2011 LSBC 05
Report issued: February 17, 2011
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: January 27, 2011

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

Counsel for the Law Society: Maureen Boyd
Counsel for the Respondent: Gordon J. Kehler

Introduction

[1] In the facts and determination phase of this summary proceeding, we found that the Respondent had committed professional misconduct by failing to respond to requests for information by or on behalf of the Law Society. Our reasons were given in a report issued on January 6, 2011 (2011 LSBC 01). We repeat for convenience the two instances of misconduct alleged as points a) and b) in the citation, both of which we found the Law Society had proved:

> 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,
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> a) you did not immediately produce:
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> i. a copy of the statement from a trust company, account number [number] for the period from 31 October to 28 November, 2008;
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> 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,
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> 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;
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> 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.

[2] The Respondent's practice status has changed since the facts and determination phase of this proceeding. He was suspended from practice effective December 7, 2010 under Rule 3-74.1(2) for failure to file his annual Trust Report for 2009. That suspension came to an end as of January 5, 2011, when he filed the report. In the meantime, however, his membership had ceased for non-payment of fees. We were advised by the Respondent's counsel that, before the end of December, the Respondent sent in a renewal of his membership with cheques to cover his fees and other amounts owing to the Law Society, but one cheque was not honoured by the bank owing to a misunderstanding at the bank's end. The result was that the Respondent's practice fee was not paid as of the end of December as required by Rule 2-72(1) and the Respondent automatically ceased to be a member of the Law Society effective January 1, 2011 pursuant to s. 25(1) of the *Legal Profession Act*. We were advised that the Respondent's practice, consisting of 35 to 40 files, is in the hands of a locum, pursuant to Law Society requirements, and that the Respondent intends to apply for reinstatement (Rule 2-52) at the earliest opportunity.

[3] We now give our reasons on the disciplinary action.

Submissions of the Law Society

[4] The disciplinary action sought by the Law Society was a suspension of six to nine months, to commence upon the Respondent's reinstatement as a member, when and if it occurs. It supported this proposed action by reference to the factors enumerated in *Ogilvie*, [1999] LSBC 17, which we consider below. The factors it particularly relied upon were the Respondent's prior disciplinary record, the repeated nature of the misconduct, the need for specific and general deterrence, and the need to ensure the public's confidence in the integrity of the profession by demonstrating that the Law Society effectively deals with lawyers who thwart the investigation of complaints made by members of the public.

[5] The Law Society also noted that it had given the Respondent notice by letter dated October 1, 2010, that it would raise ungovernability as an issue at the disciplinary action phase of the hearing. This met the requirement in Rule 4-35(6) that the Law Society must give 30 days' notice of its intent to raise the issue of ungovernability in a disciplinary hearing. The Society did not seek disbarment on the ground of ungovernability, but argued that the "appearance of ungovernability" called for strong disciplinary action that would bring home to the Respondent that, if he continued to ignore his regulatory body, the outcome would be disbarment.

[6] The Law Society put in evidence the Respondent's Professional Conduct Record. This comprised the following:

> (a) A citation was issued against him on May 25, 2009, for failing to respond to communications from the Law Society and failing to provide a substantive response to a letter and a voicemail message. On July 21, 2009, a hearing panel ordered the Respondent to pay a $2,000 fine and costs of $2,000.
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> (b) The Discipline Committee referred the Respondent to the Practice Standards Committee regarding his breach of Rule 3-44(1) by failing to report unsatisfied judgments to the Law Society within seven days of entry, and regarding the possibility that the Respondent might not be maintaining the standards of financial responsibility set out in the Rules. The Discipline Committee also ordered a Conduct Review, which took place on December 10, 2009. The Conduct Review concerned the Respondent's dealing with his financial difficulties. The four unpaid judgments that led to the Conduct Review were a May 2005 certificate in favour of Revenue Canada for $90,000, of which $40,000 remained unpaid at the time of the Review; a builder's lien for $900 that was registered in November 2005 and still unpaid at the time; a judgment in April 2006 for $18,700 in respect of the Respondent's line of credit, of which

about $11,500 was still owing at the time; and a certificate for PST filed in June 2008 for $5,400, which had been paid in full.

(c) A citation was issued on December 21, 2009, alleging that the Respondent had failed to respond to a letter and a telephone message from the Law Society. These were sent pursuant to an investigation by the Law Society of a complaint by KP, the substance of which was that KP had retained the Respondent in respect of a personal injury matter in or about September 2008 and given him a $2,000 cash retainer, after which the Respondent had failed to respond to KP's repeated telephone calls and messages and so KP could not determine what, if any, steps the Respondent had taken on his behalf. On January 27, 2010, a hearing panel found that both allegations of failure to respond were proved and that they constituted professional misconduct. The hearing as to penalty was adjourned to April 8, 2010, on condition that the Respondent provide a copy of his trust ledgers or records and/or any banking records relating to the $2,000 retainer by February 3, 2010. If the records were not produced, the penalty hearing would take place on February 5, 2010. (See (e).)

(d) At its meeting on March 4, 2010, the Practice Standards Committee considered a Practice Review Report from Law Society staff, dated January 14, 2010 on the Respondent's practice. The Committee accepted 14 recommendations in the report. These included that the Respondent speak immediately to someone at the Lawyers Assistance Program (LAP) and enlist the services of Derek LaCroix, QC, the LAP Director, or an alternative therapist to assist the Respondent in maintaining focus, prioritizing matters and dealing with any emotional stressors contributing to his failure to deal with communications from the Law Society and others. The Respondent was also to take various steps with respect to organizing his files and his office procedures and records. The Committee also ordered a follow-up Practice Review by December 1, 2010, and payment of costs of $3,000 plus HST.

(e) On April 8, 2010, the hearing panel dealing with the citation of December 21, 2009, for failure to respond (see (c)) held its penalty hearing. Stressing that this was a second instance of failure to respond, which followed hard on the heels of the first, the panel ordered that the Respondent be suspended for 45 days from July 16, 2010, and pay costs of $2,500.

(f) On December 7, 2010, the Respondent was notified that he was suspended, effective immediately, for failing to file a completed Trust Report for the period ended December 31, 2009, by the deadline of December 6, 2010. The suspension ended on January 5, 2011, when the Law Society received the completed Trust Report. (By this time the Respondent's membership had ceased for non-payment of fees; see para. [2] above.)

[7] The failures to respond that are the subject of the present proceeding are in effect a continuation of the failures to respond that led to the 45-day suspension from July 16, 2010 (see (e)). In both the earlier proceeding and this one, the Law Society communications and requests in question were part of the same inquiry, namely, whether the Respondent had received a $2,000 retainer from his client KP and, if so, what had happened to it.

Submissions of the Respondent

[8] Counsel for the Respondent described the Respondent's personal circumstances, which so far as relevant are discussed in our reasons below. Counsel introduced into evidence three letters, all dated January 26, 2011. Two were from lawyers who had worked alongside the Respondent; these are discussed below. The third was from GC, an older cousin of the Respondent. He and his wife and three children have had a close relationship with the Respondent, his wife, and their two children. GC's letter describes a

gradual deterioration over the last years in the Respondent's emotional state, his ability to deal with financial matters, and his relationships with those close to him. The Respondent recently admitted to GC that his difficulties stemmed from depression, about which he had been seeing his family doctor for some years. GC said the Respondent had informed him of the issues with the Law Society in some detail, and he (GC) expressed the intention to help the Respondent work his way through his personal difficulties and through the financial consequences of the Respondent's disciplinary situation.

[9] The thrust of counsel's submissions was that the Respondent's misconduct was not chronic, but situational, the result of an accumulation of pressures the Respondent faced in his personal life. The Respondent's behaviour over the last year and a half was atypical of him, and was attributable to his rapidly worsening financial and personal difficulties, together with emotional problems that were related to them. Not only the Respondent, but also his family had experienced emotional strain, notably as a result of illness and death of his wife's mother during the period of the failures to respond in this case. The Respondent, it was argued, had now acknowledged his situation and was taking steps to remedy it. He had retained counsel to assist with his Law Society disciplinary matters; he had advised his wife and family of his difficulties and the reasons for them; he had met with LAP, and he had pleaded guilty to the Canada Revenue Agency's prosecution of him for failures to file and for non-payment of taxes. The Respondent has had a consultation with one psychiatrist and is on the wait list for another psychiatrist to do a full assessment.

[10] The Respondent's counsel suggested that the misconduct here was omission rather than commission. There was no indication that the Respondent's failures to respond were a deliberate attempt to conceal facts or to delay the Law Society's investigation. Counsel proposed that in the light of all the circumstances, three months' suspension would serve the purposes of specific and general deterrence.

Reasons for Decision

[11] We assess the disciplinary action in light of the non-exhaustive list of factors given in *Law Society of BC v. Ogilvie*, 1999 LSBC 17:

(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 on 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.

[12] In this case there was no victim injured by the Respondent's conduct (factor (d)). Nor was there any evidence that the Respondent gained an advantage by his delay in providing the bank records (point (a) of the citation) or by failing to provide dates to meet with Mr. Barbour (point (b)) (factor (e)). No other sanctions or penalties have resulted from the Respondent's failures that are the subject of this proceeding (factor (i)). We therefore do not further consider factors (d), (e) and (i).

[13] On the nature and character of the conduct proven (factor (a)), the Law Society is right to stress the serious nature of any failure by a lawyer to comply with requests for information made by the Society in its regulatory capacity. The capacity of the Society to carry out its statutory responsibilities in the public interest could be impaired or even stultified if lawyers were left under the impression that a failure to comply with the Society's requests for information would lead to only mild penalties.

[14] We also accept the Law Society's argument that the Respondent's misconduct, which is the subject of this proceeding, is aggravated by the fact that, within the last year and a half, he had already been disciplined twice for failing to respond to the Law Society's requests for information. The second of these disciplinary actions related to a request for information in investigation of the same client complaint as the requests in this case, and the Respondent had been suspended from practice for 45 days. He was actually under that suspension for much of the time during which he was failing to respond to the requests in this case. Under these circumstances a significant escalation in disciplinary action is called for.

[15] On factor (b), age and experience, the Respondent is 46 years old and was called to the Bar in 1991. After four years as Crown counsel, his practice has been concentrated in criminal defence work. We were told that he had a busy practice. Counsel for the Respondent provided us with two letters from lawyers who had knowledge of the Respondent's practice. One was Lothar Kiner, who was the Administrative Crown Counsel who supervised the Respondent during his time with the Crown. The other was Peter Wilson, QC, an experienced defence lawyer who, in a four-month trial in 2007, had defended a co-accused who was being tried with the Respondent's client. Both letters described the Respondent as competent and hard-working counsel. Mr. Kiner's letter expresses this opinion while adverting to the Respondent's disciplinary problems with the Law Society; it is not clear from his letter whether Mr. Wilson was aware of the disciplinary events.

[16] Factor (c), the Respondent's previous character and disciplinary record, is important in this case. In the Respondent's favour is that he practised for about 17 years without any problems relating to his professional conduct. Against that, however, must be set the string of largely interrelated disciplinary proceedings since July 2009, as described above in para. [4]. This also relates to factor (f), the number of times the offending conduct occurred.

[17] As to whether the Respondent has acknowledged the misconduct and taken steps to rehabilitate himself (factors (g) and (h)), there was certainly evidence that he acknowledged the misconduct, and there were at least indications that he was, at long last, taking steps to deal with his financial and organizational problems and the emotional difficulties that seem to underlie them. He has begun to seek help by retaining counsel to represent him in these proceedings, by contacting LAP, and by consulting a psychiatrist. He is attempting to get his financial affairs under control. We know of no reason why the Respondent should not be able to overcome his difficulties and resume what, until 2009, was an unblemished record in the practice of law. On the other hand, the positive steps the Respondent has taken are all extremely recent, and it is too soon to say whether or not they truly mark a turning of the page.

[18] In assessing the length of a suspension it is appropriate to take into account the impact that the suspension will have on the Respondent (factor (j)). The Respondent is a sole practitioner mainly doing

criminal defence work. The longer the suspension, the more seriously his practice is likely to be eroded. He is the sole income earner in the family. We were told that he has no savings and no assets except for his share of the equity in the family home. The cessation of income from practice is expected to require borrowing on the security of the family home, if that can be arranged. The Respondent has received notice of foreclosure on his mortgage loan on the house but we were told there is enough equity in the property that finding a lender who will make an additional loan appears feasible. The longer the suspension, the more he and his family will be put under financial strain.

[19] As for deterrence, the Respondent's failure to alter his behaviour, even after the previous disciplinary measures against him, clearly makes specific deterrence (factor (k)) a major consideration. As counsel for the Law Society pointed out, the Respondent not only persisted in a pattern of failing to respond to Law Society communications, but he also failed, until the last few weeks, to take any of the steps ordered by the Practice Standards Committee in March 2010 (see para. [4], item (d)). General deterrence (factor (l)) is always important in cases of failure to respond, because of the vital public interest in maintaining the Law Society's ability to respond to complaints promptly and effectively.

[20] Given that a 45-day suspension was ordered for previous failures to respond, and the Respondent persisted in his pattern of misconduct, the disciplinary measure in the present case must clearly be a suspension and it must be a substantially longer suspension.

[21] The precedents on failure to respond give some guidance. In the cases the Law Society put before us, by far the longest suspension was that in *Law Society of BC v. Basi*, 2007 LSBC 25. The lawyer had previously been suspended for four months (2005 LSBC 1) for breaches of two undertakings, two instances of failures to respond to communications from the Law Society, and failure to respond to communications from another lawyer. In the later proceeding he was found to have failed to provide quality service, failed to respond to the client, and failed twice to respond to the Law Society. The lawyer told the hearing panel he did not intend to practise law in the future, although the panel (at para. 21) attributed the statement to his remorse and to his fragile psychological condition. The panel ordered that he be suspended for 18 months. We note that the circumstances in *Basi* were quite different from those in this case, including the fact that the misconduct found there extended beyond the lawyer's behaviour vis-à-vis the Law Society to his behaviour vis-à-vis other lawyers and his client, a pattern of failures a good deal broader in scope than that in this case.

[22] The other failure to respond cases involved penalties ranging from a reprimand to a three-month suspension. The latter was ordered in *Law Society of BC v. Ashton*, 2004 LSBC 12, in which the respondent lawyer failed, over a period of seven months, to respond to communications from another lawyer.

[23] A matter discussed in *Basi*, 2007 LSBC 25, and also raised in this case by the Law Society (see para. [5]), is ungovernability. In this case the Society did not take the position that the Respondent was ungovernable and so should be disbarred. However, counsel did suggest that the "appearance of ungovernability" in the Respondent's conduct was a distinct reason for lengthening the period of suspension. Law Society counsel did not press that argument, and we do not rely on it. It seems to us that the other factors we have noted enable an appropriate disciplinary action to be set. In addition, any arguments about the Respondent's suitability for practice can be raised and considered as part of the reinstatement process, if and when the Respondent applies for reinstatement.

[24] Considering all of the factors discussed above, we are of the opinion that an appropriate disciplinary action in this case is that the Respondent be suspended from practice for four months.

[25] The Law Society's position was that any period of suspension should run from the date when the

Respondent is reinstated to membership, assuming he applies for reinstatement and that the application is successful. This position was based on the argument that if the period of suspension was partly or wholly consumed by the process of applying for and being granted reinstatement, the suspension would not be meaningful. That argument might be persuasive if the timing of the reinstatement were more or less in the Respondent's control. This was so in *Law Society of BC v. Jackson*, 2008 LSBC 28, in which the suspension was ordered to run from the time when the lawyer secured a change in his status from non-practising to practising. The reinstatement process here, however, may well involve a Credentials Committee hearing. The effective punishment being imposed is exclusion from practice. The Respondent is currently excluded from practice by the lapse of his membership. We were told that he intends to apply for reinstatement as soon as he can. We think that it would not be fair to make the end-date of the suspension vary, by weeks or months, depending on how long it takes for the reinstatement process to be completed. The four-month period of suspension will therefore run from the date our decision is issued.

[26] At the hearing, the panel discussed with counsel the potential need for evidence, if and when the Respondent applies for reinstatement, as to his mental and physical fitness to practise. We note this discussion because, although a good deal of the argument of Respondent's counsel was based on the Respondent's emotional and mental circumstances at the time of the misconduct, we had to make our decision without any actual medical evidence. We leave it to the Credentials Committee, however, to decide what evidence may be needed upon an eventual application for reinstatement.

[27] As for costs, the Law Society sought an order for costs of $3,500, which was higher than the costs order made in earlier cases of this type that it cited to us. The additional costs were attributed to the adjournment of the first hearing date at the Respondent's request, made two days before the hearing; the need for the present case to be heard over two days, as a result of the adjournment, again at the Respondent's request, of the disciplinary action portion of the proceeding; and the more complex legal issues raised in this proceeding as a result of the Respondent's Professional Conduct Record. While these factors were present, we think it is hard to say what effect they had on the cost of the proceedings to the Law Society, and so our order for costs is in the amount of $2,500.

Disciplinary Action

[28] For the reasons given, the Panel orders:

1. The Respondent is suspended for four months commencing on the date this decision is issued.

2. The Respondent must pay a contribution to the costs of these proceedings in the amount of $2,500, payable by October 31, 2011.