

2014 LSBC 29
Decision issued: June 27, 2014
Citation issued: June 18, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

THOMAS PAUL HARDING

RESPONDENT

**DECISION OF THE HEARING PANEL ON
FACTS AND DETERMINATION**

Hearing date: April 29 to May 1, 2014

Panel: A. Cameron Ward, Chair
Dennis Day, Public representative
Brian J. Wallace, QC, Lawyer

Counsel for the Law Society: Robin McFee, QC
Counsel for the Respondent: Gerald Cuttler

INTRODUCTION

[1] The Law Society issued the citation against the Respondent on June 18, 2013. The citation was amended pursuant to Rule 4-16(1)(a) of the Law Society Rules on November 6, 2013, and alleges that:

1. On or about June 26, 2012, while at a Unitow lot in Surrey, British Columbia attending to a client matter, the Respondent engaged in dishonourable or questionable conduct that casts doubt on his professional integrity, or reflects adversely on the integrity of the legal profession, or reflects adversely on the administration of justice, contrary to Chapter 2, Rule 1 of the *Professional Conduct Handbook* then in force, including but not limited to some or all of the following:

- (a) telling a police dispatcher that he was “going to get a crowbar and smash up the place”;
- (b) taking pictures of Unitow personnel and property after being requested not to do so;
- (c) blocking the entrance to the Unitow lot with his motor vehicle.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

- [2] The Respondent admits that he was served through his counsel with the citation and amended citation on June 20, 2013 and November 15, 2013, respectively, and waives the requirements of Rule 4-15 of the Law Society Rules.
- [3] The Law Society and the Respondent tendered an Agreed Statement of Facts and Documents (“ASF”), which was admitted into evidence. The ASF included extracts of surveillance video selected by the complainant, and the audio recording of the Respondent’s conversation with the Surrey RCMP non-emergency dispatcher.
- [4] The Law Society called one witness, the complainant, ST, who is an employee of Unitow Service (1978) Ltd. (“Unitow”) but did not witness the events. The Respondent testified on his own behalf.

BACKGROUND FACTS

- [5] The Respondent was called and admitted as a member of the Law Society of British Columbia on August 31, 1990, and has practised since that time in the Lower Mainland in the areas of family law and personal injury.
- [6] The Respondent’s mother-in-law was involved in a motor vehicle accident on June 25, 2012 in which the vehicle she had been driving was rendered inoperable. A Unitow employee towed it from the scene of the accident to the secure compound at the Unitow facility in Surrey.
- [7] The Respondent’s mother-in-law asked him to assist her with a possible claim arising from the accident, and he agreed. On the morning of June 26, 2012, the Respondent arrived at the Unitow facility for the purpose of taking pictures of the damage to his mother-in-law’s vehicle before it could be moved or altered. The Respondent was concerned that liability for the accident might be in issue, making the nature of the damage to the vehicle important.

- [8] The Respondent thought that he would be able to spend a few minutes taking photographs before proceeding to his law office. However, events did not unfold that way. Instead, he had a number of dealings with Unitow personnel and police over the next hour and a half that ultimately resulted in the amended citation.

Events of June 26, 2012

- [9] There were several security cameras at the Unitow facility, so much, but not all, of what transpired during the Respondent's visit was recorded. The hearing panel watched and heard these recordings, and had the benefit of a transcript, which the parties agreed was fair, if not perfect. The quotations below are from that transcript.
- [10] The Respondent arrived at Unitow's facility at about 9:00 am, entered the small public area of the office and went to the plexiglas window that separates the public from the staff. The Respondent (R) spoke to a female Unitow employee (FUE) through the small opening in the plexiglas window:

R I am here to look at a Chevy Cavalier brought in yesterday (he provided the licence plate number).

FUE Okay, do you have your ICBC claim number with you?

R (The Respondent repeated the licence number)

FUE No, ICBC claim number.

R Oh I don't - do I need that? I can phone and get it.

FUE Just to let you know, there's no pictures allowed in our yard sir.

R Why?

FUE Privacy Policy Act. There are no pictures allowed.

R I am a lawyer.

FUE Oh, then definitely you are not going in.

R What?

FUE You are not going in sir.

R Why is that?

FUE The registered owner only can go in and grab personals out no lawyers are allowed to go in the yard sir.

R Can you explain to me how that is?

FUE The registered owner only legally is allowed to go into the yard.

R Says who?

FUE Says the law.

R No not says the law, as a lawyer, as her lawyer (inaudible).

FUE I understand that sir. You are not allowed to go into the yard, I am sorry sir.

Unseen Male's Voice You have to get written permission from the owner.

R Do you have a name?

FUE Do I have a name? Well my manager's name is JA.

R Can I see JA?

FUE He's not in the office as of yet.

...

R As her counsel I am entitled to go anywhere she is. Legally speaking I am her, okay, so I don't know what your issue is.

FUE If you want to call and speak to JA later when he is in you are more than welcome to do so.

R I am going to speak with JA, then I'm going to send a letter to the Attorney General's department and see if I can have your licence (inaudible) because that's illegal.

[11] The female Unitow employee left the window and spoke to someone else, and then returned to address the Respondent:

FUE Where is your written permission from the owner to give you permission to go look at her car?

- R Okay, that's a different answer that you gave me just a minute ago, so what is the game you are playing here?
- FUE I am not playing a game sir, I'm just asked you a question sir
- R Do I need written permission?
- FUE Yah
- R Let me talk to the person that is behind the door, I want to talk to him (inaudible).
- FUE Well JA is not here.
- R Who are you speaking to?
- FUE You can speak to JA.
- R (inaudible)
- FUE He's our manager.
- R You're giving me two different stories.
- FUE I'm not giving you two different stories sir. He's our manager. You are more than welcome. I can leave a message for him if you like. You just call the number on the front.
- R So wait a sec. I am going to back here in less than an hour with written permission. I don't want any game from you about what the permission says. So if you can tell me what it needs to say.
- FUE I need her name, her driver's licence number, the vehicle information, your name
- R Vehicle information – what do you mean by that?
- FUE Make, model, licence plate and colour, okay, the I want your name, your driver's licence number
- R You don't need my driver's licence
- FUE Yes I do sir, that's what we require on the letter. She needs to sign it and date it and write a number that we can call her at.

R Okay, so let's try this if I go to the convenience store and I have some strange lady write that down how are you going to know that it is not her (inaudible) writing.

[12] The Respondent then left the Unitow facility, went to his mother-in-law's residence and obtained a handwritten letter of authorization containing all of the requested information. He returned approximately 45 minutes later.

[13] A female Unitow employee came to the window and advised that she was going to call her manager, "JA". The Respondent held the handwritten letter against the plexiglas and said that if he didn't have an answer in less than 10 minutes he was going to call the police.

[14] While waiting for the Unitow employee to return to the front window, the Respondent took a camera out of his bag and apparently took some photographs of the premises and personnel, which are the subject of the second allegation in the amended citation.

[15] First, the Respondent took pictures of the Unitow office area. He says it was to show the presence of the security cameras. The Respondent then put his camera lens against the plexiglas window to take pictures of the interior of the office to photograph the business licence. While doing so, the female employee returned to the vicinity of the plexiglas window, at which time The Respondent tried to take her picture. However, she moved away from the area visible through the window. Another employee said to the Respondent, "It's illegal. You should know that. You're a lawyer." Soon thereafter, another woman came into sight through the window, and the Respondent photographed her.

[16] The Respondent then left the Unitow office area and went to the parking area where he placed a phone call to the Surrey RCMP detachment non-emergency line. The call was recorded. The Respondent spoke to the RCMP dispatcher, using the words that give rise to the first allegation in the amended citation. We include them here in context, from a transcription the parties agree is accurate:

R I come back and they say they won't let me in and ... I told the lady at the switchboard that, I need someone there to talk to these idiots because otherwise you'll have to send a police officer probably to arrest me because I'm going to go get a crowbar and smash up the place.

Dispatcher Well if you'll just standby for one second, this is a recorded line, which you probably no [sic] so let's not even go

R Oh good.

Dispatcher Let's not even go in that aspect because we don't want you to be the one like you mentioned [inaudible] to property.

R Yeah, well I didn't say it to them because I'm not uttering threats, I'm saying it to you 'cause I want you to keep the peace.

- [17] During the course of that conversation the RCMP dispatcher put the Respondent on hold and contacted the Unitow office, speaking to an individual named JB. JB notes that a Unitow employee overheard the crowbar comment, which is the subject of the first allegation.
- [18] Sometime while the RCMP dispatcher was on the line, the Respondent moved his car in front of the gate to the secure storage portion of the Unitow facility, and waited for the police to arrive. This blocked ingress and egress for vehicular traffic to the secured storage area unless the Respondent moved his car. This action gives rise to the third allegation in the amended citation.
- [19] Near the end of the conversation, the RCMP dispatcher proposed to the Respondent that he not communicate with the Unitow personnel, and that she would let the Unitow personnel know that he was in the parking lot, in his car, and that there was not going to be any communication until an officer arrived. The dispatcher asked the Respondent if he was in agreement with this proposal. The Respondent advised the dispatcher that he agreed.
- [20] While the Respondent waited in his car for the RCMP to arrive, no vehicles attempted to pass through the gate, and there was no evidence that anyone asked him to move his vehicle.
- [21] A male, apparently a Unitow employee, did approach the Respondent's car and took pictures of it. The Respondent then got out of his car, and it appeared from the video that the two men photographed each other.
- [22] At about 10:00 am, a police officer arrived, parking immediately behind the Respondent's car. Approximately two minutes later, another officer arrived, got out of his car and approached the Respondent's car. The Respondent got out and shook the police officer's hand, and they engaged in a discussion. The first officer returned, moved his car and joined the conversation. The Respondent then moved his car from in front of the gate and back to the visitor parking area.

ISSUE

[23] Was the Respondent's conduct:

- (a) in telling the police dispatcher that he was "going to get a crowbar and smash up the place" (the crowbar comment);
- (b) taking pictures of Unitow personnel and property after being requested not to do so (taking pictures); or
- (c) blocking the entrance to the Unitow storage lot with his motor vehicle (blocking the entrance),

"a marked departure from that conduct the Law Society expects of its members" (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171) such that it constituted professional misconduct?

POSITION OF THE PARTIES

[24] The Law Society acknowledges that it bears the burden of proving, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct on a balance of probabilities. The Law Society submits that, on the totality of the evidence, it has done so.

[25] The Respondent takes no material issue with the facts supporting the allegations but argues that, in the circumstances, his conduct did not constitute a marked departure from the conduct expected of members of the Law Society.

ANALYSIS

[26] Chapter 2, Rule 1 of the *Professional Conduct Handbook* states:

A lawyer must not, in private life, extra professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence or reflects adversely on the integrity of the legal profession or the administration of justice.

[27] We are to determine whether, in the context of seeking to preserve evidence for a client, by means of the crowbar comment, taking pictures or blocking the entrance, the Respondent violated the prohibition against dishonourable or questionable

conduct that reflects badly on either the lawyer's or the profession's integrity, and if so, whether the conduct is a marked departure from acceptable standards.

The crowbar comment

[28] The Supreme Court of Canada considered freedom of expression and lawyers' professional responsibility in *Doré v. Barreau du Québec*, [2012] 1 SCR 395:

61. No party in this dispute challenges the importance of professional discipline to prevent incivility in the legal profession, namely "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy" (Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 Can. Crim. LR 97, at p. 101; see also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 8-1).

....

63. But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*... (MacKenzie, at p. 26-1)

...

68. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have the right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

[29] In this passage, the Supreme Court sets a high standard for lawyers' conduct: that lawyers are to "endure" "criticisms and pressures" "with civility and dignity" and "to behave with transcendental civility." The court goes on to recognize that circumstances may excuse a lawyer's failure to meet these standards: "lawyers should not be expected to behave like verbal eunuchs" and, "They not only have the right to speak their minds freely, they arguably have a duty to do so." Finally,

the court concludes the paragraph by balancing the right and possible duty of free expression with a standard that it be “with dignified restraint.”

- [30] Two recent disciplinary decisions of this Law Society have also considered when words alone amount to professional misconduct.
- [31] In *Law Society of BC v. Foo*, 2013 LSBC 26, a citation was upheld against a lawyer who spoke to a social worker in a courthouse waiting area, saying he should “shoot her” because she “takes away too many kids.” The lawyer asserted that he had made a spontaneous joke. However, the hearing panel found that, considering that the social worker felt threatened by the comments and that they were made within earshot of others in a busy courthouse, the remarks constituted a marked departure from the conduct the Law Society expects of its members.
- [32] In *Law Society of BC v. Johnson*, 2014 LSBC 8, a citation was upheld against a lawyer who said “fuck you” to a witness (a police officer) in a corridor outside a courtroom at the Kelowna courthouse. According to the majority decision of the hearing panel, at para. 14:
- [I]t does not matter if a lawyer is provoked, or whether the lawyer has reached a breaking point or if litigation is sometimes hostile, aggressive and fierce. Saying “fuck you” to a witness, another lawyer, or a member of the public in a courthouse in an angry, insulting, hostile or belligerent manner, as the Respondent did, is totally indefensible, is always a marked departure from the standard of conduct that the Law Society expects of lawyers and, therefore, always constitutes professional misconduct.
- [33] As with the *Foo* case, the comment “was going to get a crowbar and smash up the place” would have been menacing had it been uttered as a threat to a Unitow employee. But it wasn’t. It was made to an RCMP dispatcher to emphasize the volatility of the situation and to persuade her that police attendance was required. As the Respondent said to the dispatcher when she admonished him, “I didn’t say it to them because I’m not uttering threats, I’m saying it to you ’cause I want you to keep the peace.”
- [34] While the comment was apparently overheard by a Unitow employee, there is no evidence to suggest that the Respondent intended that it be overheard or relayed to any Unitow employee. The statement was ill-advised and as the Respondent himself has admitted, ill-considered. He should not have made it.
- [35] Unlike what happened in the *Johnson* case, during the course of his dealings with Unitow that day, the Respondent did not use profanity. He spoke aggressively and

condescendingly, but the audio and video recordings demonstrate that he maintained his composure throughout an event that was time-consuming and frustrating, in which he was being prevented from taking pictures of his client's car, which he was satisfied was important in order to preserve a record of the damage to it.

- [36] The Respondent has acknowledged making this remark in a moment of frustration, and he provided a written apology to the Law Society within a few months of receiving the transcript confirming the statement had been made. While we do not excuse the Respondent for the ill-considered nature of his utterance, we accept the explanation and note his apology.
- [37] The crowbar comment was not made as a threat, and it was not gratuitous. Rather it was an intemperate overstatement made in the context of protecting a client's interest. Lawyers are required to comply with standards of conduct expected of them as professionals, not with standards of perfection. We cannot say that this statement, viewed in context, represented a marked departure from the standard of conduct expected of the Law Society's members.

Taking pictures

- [38] Early in their dealings, the Unitow employee told the Respondent that he could not take pictures in the Unitow yard. Upon his return with the signed authorization from his mother-in-law, the Respondent took pictures in the reception area and through the plexiglas window at the counter. A second Unitow employee told him not to take pictures, that it was "illegal". The Respondent continued to take photographs. ST told us that not allowing photographs was a company policy, but the evidence was that no written policy was posted on the premises, and none was entered in evidence. Finally, we were directed to the *Privacy Act*, RSBC 1996, c. 373, s. 1, to demonstrate that taking the pictures was a breach of the Unitow employees' privacy rights.
- [39] Section 1 of the *Privacy Act* provides that:
- 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
 - (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

- (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

[40] We find that, in taking the photographs, the Respondent did not breach anyone's privacy. The Unitow facility is a public place under video surveillance. Given the developing dispute with Unitow, the Respondent claimed the right to have a record of the employees with whom he dealt, of Unitow's business licence and of what surveillance cameras there were on the premises. The Respondent believed this record might be useful in regard to furthering the lawful interests of his mother-in-law.

[41] Although taking the pictures was not a tort, it may still have been unprofessional conduct. However, we find that it was not. It was aggressive and rude, but in the Respondent's view, he had a duty to take the pictures to create a record in order to protect the interests of his client. The fact that Unitow employees refused consent and that Unitow asserted a policy prohibiting photographs does not make taking pictures a marked departure from the standard of conduct the Law Society expects of its members. This act did not constitute professional misconduct.

Blocking the entrance

[42] The Respondent moved his car to block the entrance to the storage area of the Unitow facility. He did so in order to prevent the removal of his client's car. The action was entirely consistent with his goal of preserving evidence. He had called the RCMP in an attempt to resolve the impasse, and they were on their way. It was a temporary measure, and no one asked him to move his vehicle. Again it was aggressive, but done out of the Respondent's belief that it was necessary to protect his client's interest.

[43] We find, in the circumstances, that blocking the entrance was not a marked departure from the standard of conduct the Law Society expects of its members and that it does not constitute professional misconduct.

DECISION

[44] The citation is dismissed, and the parties are at liberty to make submissions respecting costs within 30 days of the issuance of this decision.