2012 LSBC 18
Report issued: May 17, 2012
Oral Reasons: April 27, 2012
Citation issued: March 22, 2011

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

Hearing date: April 27, 2012
Panel: **Majority decision**: Tony Wilson, Chair, William Jackson, QC **Minority decision:** David Chiang

Counsel for the Law Society: Carolyn Gulabsingh
Appearing on his own behalf: Douglas Welder

Background

[1] This hearing was ordered in a citation authorized by the Discipline Committee on March 2, 2011, issued on March 22, 2011 and amended under Rule 4-16(1)(a) on November 30, 2011.

[2] The citation pertains to a matter in which the Respondent failed to communicate with the Law Society regarding two Requirements to Pay issued by the Canada Revenue Agency ("CRA") in October 2007 and December 2008, and from the Respondent's failure to comply with the provisions of a Law Society Review Panel Order made June 8, 2007. The citation alleges that conduct constitutes professional misconduct or a breach of the Act or rules for the former and alleges that conduct constitutes professional misconduct or conduct unbecoming for the latter.

[3] The Respondent admits service of the amended citation.

[4] This matter came before the Hearing Panel pursuant to Rule 4-22, which allows the Panel to accept a conditional admission of a discipline violation and proposed disciplinary action. The Respondent has conditionally admitted that his conduct in respect of both allegations in the amended citation constitutes professional misconduct.

[5] The Respondent has proposed disciplinary action of a suspension of three months, commencing May 1, 2012 and costs in the amount of $2,500, payable by October 31, 2012. The Respondent also expressly acknowledged that publication of the circumstances summarizing this admission would be made pursuant to Rule 4-38 and that such publication would identify the Respondent.

[6] At the conclusion of the hearing, the Panel gave its decision orally. The Panel found that the conduct specified in the amended citation was proven, and that the agreed upon suspension and costs are within the range of appropriate disciplinary action. The Panel ordered that the Respondent be suspended from the practice of law for three months, commencing May 1, 2012 and that he pay costs of $2,500 by October 31,

2012. These are our written reasons.

Facts

[7] The Respondent was called to the bar in British Columbia on May 12, 1981. After his call, he practised law in Kelowna. Since May 1991 he has been self-employed as a sole practitioner.

[8] Law Society counsel and the Respondent filed an Agreed Statement of Facts. That Agreed Statement of Facts sets out the following:

> 1. In October 2007 and December 2008, two certificates were registered in the Federal Court by the Canada Revenue Agency ("CRA") for debts owed by Mr. Welder.
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> 2. Between February 2009 and February 2010, staff from the Law Society's Audit and Investigation department wrote to Mr. Welder to inquire about the current amount owing to CRA. Staff wrote six times to inquire but Mr. Welder did not reply to any of the correspondence.
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> 3. Audit and Investigation staff referred the matter to the Law Society's Professional Conduct department. Staff from that department wrote to Mr. Welder in March 2010 and asked him to reply to the letters from the Audit and Investigation department and to address the reasons why he had earlier failed to respond.
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> 4. Mr. Welder wrote to the Law Society on April 5, 2010 and advised that he did not know the exact amount he currently owed to CRA, but if the amount was still required he would obtain it from the CRA.
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> 5. Staff from the Professional Conduct department wrote to Mr. Welder again on April 14, 2010 and asked him to confirm the amount of his debt to CRA and to address why he failed to reply to the Audit and Investigation department. Mr. Welder replied by letter dated May 31, 2010 and advised that he would provide the "CRA figures" as soon as he received them from CRA. He added, "As to your second questions [sic], I can only add that it appears I never dealt with the correspondence. Otherwise, I have nothing to add."
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> 6. On June 11, 2010, Mr. Welder informed the Law Society of the amount he owed to CRA as of June 1, 2010.
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> 7. In January, 2011, Law Society staff wrote to Mr. Welder to advise that the matters of his failure to respond and his failure to deliver a proposal of how he would satisfy the judgments would be referred to the Discipline Committee. Staff invited Mr. Welder to deliver a proposal regarding satisfaction of the CRA debt before the matter was considered by the Discipline Committee. Mr. Welder did not reply to the Law Society's letter and did not provide a proposal regarding satisfaction of the judgments.
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> 8. Concerning the allegation of failure to comply with the Review Panel decision, the parties agree that on June 8, 2007 the Benchers on Review ordered Mr. Welder suspended from practice for three months, and ordered that, upon his return to practice, he provide the Law Society with monthly proof that he had remitted taxes due pursuant to the *Income Tax Act*, the *Excise Tax Act* and the *Social Services Tax Act*.
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> 9. On December 17, 2009 Law Society staff from the Audit and Investigation department wrote to Mr. Welder to inquire about the proof of payment of the Social Services tax. Mr. Welder did not

reply. Staff wrote to Mr. Welder again in January 2010 and asked him to respond to the December 17 letter by February 4, 2010.

10. On February 5, 2010, Mr. Welder provided proof he had paid the Social Services tax but did not provide his GST return nor proof he had paid the GST, due ending December, 31, 2009. Staff from the Audit and Investigation department wrote to Mr. Welder again on March 9, 2010 to repeat the inquiry. On March 24, 2010, as there had been no reply from Mr. Welder, staff again wrote requesting a reply.

11. Mr. Welder provided the GST return and proof of payment for the period ending December 31, 2009 on April 5, 2010. The response confirmed that in January, 2010, Mr. Welder paid $900 of the $3,858.42 due. He paid the balance on March 30, 2010.

DISCUSSION

[9] Chapter 13, Rule 3 of the *Professional Conduct Handbook* states that lawyers are required to reply promptly to any communication from the Law Society as well as to provide documents as required by the Law Society, not to obstruct or delay Law Society investigations improperly and to cooperate with Law Society investigations and audits.

[10] The Benchers have concluded in *Law Society of BC v. Dobbin*, [1999] LSBC 27 “that unexplained persistent failure to respond to Law Society communications will always be prima facie evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct.”

[11] This principle has been followed in many cases and was commented on in *Law Society of BC v. Cunningham*, 2007 LSBC 17. In paragraph [22] of that decision the hearing panel said:

> It is hardly necessary for us to repeat what many panels before us have said, which is that the LSBC cannot satisfactorily discharge its function of over-seeing the conduct of its members unless the members respond as required to LSBC investigations. The same must be said about inquiries concerning member conduct initiated by the LSS. The LSBC must remain vigilant. If members of the public were to come to think that the LSBC pursues its investigations casually, by not requiring those under investigation to respond promptly and comprehensively, it might be thought that someone other than lawyers should govern the legal profession. If self-governance were lost, lawyer independence, of which self-governance is an essential element, would be lost as well, and that loss would be contrary to the public interest.

[12] The obligation to immediately notify the Law Society of an unsatisfied monetary judgment under Rule 3-44 is part of a lawyer’s professional responsibility.

[13] As previously, stated, we find that the allegations of professional misconduct contained in the amended citation have been proven.

APPROPRIATENESS OF DISCIPLINARY ACTION

[14] Many of the factors for this Panel to consider on disciplinary action are set out in *Law Society of BC v. Ogilvie*, (1999) LSBC 17. These include:

(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 or redress the wrong and the presence or absence of other mitigating factors;

(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.

[15] This is a Rule 4-22 hearing. As such, the function of the Panel is limited to either accepting or rejecting the proposed disciplinary action. The test to be applied is whether the proposed disciplinary action is within the range of a "fair and reasonable disciplinary action in all of the circumstances".

[16] The test is set out in *Law Society of BC v. Rai*, 2011 LSBC 2 at paragraphs [6] through [8]:

> This proceeding operates (in part) under Rule 4-22 of the Law Society Rules. That provision allows for the Discipline Committee of the Law Society and the Respondent to agree that professional misconduct took place and agree to a specific disciplinary action, including costs. This provision is to facilitate settlements, by providing a degree of certainty. However, the conditional admission provisions have a safeguard. The proposed admission and disciplinary action do not take effect until they are "accepted" by a hearing panel.
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> This provision exists to protect the public. The Panel must be satisfied that the proposed admission on the substantive matter is appropriate. In most cases, this will not be a problem. The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"
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> This approach allows the Discipline Committee of the Law Society and the Respondent to craft creative and fair settlements. At the same time, it protects the public by ensuring that the proposed disciplinary action is within the range of fair and reasonable disciplinary actions. In other words, a degree of deference should be given to the parties to craft a disciplinary action. However, if the disciplinary action is outside of the range of what is fair and reasonable in all the circumstances, then the Panel should reject the proposed disciplinary action in the public interest.

[17] In the case at hand, the Respondent's conduct was ongoing, repeated and occurred over a period of approximately 20 months. He failed to respond substantively to seven letters from the Law Society between February 2009 and January 2011. Indeed, his actions were obstructionist in nature. In a letter to the Law

Society dated April 5, 2010 he stated “I do not recall that the Review Panel decision from June of 2007 required me to produce worksheets to support the calculations of the payments that I am required to make,” despite the wording of the Order requiring him to fully co-operate with the Discipline Committee and for him to provide all information requested by it.

[18] The Respondent’s conduct was similar concerning his failure to provide a proposal to satisfy the judgments. He had also failed to respond to staff inquiries about a proposal to satisfy the CRA judgments. He had been offered a final chance to provide a proposal in January 2011 and again failed to do so.

[19] The pattern of misconduct, particularly when combined with an admission of a failure to comply with the provisions of an earlier Review Panel decision, strike at the ability of the Law Society to perform its core function, which is to regulate its members in the public interest.

[20] Indeed, the Panel was troubled with the Respondent’s comment during the hearing: “I am hopeful that I will change my behaviour,” which is not the same as “I will change my behaviour.”

[21] The Respondent also gained an advantage from the misconduct by failing to prove to the Law Society that his payments to the CRA were current. He had the benefit of use of the funds he had collected for taxes but which had not been remitted.

[22] The Respondent has a Professional Conduct Record comprising five Conduct Reviews and five prior citations, as set out below:

> July 3, 1992 Conduct Review for conflict of interest arising in a failed real estate transaction in which the Respondent acted for the vendor and a partner in his firm acted for the purchaser.
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> July 24, 1994 Conditional admission pursuant to Rule 468 (now Rule 4-21) in respect of the Respondent’s conduct in making unsubstantiated allegations against another lawyer. (Citation issued February 16, 1994).
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> September 11, 1995 Conduct Review arising from the rescission of two allegations in the February 16, 1994 citation, for which the Conduct Review was substituted. The Conduct Review Subcommittee concluded that the Respondent had not intentionally attempted to mislead the court and that “this problem has arisen from a failure to prevent the prior conflict between clients from affecting relations between counsel.”
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> November 5, 1998 Conduct Review arising from the Respondent’s delay and inactivity on an estate matter.
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> July 9, 1999 Citation hearing in respect of the Respondent’s conduct in assisting his client to attempt to breach a trust and attempt to defeat the interest of the other beneficiaries of the trust in certain property. Resolved by conditional admission and disciplinary action of a 60-day suspension from July 1, 1999.
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> March 8, 2002 Citation hearing in respect of the Respondent’s failure to remit funds collected for payment of GST and PST. Resolved by admission and disciplinary action of a fine of $2,500; a reprimand; and a condition he provide to the Executive Director a statutory declaration each quarter regarding his collection and remittance of GST and PST.
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> November 16, 2005 Citation hearing in respect of his failure to remit funds collected for payment of GST and PST. Respondent signed an Agreed Statement of Facts and admitted the misconduct. Disciplinary action imposed was a one-year suspension and conditions. On a section 47 review (decision issued June 2007), the disciplinary action was reduced to: a reprimand; a suspension of three months (served July to October); a condition to provide, on a monthly basis, evidence of his

compliance with and payment in full of his tax-remitting requirements; and a condition he fully cooperate with the Discipline Committee by providing to it all information requested by it so that it may ensure that his continued practice poses no danger to the public interest.

September 6, 2007 Conduct Review arising from his failure to comply with his undertaking given in support of the stay application pending the outcome of the s. 47 review of the 2005 hearing panel decision.

November 20, 2009 Conduct Review with respect to his failure to comply with an undertaking within a reasonable time and to reply to correspondence from counsel promptly. Final report issued April 22, 2010.

August 12, 2009 Citation issued concerning three counts of his failure to respond to three distinct requests from the Law Society made in the context of an investigation and audit pursuant to Rule 4-43. Summary hearing pursuant to Rule 4-24.1 and finding of professional misconduct with respect to one count in the citation. On a section 47 review (decision issued February 18, 2011), the Benchers set aside the dismissal of one count and substituted a finding of professional misconduct in respect of it. Disciplinary action was a suspension of 45 days.

[23] The range of penalties for professional misconduct by failing to respond to inquiries from the Law Society range from reprimands to suspensions.

[24] These include *Law Society of BC v. Tak*, LSBC 2011 05. In that case, the respondent was suspended for four months for a third citation in light of his previous disciplinary record.

[25] In *Law Society of BC v. Braker*, 2007 LSBC 01, the panel imposed a suspension of one month after considering previous findings of professional misconduct for failure to respond to the Law Society on his Professional Conduct Record.

[26] The only case cited concerning the penalty for breach of a hearing panel order was *Law Society of BC v. Coutlee*, 2010 LSBC 27. The penalty there was a one-month suspension imposed in light of a pre-existing discipline history. The panel commented at paragraph [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.

[27] Following the approach to Rule 4-22 hearings as set out in *Law Society of BC v. Rai* (supra), the Panel finds that the proposed penalty is acceptable, but only because it is within the current range of precedent dispositions. In all of the circumstances, we find it to be within the range of fair and reasonable disciplinary action.

[28] However, had the Panel been free to determine the disciplinary action based on the *Ogilvie* (supra) criteria, a substantially longer suspension would have likely been imposed. The aggravating factors of this particular case are the following:

(a) nature and gravity of the conduct proven;

(b) age and experience of the respondent;

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

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

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

(k) the need for specific and general deterrence;

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

[29] However, a hearing panel convened pursuant to Rule 4-22 has no such discretion. It may only accept or reject a decision of the Discipline Committee to recommend the proposed disciplinary action.

COSTS

[30] The Panel derives its authority to order costs from Rule 5-9. This Rule provides that a panel may order the respondent to pay the costs of a hearing of a citation and may set a time for payment of the costs.

[31] Factors to be considered on the quantum of costs are set out in *Law Society of BC v. Racette*, 2006 LSBC 29. Those factors are:

(a) the seriousness of the offence;

(b) the financial circumstances of the Respondent;

(c) the total effect of the penalty, including possible fines and/or suspensions; and

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating or conversely, being saved.

[32] Counsel for the Law Society cited a number of cases concerning costs awarded for Rule 4-22 hearings. These range from $1,500 to $3,000.

[33] Accordingly, after considering the factors above, this Panel agrees that the proposed costs of $2,500 to be paid by October 31, 2012 to be reasonable.

ORDER

[34] The Panel orders that the Respondent:

(a) Be suspended from practice for a period of three months, commencing May 1, 2012; and

(b) Pay costs to the Law Society of $2,500 on or before October 31, 2012.

MINORITY DECISION OF DAVID CHIANG

[35] Counsel for the Law Society submits that deference should be given to the recommendation of the Discipline Committee to accept the proposal under Rule 4-22 if the proposed disciplinary action is within the range of "fair and reasonable disciplinary action."

[36] The Hearing Panel was referred to *Law Society of BC v. Rai*, 2011 LSBC 2. At paragraph [7], the hearing panel in that case wrote

> This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question that the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of fair and

reasonable disciplinary action?”

[37] The Respondent admits that he professionally misconducted himself by committing the disciplinary violations set out in the citation issued March 22, 2011 and in the Agreed Statement of Facts. Further, the Respondent’s Professional Conduct Record is unique by his repeat offenses and frequent disregard for the Rules of professional conduct.

[38] In her submission to the Panel, counsel for the Law Society was not able to find any case law where a lawyer had been disciplined repeatedly for conduct exactly the same. The ranges provided were for first instances of failure.

[39] In determining what is fair and reasonable, the Respondent’s lengthy history of professional misconduct, the Respondent’s lack of contrition, and the number of times the offending conduct occurred should be taken into account. In my view, a suspension greater than the range for first instances of failure is warranted.

[40] For these reasons, I reject the decision of the Discipline Committee to recommend the proposed disciplinary action as it is not within the range for repeat and frequent misconduct. In essence, the range of penalties used to assess the specified disciplinary action in this case is simply too low.