

> [CG] requested a written contingency fee retainer agreement with me on numerous occasions because, as she kept telling me, she and her brother had no monies with which to pay me or any other counsel arranged to act on their behalf. I kept telling her that a contingency fee agreement was premature because I expected the matter would not proceed beyond mediation and that in any event, she and her brother would be responsible for any proper disbursements I expended on their behalf together with fees for my time which I informed her was ordinarily $300.00 per hour. She became so

insistent that during December, 2006, I finally agreed to prepare a contingency fee agreement for her.

29. The Respondent did not issue a bill for his services to GG or CG. However, when requested by CG to send his file to their new lawyer, the Respondent initially refused to provide his personal notes and memoranda on the basis that they belonged to him and he had not been paid for them.

30. The Respondent admits that, when he represented GC and his sister, he did so in the expectation of a fee, gain or reward, direct or indirect, from GG and CG.

31. On January 24, 2007, CG made a complaint (the "Complaint") about the Respondent to the Law Society.

Admissions

32. The Respondent admits that, in 2006 and 2007, he provided legal services to CG and GG in a wills and estates matter and engaged in the practice of law, contrary to the order of the disciplinary hearing panel made on January 13, 1997, by which he was suspended pursuant to section 46(1)(d)(i) of the *Legal Profession Act* from the practice of law in all fields except for defending persons in the field of criminal law and personal injury claims in the field of civil litigation. The Respondent admits that his conduct constitutes professional misconduct.