

2012 LSBC 17

Report issued: May 17, 2012

Oral Reasons: March 23, 2012

Citation issued: November 10, 2011

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

John Lyndon Decore

Respondent

**Decision of the Hearing Panel
on Facts, Determination and Disciplinary Action**

Hearing date: March 23, 2012

Panel: Gregory Petrisor, Chair, Linda Michaluk, Dale Sanderson, QC

Counsel for the Law Society: Alison Kirby

Appearing on his own behalf: J. Lyndon Decore

preliminary matters

[1] The Respondent faces a citation that alleges:

1. You failed to provide a substantive response, promptly or at all, to communications from the Law Society regarding your completion of the required professional development, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular you failed to respond to some or all of:

(a) letters dated December 31, 2010, March 9, 2011, May 12, 2011, July 15, 2011, July 29, 2011, and August 17, 2011; and

(b) an email dated August 31, 2011.

This conduct constitutes professional misconduct.

[2] The Respondent was served with the citation on November 16, 2011. He admits service of the citation and admits receipt of the Notice of Hearing.

[3] The hearing proceeded by way of summary hearing, authorized by Rule 4-24.1. The Law Society provided evidence by way of two affidavits sworn by Lesley Small, Manager of the Credentials and Licensing Department, and an affidavit sworn by Tara McPhail, a Law Society staff lawyer in the Investigations, Monitoring and Enforcement Department.

[4] Ms. Small, in her affidavit, deposed:

(a) The Respondent's membership with the Law Society was suspended on April 8, 2010, pursuant to Rule 3-18.5, as a result of the Respondent's failure to complete and certify his

completion of his 2009 continuing practice development requirements.

(b) On April 8, 2010, Ms. Small sent a letter to the Respondent advising him of the suspension.

(c) The letter was sent by Ms. Small to the Respondent's address which he had given to the Law Society as his place of business.

(d) The Respondent did not respond to that communication.

(e) By letter dated December 23, 2010, the Respondent wrote to Ms. Small using a different return address than that which was on file with the Law Society.

(f) Ms. Small, on December 31, 2010, sent a letter to the Respondent to the second address, asking for a response in respect of his 2009 and 2010 continuing practice development requirements, and also asking for the Respondent's advice as to whether or not he had engaged in the practice of law since his suspension on April 8, 2010.

(g) The Respondent did not respond to that communication.

(h) Ms. Small wrote the Respondent again on March 9, 2011, confirming that he would continue to be suspended until such time as both his 2009 and 2010 continuing practice development requirements were met and certified. Ms. Small asked the Respondent for his written advice as to whether he intended to meet those requirements, and if so, his plan for doing so. Ms. Small also mentioned that the Respondent could be referred to the Discipline Committee or the Chair.

(i) The Respondent did not respond to that communication.

(j) On May 12, 2011, Ms. Small again wrote to the Respondent, confirming that he could be referred to the Discipline Committee or its Chair. Ms. Small also pointed out to the Respondent that a lawyer must promptly reply to any communication from the Law Society. She asked for the Respondent's response within two weeks.

(k) The Respondent did not respond to that communication.

[5] In her affidavit, Ms. McPhail deposed:

(a) On July 15, 2011 and July 29, 2011, Ms. McPhail wrote to the Respondent asking for a response. These letters were sent to the Respondent at the first address which the Law Society had on file for the Respondent.

(b) The Respondent did not respond to either of those letters.

(c) On August 17, 2012 Ms. McPhail again wrote the Respondent asking for a response. She enclosed copies of her earlier letters, and sent them via courier and Canada Post to both the addresses of the Respondent on file with the Law Society, and also the address provided by the Respondent in his December 23, 2010 letter to Ms. Small.

(d) The Respondent did not respond to that communication.

(e) On August 31, 2011, Ms. McPhail attempted to contact the Respondent by telephone at his last known telephone number and by email to the last known email address of the Respondent.

(f) The Respondent did not respond to the email.

(g) On October 12, 2011, Ms. McPhail sent another letter to the Respondent, delivered to both addresses. She advised the matter had been referred to the Discipline Committee for its

consideration. For the first time, one letter, specifically the one sent to the address on file was returned with the notation “No longer at this address”.

(h) The Respondent did not respond to that correspondence.

[6] As stated, the Respondent was personally served with the citation on November 16, 2011.

[7] On January 1, 2012, the Respondent ceased being a member of the Law Society for non-payment of his annual membership fees.

[8] We were advised that the Respondent, in a conversation with Law Society counsel prior to the hearing, advised that he did not take issue with the facts as alleged by the Law Society. At the hearing, the Respondent did not dispute any of the facts as alleged by the Law Society.

[9] The Respondent gave viva voce evidence at the hearing. He admitted receiving at least some of the letters sent to him by Ms. Small and by Ms. McPhail. He admitted that he did not respond to that correspondence. He advised he did not challenge the allegation of professional misconduct. The Respondent also gave evidence of his personal circumstances in 2010, 2011 and early 2012. He gave evidence of his employment history dating back to 1997.

[10] The Respondent stated he did not want to make excuses for not responding to the Law Society’s communication.

[11] At the conclusion of the hearing, the Hearing Panel considered the evidence and material provided, and gave its oral decision and Order. We promised to provide written reasons, and these are those reasons.

DISCUSSION

[12] Chapter 13, Rule 3 of the *Professional Conduct Handbook* states:

A lawyer must:

(a) Reply promptly to any communication from the Law Society;

[13] The onus is on the Law Society to prove the allegations it makes, and the standard of proof is the balance of probabilities, as stated in *Law Society of BC v. Tak*, 2009 LSBC 25.

[14] Given the evidence offered by the Law Society, and given also that the Respondent has not challenged that evidence, we find, on a balance of probabilities, that the Respondent did in fact fail to respond to communication from the Law Society that he received.

[15] As stated in *Law Society of BC v. Martin*, 2005 LSBC 16, and adopted by a Review Panel of Benchers in *Re Lawyer 11*, 2011 LSBC 35, the test for professional misconduct is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members. If so, it is professional misconduct.

[16] In *Law Society of BC v. Malcolm*, 2012 LSBC 04, the hearing panel held that a lawyer’s failure to respond to communication from the Law Society is prima facie professional misconduct. Numerous other decisions, including *Law Society of BC v. Tak* (supra), and *Law Society of BC v. Dobbin*, [1999] LSBC 27, have held that the failure to respond to communication from the Law Society constitutes professional misconduct.

[17] Having regard to the facts before us, in light of the repeated attempts by Law Society staff to elicit a response from the Respondent and his prolonged and unexplained failure to respond, and also given the

Respondent's admissions, we conclude that the Respondent's conduct does constitute professional misconduct.

Disciplinary Action

[18] The Law Society seeks a fine in the amount of \$2,500, costs in the amount of \$2,500 and an Order that the Respondent provide a written response to the letters sent to the Respondent by the Law Society staff dated December 31, 2010, March 9, 2011, and July 15, 2011. A specific draft Order was provided by counsel for our consideration.

[19] Counsel for the Law Society argued that the protection of the public, and maintenance of the public's confidence in the regulation of the profession require significant sanction in this case. Among the decisions cited by Ms. Kirby, *Law Society of BC v. Malcolm* (supra), *Law Society of BC v. Tak* (supra) and *Law Society of BC v. Cunningham*, 2007 LSBC 17, involved facts similar to the facts in this matter. Each of these decisions included a fine of \$2,000 and costs ranging from \$2,000 to \$5,000. The sanctions imposed in *Malcolm* and *Tak* included an order that the Respondent respond to communication from Law Society staff within a specific time.

[20] Ms. Kirby advised that actual costs were approximately \$6,000, which is perhaps slightly above normal, in part, because of an adjournment of the hearing requested by the Respondent.

[21] The Respondent asked for a reprimand and no fine, and a reduced amount of costs. He suggested \$1,500 as an appropriate figure for costs. He argued that he does not, and did not at any material time, take work from clients, and accordingly there has been no harm to the public or the public's perception of the regulation of the legal profession. He argued that in several decisions, including *Dobbin* (supra), *Law Society of BC v. Lebeau*, 2010 LSBC 12, and *Law Society of BC v. Racette*, 2005 LSBC 36, the sanction given was a reprimand.

[22] The Respondent advised that he could pay a fine and costs in the range suggested by Law Society counsel.

[23] While it seems apparent that, at all material times, the Respondent was not engaged in the traditional practice of law on behalf of clients, he was nonetheless subject to the normal obligations of all members of the Law Society. Those obligations are accepted as necessary for the preservation of self-regulation. The Law Society must effectively regulate its members and must have the confidence of the public in its ability to successfully regulate its members. The repeated failure to respond to communication from the Law Society over a long time span that has occurred in this case, does harm or could potentially harm the public perception of the Law Society's ability to effectively regulate its members. Accordingly, the sanction imposed must be meaningful.

[24] In the cases provided to us earlier, the sanctions imposed range from a reprimand to a suspension of two months. In the majority of those decisions, the sanction imposed was a fine.

[25] In this matter, aggravating factors include the following:

(a) The failure of the Respondent to respond to communication from the Law Society was persistent and occurred over an extended period of time.

(b) The Respondent, right up to the conclusion of the hearing, offered no explanation for his failure to respond.

(c) The Respondent's Professional Conduct Record includes an administrative suspension for failing to complete and certify continuing professional development requirements.

[26] Mitigating factors include the following:

- (a) The Respondent did not gain any advantage.
- (b) The Respondent has acknowledged the misconduct.

[27] Weighing the factors set out above, we are of the view that a fine in the amount of \$2,000 is appropriate, and within the range suggested by the authorities cited above.

[28] The order suggested by Ms. Kirby, that the Respondent respond to the letters to him from Law Society staff dated December 31, 2010, March 9, 2011 and July 15, 2011, is appropriate. Aside from any sanction for failing to respond, the point of this matter is to ensure that the Respondent provides a substantive response to communication from the Law Society. The Respondent assured the Hearing Panel that he will reply to the questions in those letters from the Law Society described above by April 30, 2012. The Respondent did not oppose the suggested order that he respond by a date specific.

[29] In respect of costs, the amount of \$2,500 is cited by counsel as being approximately 21 percent of the total estimated costs and disbursements in relation to this matter. That figure is within the range suggested by authorities, and below the usual 30-40 percent of the actual cost indemnity sought by the Law Society. In all the circumstances, we find the amount of \$2,500 for costs reasonable and appropriate.

ORDER

[30] The Hearing Panel orders that the Respondent:

- (a) pay a fine in the amount of \$2,000, pursuant to Section 38(5)(b), payable on or before April 30, 2012;
- (b) provide in writing a substantive response to the Law Society's letters to him dated December 31, 2010, March 9, 2011 and July 15, 2011 on or before April 30, 2012;
- (c) pay costs in the amount of \$2,500 to the Law Society on or before April 30, 2012.