2015 LSBC 03
Report issued: January 27, 2015
Citation issued: August 19, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DONALD ROY MCLEOD

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	December 15, 2014
Panel:	Jan Lindsay, QC, Chair Satwinder Bains, Public representative Peter Warner, QC, Lawyer
Discipline Counsel:	Susan Coristine
Counsel for the Respondent:	William G. MacLeod

BACKGROUND

[1] The Discipline Committee authorized the citation against Donald Roy MacLeod (the "Respondent") on July 11, 2013 (the "Citation"), which alleged that, on or about November 21, 2012, the Respondent disclosed confidential client information concerning his clients, contrary to Chapter 5, Rule 1 of the *Professional Conduct Handbook* then in force, by doing one or more of the following:

(a) preparing and filing a Notice of Application containing confidential client information, to be removed as his clients' solicitor of record in BCSC Victoria Registry Action [number];

(b) serving the Notice of Application on the defendant to the action;

(c) preparing and filing an affidavit containing confidential client information in support of the application to be removed as his clients' solicitor of record;

(d) serving the affidavit on the defendant to the action.

The Citation alleges that the above conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act.*

[2] The hearing took place on February 18 and 19, 2014, and in a decision dated April 19, 2014 (2014 LSBC 16) this Panel determined that the Respondent had breached Chapter 5, Rule 1 of the *Professional Conduct Handbook* and that the breaches set out in (a), (b), (c) and (d) of the Citation constituted professional misconduct.

[3] There were an Agreed Statement of Facts and a joint Book of Documents. The evidence is summarized in paragraphs 3 through 22 of the Decision on Facts and Determination.

[4] Very briefly, Mr. McLeod was retained to act for two clients in two Supreme Court actions, one for personal injuries arising from a motor vehicle accident and the second for damages arising from an alleged misrepresentation concerning their purchase of a house.

[5] The clients ultimately retained new counsel on the personal injury action. Mr. McLeod was concerned that he would not be paid on the misrepresentation action and in fact had submitted accounts that were not paid.

[6] Because he wanted to pursue recovery of his fees, the Respondent determined that he should no longer act for the clients on the misrepresentation action. He asked them to file a Notice of Intention to Act in Person. They wanted him to continue to represent them on the misrepresentation action. He then brought an application to be removed from the record. In that application he disclosed confidential information, the details of which are set out in paragraph 21 of the Decision on Facts and Determination.

[7] The Law Society submitted that the facts supported a finding of professional misconduct. Mr. McLeod gave a number of reasons why they did not. Ultimately, this Panel concluded at paragraph 63, that, while not every breach of confidentiality will necessarily lead to a finding of professional misconduct, the breaches established in this case did constitute professional misconduct.

[8] Mr. McLeod submitted that he was authorized to disclose confidential information by way of a retainer agreement, although he did not actually have a retainer agreement on the misrepresentation action. He was relying on the retainer agreement executed by the clients in two earlier motor vehicle accident claims. Mr. McLeod suggested that the disclosed information was not confidential. We did not agree. Mr. McLeod submitted that he was entitled to disclose the confidential information in support of his application to be removed from the record. He relied on authority that pre-dated the Supreme Court of Canada decision in ***R. v. Cunningham***, 2010 SCC 10, [2010] 1 SCR 331. Mr. McLeod gave evidence that he had considered the *Cunningham* decision before preparing his material but he felt that *Cunningham* was distinguishable. This Panel specifically rejected his interpretation of *Cunningham* and at paragraph 45 specifically found that the Respondent "did not understand, did not read or ignored *Cunningham* when he drafted his affidavit."

[9] The Panel went on to find that much of the information disclosed by Mr. McLeod, in his affidavit and on his application, was not *necessarily* disclosed by any reading of the case law, either before or after *Cunningham.*

[10] The decision in *Sandhu v. Household Realty Corp*, 2013 BCSC 192, confirms that the *Cunningham* reasoning applies equally to applications to get off the record in a civil case. Mr. McLeod's evidence was that, if the *Sandhu* case had been reported before he drafted his materials, he would have drafted his materials differently.

[11] Finally, although Mr. McLeod was awarded costs on the application to remove himself from the record, this Panel did not agree with the suggestion that the hearing judge was specifically ruling on the propriety of Mr. McLeod's affidavit. We found it more likely that the hearing judge knew that the Law Society was investigating the disclosures made by Mr. McLeod in the affidavit and on the application.

[12] In the result, this Panel found that the Respondent was not legally entitled to disclose the confidential client information that he did disclose and that his disclosure constituted a breach on his part of Chapter 5, Rule 1 of the *Handbook*.

[13] In *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, the importance of preserving client confidentiality was discussed as follows:

> Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their clients' cases before courts and tribunals. In preparing for a hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's

> most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose nor take advantage of these revelations.
>
> Our judicial system could not operate if this were not the case. It cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed.

[14] Mr. McLeod submits that his clients suffered no harm as a result of his disclosures. On the other hand, this Panel noted that the clients' complained quite strenuously in their filed response to his original application and in their oral evidence at the hearing. They suggested that his disclosure was "highly improper" and that "he was operating quite outside what we would view as any type of established legal ethics." The Panel agrees.

[15] Further, as was stated in *Law Society of Upper Canada v. A Member*, 2005 CanLII 16408 (ONLST), client harm following a breach of client confidentiality is irrelevant to a determination of professional misconduct. When such breaches occur, there is harm to the reputation of lawyers generally and to the public's faith in the solicitor-client relationship, a relationship steeped in trust.

[16] Lawyers hold a unique position among professionals who receive confidential information from clients. Confidential information given to a doctor or to an accountant might be compellable. Confidential information given to a lawyer is only compellable in the rarest of circumstances. One of the hallmarks of solicitor-client relationships is the sanctity and non-disclosure of confidential information without informed consent.

[17] There are well-established procedures for bringing applications to get off the record, and for serving applications on parties who are not entitled to disclosure of confidential client information that the Respondent should have known about and used.

WHAT IS THE APPROPRIATE SANCTION?

[18] Mr. McLeod has a relevant professional conduct history. In 1991, he was the subject of a conduct review following three complaints of rudeness and abusive conduct and one complaint of sharp practice. While a conduct review is not a hearing and findings of credibility are not made, in the 1991 conduct review, Mr. McLeod admitted that he had acted and spoken intemperately and unwisely.

[19] In 1997 Mr. McLeod was again the subject of a conduct review following two complaints, firstly that he had been discourteous and secondly that he unnecessarily disclosed confidential client information.

[20] In 2003-2004 Mr. McLeod was again the subject of another conduct review following a number of complaints, including improper use of confidential client information. At that time, the Conduct Review Subcommittee noted that Mr. McLeod had previously provided assurances and promises about transgressing the boundaries of professional conduct. That conduct review was adjourned so that Mr. McLeod could receive treatment and counselling.

[21] Mr. McLeod ultimately did attend some courses offered through the Justice Institute and, on his evidence, he went on to complete a LLM in Alternative Dispute Resolution at Osgoode Hall. He tells us that the LLM was completed in or around 2010; we note, however, that his professional misconduct that is the subject of this proceeding occurred in November 2012. Discipline Counsel suggests that Mr. McLeod's professional conduct record calls for the application of "progressive discipline".

[22] We have been referred to the oft cited decision of *Law Society of BC v. Ogilvie* [1999] LSBC 17, which states:

> 9. Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
>
> 10. The criminal sentencing process provides some helpful guidelines, such as: the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:

(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 time the offending conduct occurred;

(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;

(h) the possibility of remediating or rehabilitating the respondent;

(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.

[23] On an analysis of the "*Ogilvie* considerations", we consider most to be aggravating in this case:

(a) Nature and gravity of the conduct: Again a lawyer's obligation to preserve client confidentiality is an integral and vital part of our justice system. Mr. McLeod's misconduct in this case is serious;

(b) Age and experience: Mr. McLeod has been practising since 1981. He has participated in conduct reviews on the issue of client confidentiality and he should have known how to properly withdraw as counsel without breaching the Rules;

(c) Previous character: In this case, Mr. McLeod's prior disciplinary record is an aggravating factor. He was the subject of prior conduct reviews on issues including client confidentiality and, more specifically, inappropriately disclosing client information in pursuit of his own fees. He was directed to take counselling and remedial courses which should have clarified the importance of client confidentiality for him;

(d) Impact upon the victim: Here Mr. McLeod's clients were affected by his disclosure. They complained of it to the court. But here also, the victim is more than just his individual clients, it is the legal profession generally. Anything that might cause the public to lose confidence in the legal profession and the sanctity of lawyers maintaining confidential information harms us all;

(e) Advantage gained or to be gained by the respondent: Mr. McLeod was bringing an application to get off the record so that he could pursue his claim for unpaid fees;

(f) The number of times the offending conduct occurred: Again, Mr. McLeod was the subject of conduct reviews, including reviews for improperly disclosing confidential client information in pursuit of his own fees;

(g) Whether the respondent has acknowledged the misconduct: At the hearing to determine disciplinary action, Mr. McLeod did apologize to the profession and to his clients. However, he has been very slow to acknowledge his error and his professional misconduct in this case.

[24] The protection of client confidentiality is critical to the proper functioning of the solicitor-client relationship and is at the very core of every lawyer's duty towards his or her clients. In *Law Society of BC v. Bjurman*, 2009 LSBC 5, the panel noted:

> … To disclose a client's privileged or confidential information without consent is subversive of the privileged position of members of the legal profession, …

[25] The Law Society has proposed a fine of between $7,500 and $10,000 and a remedial course. Mr. McLeod's counsel has proposed a $2,500 fine.

[26] There is no case on all fours, but there are a number of disciplinary decisions dealing with counsel's disclosure of confidential client information. The penalties in the cases we have been referred to range from a fine to suspension.

[27] Many of the suspension cases include other aggravating factors. As noted, in this case, Mr. McLeod has been the subject of previous disciplinary action for similar misconduct.

[28] We learned that Mr. McLeod devotes a substantial portion to his practice to doing pro-bono work and that he was named Pro-Bono Family Law Lawyer of the Year in 2010.

[29] The Panel also notes a letter of support written by Richard Margetts, QC that says Mr. McLeod has always been sensitive to the underlying obligations counsel owes to clients, the court and his colleagues at the Bar.

[30] This Panel has decided in favour of a significant sanction, both as a specific deterrent and reminder to Mr. McLeod about the importance of client confidentiality and as a more specific observation of the importance to the profession and to the administration of justice generally. We have concluded that Mr. McLeod should serve a short period of suspension, namely one week, and that he should pay a fine in the amount of $2,500. He has already taken courses and counselling on these issues.

[31] It is appropriate that Mr. McLeod be ordered to pay costs of these proceedings. While there was an Agreed Statement of Facts and joint Book of Documents, the finding of professional misconduct was the subject of a two-day hearing with a further half-day hearing to determine sanction. Costs are set at $5,000.

[32] Mr. McLeod has six months in which to serve his suspension and pay the fine and costs. He and his counsel can determine the dates of the suspension with counsel for the Law Society.

[33] The Law Society has asked that the Notice to Admit and addendum be sealed. Mr. McLeod does not take a position on the application. The Notice to Admit and addendum will be sealed. Such sealing does not unduly deprive the public of access to the facts underlying this disciplinary matter.