

2011 LSBC 25

Report issued: August 30, 2011

Citation issued: August 12, 2009

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

Douglas Warren Welder

Respondent

**Decision of the Hearing Panel
on Disciplinary Action**

Hearing date: By written submission

Panel: Leon Getz, QC, Chair, Robert Brun, QC, Alan Ross

Counsel for the Law Society: Maureen Boyd

Appearing on his own behalf: Douglas W. Welder

Background

[1] This Panel delivered its decision on Facts and Verdict orally on March 4, 2010, and the written decision was issued March 24, 2010 (*Law Society of BC v. Welder* 2010 LSBC 05). The Panel dismissed allegations 1(a) and (b) of the citation, but found that allegation 1(c) had been made out. The Discipline Committee requested a Review of the finding in relation to allegation 1(a). The Benchers on Review found that allegation 1(a) was proven and constituted professional misconduct (*Law Society of BC v. Welder* 2011 LSBC 06).

[2] By agreement, the evidence and argument on the disciplinary action phase were submitted in writing. There was no oral hearing.

[3] As noted in the Decision of Facts and Verdict, this matter related to the Respondent's grudging and incomplete cooperation with the Law Society during an audit and investigation.

[4] The Law Society tendered a further affidavit of Mr. Howie Caldwell, a staff lawyer in the Professional Conduct Department of the Law Society. Mr. Caldwell deposed that, after the hearing of Facts and Verdict, the Respondent provided a substantive response to the Law Society:

(a) On March 10, 2010, answering four of the questions in the letter of Mr. Caldwell dated April 17, 2009; and

(b) On August 17, 2010, documents requested in paragraph (j) of Mr. Caldwell's April 17, 2009 letter were produced.

[5] Also tendered into evidence was the Professional Conduct Record of the Respondent.

DELAY

[6] Both the Law Society and the Respondent provided written submissions. Following the decision of the Benchers on Review, this Panel provided direction to the parties on a timeline for delivering written submissions on the disciplinary action to be imposed. That direction required that the Law Society provide written submissions on or before April 5, 2011. The Respondent was directed to provide his submissions within 21 days of the receipt of the Law Society's submissions. The Law Society was given a further seven days to provide reply submissions. All of the submissions were then to be forwarded to this Panel at one time.

[7] The Law Society submissions were received on March 14, 2011. After the expiry of the 21 days, no submissions having been received from the Respondent, the Law Society's submissions were circulated to this Panel on May 2, 2011. The Panel convened a preliminary meeting to consider the issue of disciplinary action in light of the Law Society's submissions.

[8] The Respondent delivered his written submissions on June 13, 2011, well after the date directed by this Panel and after the Panel had initial discussions regarding disciplinary action. Despite the late delivery of the Respondent's submissions, we have reviewed them and given them due weight.

POSITION OF THE LAW SOCIETY

[9] In determining disciplinary action for the Respondent, the Law Society submits that the Panel should consider the factors set out in *Law Society of BC v. Ogilvie*, [1999] LSBC 17.

[10] The Law Society's position is that a combination of factors makes this an appropriate case for a suspension. Those factors include:

- (a) the conduct that was the subject of the citation;
- (b) the period of time over which the conduct occurred;
- (c) the limited chance at remediation;
- (d) the Respondent's propensity toward failure or refusal to comply with regulatory requirements;
- (e) the need for specific deterrence; and
- (f) the Respondent's prior discipline history.

[11] The Law Society notes that the Respondent's discipline history includes five prior conduct reviews and four prior citations. On two occasions he has been suspended by the Law Society for periods of 60 days and three months respectively.

[12] Based on all of the evidence tendered and prior decisions relating to penalty, the Law Society submits that the appropriate disciplinary action would be:

- (a) a suspension of one to three months to commence on the first of the month following the date upon which this Panel issues its decision on disciplinary action; and
- (b) an order of costs in the amount of \$3,000 payable to the Law Society by October 31, 2011.

POSITION OF THE RESPONDENT

[13] The Respondent submits that the appropriate disciplinary action would be a reprimand, or a fine of less than \$2,000.

[14] The Respondent submits that:

- (a) He had given the Law Society investigators the information about his bank accounts verbally at the beginning of the investigation.
- (b) His refusal to answer was based on his belief that he had provided the information that had been requested.
- (c) In other cases involving a failure to respond to the Law Society, a fine of \$1,000 to \$3,000 has been imposed (*Law Society of BC v. Tak*, 2009 LSBC 25, at para. 32).
- (d) There was no victim in this instance, and no advantage to the Respondent.
- (e) This was a first time offence, and the Respondent immediately responded after the decisions of the Panel and the Benchers on Review.

[15] The Respondent further submits that the concept of rehabilitation does not arise because this incident constitutes a “one-off” event, and he has never failed to respond to the Law Society on any other occasions.

[16] Finally, the Respondent submits that a fine would be appropriate because, as a sole practitioner, a suspension would have a severe effect on his practice. He says that the public’s confidence in the integrity of the profession would be satisfied by the imposition of a fine.

[17] With respect to costs, the Respondent submits that no order should be made, or that an award of \$1,500 would be appropriate. He submits that the factors discussed in *Law Society of BC v. Racette*, 2006 LSBC 29 should be considered.

DISCUSSION

[18] This Panel and the Benchers on Review found that the Respondent’s actions, or inactions, in failing to respond to questions from the Law Society constituted professional misconduct. Both decisions refer to the decision in *Law Society of BC v. Dobbin*, [1999] LSBC 27, which describes the seriousness with which this offence is viewed.

[19] As noted in our original decision on Facts and Verdict, the Panel expressed its dissatisfaction with the “cat and mouse” game played by the Respondent in respect of the audit and investigation. The Respondent himself testified that, while he did not attempt to obstruct the investigation, he did not believe it was his duty to assist it.

[20] During the investigation, there were lengthy periods during which the Respondent failed to answer the requests of the Law Society. The findings of this Panel and the Review panel do not arise from a single incident of failing to respond to the Law Society. Instead, the failure amounts to a pattern of conduct over a period of many months and many letters.

[21] The Panel considers the Respondent’s conduct to be grave. His conduct, both during the audit and the later investigation, showed a deliberate and prolonged failure or refusal to cooperate with the Law Society’s investigators.

[22] The Respondent was called to the Bar in 1981. As noted above, he has a significant disciplinary history including two suspensions.

[23] Although the Respondent says that his actions had no victim and no impact in this case, it is clear that the victim was, in fact, the Law Society of British Columbia and thus the lawyers of this Province and the public whose interests the Law Society is bound by statute to uphold and protect. The Law Society was

forced to expend significant resources pursuing an investigation instead of completing an audit that should have been straightforward.

[24] Although the Respondent has now complied with the Law Society's requests for information, his submissions regarding disciplinary action indicate that he does not believe that his conduct was serious. To that extent he has not acknowledged his own misconduct, and there are no mitigating circumstances.

[25] The Law Society submission discusses the possibility of remediation or rehabilitation. The Respondent's position is that he does not believe that he needs remediating. These reasons should indicate that this Panel does not agree with that position. His discipline history indicates that attempts to remediate the Respondent in the past have been unsuccessful. We view the facts that formed the basis of this citation to be further occurrences of the Respondent's pattern of misconduct.

[26] The Respondent submitted that the Law Society's proposed disciplinary action of a suspension would be very severe given the fact that he is a sole practitioner. As noted, the Respondent has been suspended twice in the past. It was completely within his power to cooperate with the Law Society's audit and investigation. Instead, he chose a different path. He cannot now say that a suspension from practice is too severe a penalty.

[27] Finally, we note that there is a need for specific and general deterrence and there is a need to ensure that the public's confidence in the integrity of the profession is maintained.

[28] The Law Society has outlined a number of cases in which lawyers have been suspended for actions similar to those of the Respondent. We find the decisions in *Law Society of BC v. Williamson*, 2005 LSBC 19 and *Law Society of BC v. Tak*, 2010 LSBC 13 to be the most instructive. In those cases, the respondents were suspended for 45 days. In both of those cases, the prior professional conduct record of the respondent was less problematic than that of the Respondent in this case.

[29] As noted above, the Respondent submitted that he does not require rehabilitation because this incident was a "one-off" event. He stated that he has never failed to respond to the Law Society on any other occasion. His submissions on this point were made well after the time period directed by this Panel had expired. The irony of his "one-off" submission appears to have eluded the Respondent.

[30] The Panel has reviewed the cases submitted by the Law Society. We have decided that the appropriate disciplinary action is a suspension for 45 days, commencing on October 1, 2011.

COSTS

[31] As noted above, the Law Society seeks an award of costs in the amount of \$3,000. The Respondent submits that no award should be made, or alternatively, that an award of \$1,500 is appropriate.

[32] We have considered the factors in *Law Society of BC v. Racette*, 2006 LSBC 29, including the seriousness of the offence, the financial circumstances of the Respondent, the total effect of the Penalty (including the effect of the suspension) and the extent to which the conduct of the parties resulted in costs accumulating.

[33] As noted above, we found the offence to be serious.

[34] We have no information regarding the financial circumstances of the Respondent, although we anticipate that the suspension from practice will have a significant effect on his income.

[35] In this case, it was clear that the Respondent's conduct was not only the sole reason for the audit and the investigation, but also for the citation and the hearing. As noted in our original decision on Facts and

Verdict, it was only during his testimony at the hearing that the Respondent confirmed that he did not have another trust account. That was part of the information that the Law Society had been seeking from him for several months. If the Respondent had cooperated with the audit and investigation, then the total expenditure in this case would have been a reasonable amount. The Law Society had to commence an investigation and write numerous letters to the Respondent because of his professional misconduct in failing or refusing to respond.

[36] In our opinion, the factors listed in the prior paragraph far outweigh any factors that might form the basis of an argument for a lower award of costs.

[37] As a result, we order that the Respondent pay costs in the amount of \$3,000.

ORDER

[38] We order that the Respondent:

- (a) is suspended from the practice of law for 45 days, effective October 1, 2011; and
- (b) pay the Law Society costs in the amount of \$3,000 on or before October 31, 2011.