

2011 LSBC 01

Report issued: January 6, 2011

Oral Reasons: December 6m 2010

Citation issued: October 1, 2010

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

Hearing date: December 6, 2010

Panel: Joost Blom, QC, Chair, David Mossop, QC, Kenneth Walker

Counsel for the Law Society: Maureen Boyd

Appearing on his own behalf: Bradley D. Tak

Introduction

[1] Bradley Darryl Tak, the Respondent, appeared at a summary hearing of a citation before a three-Bencher panel pursuant to Law Society Rule 4-24.1.

[2] The schedule to the citation alleged failures to respond to communications from or on behalf of the Law Society, as follows:

1. You failed to comply with Rule 4-43(2)(b) of the Law Society Rules after an Order dated February 11, 2010 made by the Chair of the Discipline Committee was served on you on March 23, 2010, and/or you failed to respond promptly or at all to communications from or on behalf of the Law Society, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular,

a) you did not immediately produce:

i. a copy of the statement from a trust company, account number[number] for the period from 31 October to 28 November, 2008;

ii. the deposit details, and a copy of all supporting documentation, from a trust company for the account number[number] for 3 December 2008 in the amount of \$2,700,

after written requests for production were made to you by or on behalf of the Law Society on May 11, 2010, May 20, 2010, June 17, 2010, June 29, 2010 and/or July 15, 2010;

b) you did not respond promptly to a letter dated July 15, 2010 from the Law Society requesting you provide available dates to meet with you to obtain your explanation(s) of certain of your files, vouchers, records, accounts, books or other evidence.

[3] The Law Society relied upon affidavit evidence. The Respondent testified to the circumstances surrounding his actions.

[4] At the conclusion of the hearing, we gave brief oral reasons, with written reasons to follow, finding that professional misconduct was proven for failure to respond to the demands for production of the sought bank documents as set out in point a) of the citation. We also found professional misconduct relating to failure to provide "available dates" as set out in point b).

[5] The Respondent then applied for an adjournment of the penalty phase of the summary hearing. His application was based upon the wish to consult counsel and prepare submissions, given that Law Society counsel had indicated it would propose a very substantial period of suspension. Ms. Boyd opposed an adjournment into January on the basis that her letter to the Respondent of October 1, 2010 (a copy of which was under tab 2 of the Affidavits of Service) had given him ample notice of the Law Society's position. The letter stated the Law Society contemplated relying on the Respondent's Professional Conduct Record to make submissions that the recurring misconduct indicated ungovernability and supported the imposition of a significant period of suspension. The penalty expected to be sought, as indicated in the letter, was a suspension in the range of six to nine months.

[6] We granted an adjournment to 5:00 pm on Monday, January 17, 2011. We indicated that we expected the Respondent to be ready to proceed at that time and that we would not look favourably on any application by him to adjourn the matter further.

[7] These are our written reasons on the facts and verdict phase of the proceeding.

Background

[8] On February 11, 2010 an order was given pursuant to Rule 4-43 that ordered an investigation into the books, records and accounts of the Respondent.

[9] On March 23, 2010, five weeks after the order was made, Mr. Barbour, an accountant engaged by the Law Society, began the investigation pursuant to the order. On the same day, Mr. Barbour met with the Respondent and obtained a box containing accounting records.

[10] Mr. Barbour met with the Respondent on April 9, 2010 and again on April 14, 2010. The Respondent co-operated during these meetings.

[11] Mr. Barbour determined that he required further bank records and, through a series of emails and voice messages, it became clear that Mr. Barbour was particularly interested in the bank statement and banking records mentioned in point a) of the citation, quoted in paragraph 2 of these reasons. The reason was that they related to transactions that figured in a complaint to the Law Society made by KP, a client of the Respondent. Mr. Barbour brought a bank authorization form that would have permitted the Law Society to obtain the bank documents directly from the bank to a meeting with Respondent on May 18, 2010. Mr. Barbour did not get the authorization signed at this meeting. In retrospect, this is an unfortunate circumstance because it is in the failure to provide these bank documents that the Respondent is now found to have professionally misconducted himself. However, Mr. Barbour decided not to ask the Respondent to sign the authorization because the Respondent told Mr. Barbour that he (the Respondent) had made an oral request to a customer service representative at the bank to have the branch retrieve the documents, and he expected they would be provided. Mr. Barbour was not wrong to accept this statement. He emailed the Respondent on May 20, confirming that the Respondent had requested the relevant documents from the

bank.

[12] On June 17 Mr. Barbour emailed another request for the documents, together with a proposed date for a further meeting at the Respondent's office "to do a further review of all files (current and historical) in the KP matter." The Respondent answered by email on June 22, saying he could not meet on the date Mr. Barbour had proposed and suggesting another date. That turned out to be impossible for Mr. Barbour, who by email of June 23 suggested a date of July 2. On June 29, not having heard from the Respondent, Mr. Barbour emailed, "[I]f you are not available to meet on 2 July 2002 [sic] as suggested would you please forward the information outlined in my email of 17 June 2010 ... as soon as possible?"

[13] On July 12, 2010, still not having heard from the Respondent, Mr. Barbour requested the assistance of Mr. Caldwell, a staff member of the Law Society, by letter of that date.

[14] Mr. Caldwell wrote a letter, and it was personally delivered to the Respondent on July 15, 2010 and also emailed to him. This letter, in strong language, identifies the need for the production of the bank documents and enclosed the bank authorization to be signed by the Respondent. The signed authorization would have permitted the Law Society to obtain the documents directly from the bank. The letter also required that the Respondent provide "at least five days between August 5 and August 12 on which you will be available." The letter demanded that the Respondent respond prior to July 30, 2010.

[15] The Respondent went to rural Saskatchewan on July 21, 2010 to be with his wife's mother, who was terminally ill. He left Vancouver without signing the authorization or otherwise responding to the July 15, 2010 letter.

[16] On July 30, 2010, the Respondent sent an email from his BlackBerry to Mr. Caldwell at the Law Society advising of the death of his mother-in-law and of his having had to go to rural Saskatchewan to be with her and the rest of the family. In this email he advised that he would be returning home to British Columbia the week of August 1, and he indicated that he would comply with the requests contained in the letter of July 15 on his return. This email did not come to Mr. Caldwell's attention because the Respondent addressed it to an incorrect email address, which caused it to be received at the Law Society in the "postmaster" mailbox, from which it was not retrieved until late September.

[17] In fact the Respondent did not return until the middle of August, and he did not immediately respond upon his return.

[18] By letter of August 25, 2010, mailed and emailed, Mr. Caldwell advised the Respondent that his failure to respond to Mr. Barbour and Mr. Caldwell's requests was being referred to the Discipline Committee, which would be meeting on September 1, 2010.

[19] On August 30, the Respondent faxed a letter to Mr. Barbour, attaching a signed authorization to Mr. Barbour to obtain the bank documents in question. In the letter the Respondent advised that he was not in possession of any other files in the KP matter.

[20] On the same day, the Respondent faxed and emailed a response to Mr. Caldwell, attaching his letter to Mr. Barbour. In his letter he also said, "As you are aware from my last email to you which was sent on July 30, 2010 [the email Mr. Caldwell did not receive] there has been some significant upheaval in my family life due to the recent passing of my wife's mother." He also advised that, since returning from Saskatchewan "... my wife continues to have frequent anxiety attacks and emotional breakdowns ..." He acknowledged that he "should have gotten a response to Mr. Barbour earlier," but "did attempt to have Mr. Barbour attend at my office at the end of June but we were not able to arrange a mutually convenient time." He apologized for the delay.

[21] The Respondent testified that, between receiving Mr. Caldwell's letter of August 25 and replying to it on August 30, he telephoned the bank and learned that the documents had not been retrieved. This was the only contact he had with the bank after his initial telephone request to it, of which he had advised Mr. Barbour at their meeting of May 17, 2010.

[22] The signed authorization permitted the Law Society to obtain the needed bank information, and that information was received on September 27, 2010 (four weeks after Mr. Barbour's request). Since there were no other files in the KP matter in the Respondent's possession, Mr. Barbour and the Law Society did not require a further meeting with the Respondent.

Position of the Parties

[23] Chapter 13, Rule 3 of the *Professional Conduct Handbook* states in paragraph (a) that a lawyer must "reply promptly to any communication from the Law Society" and, in paragraph (b), that the lawyer must "provide documents as required to the Law Society." The Law Society submits that failure to reply or to provide documents in a substantive, timely way amounts to professional misconduct.

[24] There is some authority on how the time element, in a case of failure to respond promptly, relates to other circumstances. In *Law Society of BC v. Oldroyd*, 2007 LSBC 6, Mr. Oldroyd was required to respond to a Rule 4-43 order, and he resigned on April 14, 2010. He never co-operated or responded to the various requests. He never appeared at the hearing, nor were there any excuses or explanation offered for the failure to respond. The panel had no difficulty in finding professional misconduct. However, in *Law Society of BC v. Skogstad*, 2008 LSBC 19, the panel found that a delay of three months, which was mostly caused by having to retrieve a file from a client, was not a failure to provide books and records promptly. The panel emphasized that Mr. Skogstad communicated with the Law Society throughout the three months and that the Law Society's investigation was not hampered by the delay. Counsel on behalf of the Law Society took the position that the facts in the case before us amounted to a failure to respond promptly, as set out in the two parts of the citation quoted in paragraph [2] above.

[25] The Respondent submitted that he intended throughout to comply, had not intended to impede the investigation and that, judged in the light of the circumstances, he had not been culpably slow in responding. Much of the delay in producing the bank documents, he submitted, was caused by the inability to find a mutually suitable date for the meeting with Mr. Barbour. He said he wanted to hand over the documents to Mr. Barbour personally, showing his co-operation, rather than to have Mr. Barbour retrieve the documents. The delay in responding to Mr. Caldwell's letter of July 15 was, he said, due to the emergency of his mother-in-law's illness, the need to go to Saskatchewan on July 21 for some weeks, and the need to attend to his family following the mother-in-law's death. He suggests that, because of the circumstances, his response did not amount to failure to respond promptly, nor to "gross culpable neglect of his duties as a lawyer", a test for professional misconduct set out in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 154.

Analysis

[26] The law on failure to respond promptly as constituting professional misconduct is set out in *Law Society of BC v. Dobbin*, 1999 LSBC 27 at paragraphs 21, 23 and 25:

[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:

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.

...

[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 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 willful failure to respond to the Law Society, may be symptomatic of other practice problems involving delay on files or other dereliction of professional duty. ... There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute. ...

[27] On the bank documents, there are some mitigating factors in relation to the period from the meeting of May 18 until July 15, 2010. Although he could have acted more energetically, the Respondent was co-operating with Mr. Barbour. He met with Mr. Barbour on three occasions including May 18, 2010. He provided documents. He tried to meet with Mr. Barbour again, but a mutually convenient date was not found. However, the letter of Mr. Caldwell dated July 15, 2010 and its direct language removed any excuse for further delay. The events since May 18, together with the contents of Mr. Caldwell's letter, required an immediate response. The Respondent did not sign the authorization, and did not write until his email of July 30, 2010. That email only gave reasons why he could not yet respond to the Law Society's requests. Nor did the Respondent act immediately on his return from Saskatchewan. He did nothing until he received the letter of Mr. Caldwell of August 25, which told him the meeting of the Discipline Committee was imminent. We find that the failure to respond in these circumstances to the request for the production of the bank documents does constitute professional misconduct.

[28] On the facts we also find that the Respondent failed to respond promptly or at all to the requirement in Mr. Caldwell's July 15 letter that he provide five days that he was available between August 3 and August 12. As it turns out, a further meeting was not necessary. This is perhaps less serious in result because the

Law Society did not need to meet, but it again points to the importance of immediate and substantive responses.

[29] Decisions concerning the time of prompt response can be difficult because they are driven by circumstances and the facts unique to each case. We have some sympathy for the personal circumstances arising from the family death and mourning. We recognize that delays in responding may be mitigated by compassionate circumstances. However, here the Respondent had no good reason for failing to respond in a substantive way within the two weeks demanded in the July 15, 2010 letter, and his failure was compounded by his continued inaction after his return from Saskatchewan.

[30] We therefore find that it has been proven that the Respondent has committed professional misconduct by failing to provide the bank documents requested by Mr. Barbour, as set out in point a) of the citation, and failing to provide the available dates as requested by Mr. Caldwell in his letter of July 15, as set out in point b) of the citation.