2014 LSBC 50
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THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

MARTIN DREW JOHNSON

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION

Hearing date:	June 16, 2014
Panel:	Tony Wilson, Chair Dan Goodleaf, Public representative Dale G. Sanderson, QC, Lawyer
Counsel for the Law Society:	Larry R. Jackie, QC
Counsel for the Respondent:	Gregory P. Delbigio, QC

[1] On October 17, 2013, this Panel concluded that the Respondent committed professional misconduct when he said "fuck you" to a potential trial witness (a police officer) in the corridor of the Kelowna courthouse. The Respondent had been provoked by the officer prior to that remark. The Panel concluded that the provocation did not constitute a defence to the citation. That provocation is set out in our previous reasons.

[2] The issue now is to determine the appropriate disciplinary action, and we conclude that provocation is an appropriate factor that should be taken into account.

[3] Counsel for the Law Society seeks a suspension of two months, a requirement that the Respondent complete an anger management course and costs. The Respondent's counsel suggests a reprimand and did not oppose an award of costs.

[4] In *Law Society of BC v. O'Neill*, 2013 LSBC 23 (CanLII) the panel held:

> [18] The purposes of disciplinary proceedings are set out in *Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3:
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> > It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.
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> [19] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the Panel detailed the following non-exhaustive list of factors to consider when imposing a penalty:
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> (a) the nature and gravity of the conduct proven;
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> (b) the age and experience of the respondent;
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> (c) the previous character of the respondent, including details of prior discipline;
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> (d) the impact upon the victim;
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> (e) the advantage gained, or to be gained, by the respondent;
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> (f) the number of times the offending conduct occurred;
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> (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;
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> (h) the possibility of remediating or rehabilitating the respondent;
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> (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.

[5] More recently the Review Panel in *Law Society of BC v. Lessing*, 2013 LSBC 29 confirmed that the starting point in determining the appropriate disciplinary action was a consideration of section 3 of the *Legal Profession Act*. It provides:

3 It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

(d) regulating the practice of law, and

(e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[6] The Respondent was approximately 61 years old at the time of this misconduct. He was called to the bar in 1978 and practised primarily in the areas of criminal law, personal injury and civil litigation. At the time of this breach, he was practising with his own firm in Kelowna.

[7] He had several professional colleagues write letters of reference in support of him. Although the Respondent had a prior history of substance abuse and addiction, the letters say that he has overcome those problems and for the past many years has generally been fair and courteous in his dealings with them and others on professional matters.

[8] His disciplinary record is concerning to this Panel. In 2002 he was found to have committed professional misconduct in a courtroom by arguing and coming into

physical conduct with the female prosecutor. The panel in *Law Society of BC v. Johnson,* [2001] LSBC 02, reviewed his prior disciplinary record and summarized it in this way:

> [6] In August of 1992, the Respondent was before a discipline Panel as a result of his having lied to another lawyer and his having communicated with another lawyer's client. The matter arose out of a private business venture in which the Respondent had been involved. The events complained of occurred in 1987. He was found guilty of "conduct unbecoming". He was reprimanded on one count and on the other was given a fine of $10,000 (at that time the maximum fine allowed by the Legal Profession Act) and was ordered to pay costs of $5,000. It is noted that, in rendering its decision, the Panel in that case stated that:
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> > This case represented about as closed (sic) a call between the maximum fine allowable under the statue (sic) and a suspension that we can imagine.
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> [7] In January of 1992, the Respondent was the subject of a Conduct Review as a result of a conflict of interest situation. He was ordered to send letters of apology to the parties involved.
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> [8] In November of 1993, the Respondent was the subject of a Conduct Review arising out of two different matters involving bad judgment: discourtesy to another lawyer and making an offer to a police witness that if a charge against the Respondent's client could be reduced the Respondent would have his clients drop a complaint against the police witness. The matter arose in 1990 and 1992. The Panel expressed a hope that the Respondent would seek "professional assistance to help him to resolve his personal difficulties."
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> [9] In September of 1997 (after the incident complained of in the present citation) the Respondent was the subject of a Conduct Review arising out of two matters: his failing to recognize a conflict of interest in 1996 and his involvement in a fee dispute with a client in 1994/95.

[9] Since November 2002 the Respondent has undergone further conduct reviews by Law Society Conduct Review Subcommittees. Those conduct reviews reveal flaws and judgmental errors in the Respondent's practice, resulting in recommendations to the Respondent to change certain aspects of his practice. But there were no allegations or findings of professional misconduct.

[10] In deliberating, we have considered all of the factors referred to in paragraphs 3 and 4 of these reasons and conclude as follows:

(a) **The nature and gravity of the conduct proven:** The Respondent said "fuck you" to a potential witness in the hallway of the Kelowna court house, but only in the presence of Crown Counsel and the officer. Others in the hallway did not hear the remark.

The lawyer has a duty to act with courtesy, dignity, respect, restraint and fairness (see paragraph 42 of our reasons). The Respondent breached that duty. The remark was made at the end of a corridor and was overheard by Crown Counsel and no one else. It was made after the police officer had provoked the Respondent. We conclude that the breach was moderately serious because the Respondent ought to have kept his temper despite the provocation. And it was serious because of the location of the incident, namely, in a public area of the courthouse.

The panel in *Law Society of BC v. Laarakker*, 2011 LSBC 29 at para. 35, stated as follows:

> [35] Further, in *Law Society of BC v. Greene*, [2003] LSBC 30, the Respondent had made comments about another lawyer and members of the judiciary. The panel held (at paras. 34 and 35):
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> > Our occupation is one where we often deal in difficult circumstances with difficult people, and emotions often run high. It is not in the best interests of the justice system, our clients, and ourselves to express ourselves in a fashion which promotes acrimony or intensifies the stressfulness or the difficulty of those already stressful and difficult circumstances.
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> > Public writings or comments which promote such acrimony or denigrate others in the justice system have a negative effect upon the system as a whole. This is particularly true where it appears that the comments are made for no purposeful reason.

In *Law Society of BC v. Harding*, 2013 LSBC 25, the panel said this at para. 105:

> [105] Further, in *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94, the hearing panel stated at paras. 63 and 65:
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> > [63] The requirement of civility is more than good manners in the courtroom and practice. Rather, the rationale underlying the requirement of civility reflects a concern with the effect of incivility on the proper functioning of the administration of justice and public perception of the legal profession.
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> > …
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> > [65] Our system of justice is based on the premise that legal disputes should be resolved rationally in an environment of calm and measured deliberation, free from hostility, emotion, and other irrational or disruptive influences. Incivility and discourteous conduct detracts from this environment, undermines public confidence and impedes the administration of justice and the application of the rule of law.

Considering the authorities and particular conduct of the Respondent in this case, we conclude that the breach was moderately serious.

(b) **The age and experience of the Respondent:** The Respondent was approximately 61 when this occurred. He had been a full-time practitioner since May 1977. He has sufficient maturity and experience to know he was acting inappropriately.

(c) **Previous character of the Respondent, including prior discipline:** His prior discipline record is a concern. However, it seems that his addiction to drugs and alcohol has been controlled for some time, and he has significantly improved his professional conduct. We conclude that his addiction played a role in his previous misconduct and that addiction is now in remission. His letters of reference show improvement in this area of concern, although we do not place significant weight on the letters because some of the authors may not have been aware of all the factors of this case and may not represent a broad view of the profession. They are nevertheless helpful and do disclose a significant improvement in the areas of concern.

(d) **The impact on the victim:** We do not consider there was likely any negative impact on the police officer. He did not testify, and there was no evidence of

any impact. Indeed, the police officer subjected the Respondent to an arrest in the courthouse after the insult was made, which we believe was unnecessary in the circumstances. The police officer ought to have conducted himself with integrity and civility as an officer of the law.

(e) **Any advantage gained by the Respondent:** There was no advantage gained by the Respondent.

(f) **The number of times the offending conduct occurred:** This is the second time the Respondent has committed this type of breach. This particular event involved a single act of misconduct. However, the evidence discloses that his previous misconduct and other infractions were in part fueled by substance abuse that has now apparently been resolved.

(g) **Has the Respondent acknowledged his misconduct and taken steps to redress the wrong:** The Respondent testified that he immediately regretted his remark and recognized it was a mistake. We understand he has undergone treatment to prevent any relapse of substance abuse. He has not taken anger management counselling or apologized. We conclude that the remark the Respondent made was likely a one-off remark caused partially, at least, by provocation. We do not believe that an anger management course would be useful in this case.

(h) **The possibility of remediating or rehabilitating the Respondent:** As stated previously, we believe that this incident is a one-off event. The Respondent "lost his temper" and acted inappropriately and unprofessionally. We accept that the Respondent regrets his words and acknowledges that he acted improperly. We believe that his likelihood of repeating similar conduct is unlikely and that he has learned from this experience. But we also appreciate that the practice of law can be stressful and demanding. Although we do not excuse his conduct, the Respondent is not the first lawyer in Canada to lose his temper and regret it. Given the circumstances of his arrest by the officer after the outburst (where no charges were laid), we feel that the Respondent has already paid a high price for his outburst.

(i) **The impact on the Respondent:** The finding of professional misconduct and the disciplinary action imposed will negatively impact the Respondent's reputation and standing in the community. It was reported in the press and perhaps the disciplinary action will also be reported. In our view, this should have no effect in the sanction imposed. We believe that it is important for the profession and the public to know that the Law Society will discipline,

reprimand, fine, suspend or disbar lawyers when the conduct warrants such penalty.

As set out in *Law Society of BC v. O'Neill*, 2013 LSBC 23 at para. 20(j):

> …When lawyers have misconducted themselves, the adverse publicity that comes with that must be accepted by the lawyer. That is true for all lawyers and is not unique to this case. It should not, in our view, be a factor which should be considered to reduce the penalty that the Panel believes is otherwise appropriate.
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> All lawyers will face this potential embarrassment if they are disciplined for misconduct, and we believe that to reduce an otherwise appropriate penalty because of potential public knowledge of it would be wrong in principle. It could mean that all penalties should be reduced because of the adverse publicity about the lawyer. We do not believe that is a correct principle to follow.

Any suspension, fine or award of costs will have a negative financial impact on the Respondent.

However, given the circumstances of his arrest by the officer after the outburst (where no charges were ever prosecuted), we believe that the Respondent has already paid a price for his outburst.

(j) **The impact on the Respondent of criminal or other penalties:** We are unaware of any other penalties or sanctions that may impact the Respondent.

(k) **The need for specific and general deterrence:** We believe that this is a significant factor to consider, particularly the need for general deterrence. The profession must know that courtesy, civility, dignity and restraint should be the hallmarks of our profession and that lawyers must strive to achieve such. The profession should also know that a marked departure from such standards will be sanctioned.

(l) **The need to ensure the public's confidence in the integrity of the profession:** We consider this to be an important factor for the reasons set out in paragraph 10(a) above.

At paragraph 19 of the decision on penalty in *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the panel stated:

> The public must have confidence in the ability of the Law Society to regulate and supervise the conduct of its members. It is only by the maintenance of such confidence in the integrity of the profession that the self-regulatory role of the Law Society can be justified and maintained.

(m) **The range of penalties imposed in similar cases:** We have reviewed and considered all of the authorities referred to by counsel. The sanction in each of those particular cases was, as always, determined on the facts of those particular cases. No case is identical on the facts, but the range of sanctions imposed by the Law Society ranged from a fine of $1,500 plus costs to a suspension of three months.

[11] The Panel believes that the most significant factors for consideration in this case are:

(a) The nature and gravity of the conduct proven.

(b) The discipline record of the Respondent.

[12] While the conduct of the Respondent was moderately serious, we conclude that a significant cause of the conduct was the provocation by the police officer. If there had been no provocation by the officer, then we believe a suspension of approximately two months or more would have been appropriate, given the discipline record of the Respondent. On the other hand, if the Respondent did not have the present discipline record then we feel a reprimand or a small fine would be an appropriate penalty. Put another way, we conclude that the sanction to be imposed should consider and weigh both the discipline record and provocation as somewhat off-setting factors.

[13] We believe that the provocation in this case is a factor to consider at the disciplinary action phase. See:

(a) *Law Society of BC v. Schauble,* 2009 LSBC 32 at para. 29, where the panel held that, "While provocation does not justify the Respondent's actions, it does mitigate the penalty."

(b) *Law Society of Upper Canada v. Groia,* 2013 ONLSAP 41 at para. 7, where the panel said, "A few ill-chosen, sarcastic, or even nasty comments directed at one's opponent will rarely constitute professional misconduct, particularly if they reflect a moment of ill-temper and an apology is made. Provocation from opposing counsel is a relevant consideration, although it is not a complete defence."

(c) *Law Society of Alberta v. Lee*, 2009 ABLS 31, the panel stated in part at para. 143, "The principles that we apply to our consideration of the citations include: … (iv) Provocation, or events leading up to the comments, may mitigate against the comments such that comments made which would be sanctionable if made unprovoked may not be sanctionable in the presence of provocation."

[14] We think the matter was very aptly summarized by Duncan Campbell, who is the Crown Counsel who observed these events. He wrote a letter of reference for the Respondent. In it he said in part:

> Although these pending discipline proceedings have been an "elephant in the room" for us both I think you should know that Mr. Johnson has treated me throughout with proper civility and courtesy.
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> While I may disagree with Mr. Johnson as to how the incident with Cst. B began, or the necessity for it, Mr. Johnson was, I believe, at the time doing the best he could to advance the interests of his client within the context of a difficult file, with a difficult client. To my mind Mr. Johnson simply allowed the pressure of the moment to get the best of him. Unfortunately, Cst. B, from my perspective, didn't handle the situation any better.
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> In my respectful view, had either Cst. B or Mr. Johnson approached the other next morning with cooler heads and apologized, none of this need have happened.

[15] This is not a case where trust monies were dealt with inappropriately, or the Respondent was deceitful to the court, to the Law Society or to the profession. He lost his temper inappropriately and unprofessionally in a courthouse hallway after being provoked by a witness who was a police officer. He has fully acknowledged his inappropriate and unprofessional conduct in the circumstances, and has taken responsibility for his conduct.

[16] We conclude the appropriate disciplinary action in this case is that the Respondent:

(a) be suspended for 30 days commencing on a date to be agreed upon between counsel but to commence not later than five months from the issuance of this decision. If counsel cannot agree, they must make written submissions to this Panel within 15 days from issuance of this decision; and

(b) must pay the costs of these proceedings, which we understand have been agreed to in the amount of $10,503.05, within 30 days of issuance of this decision.