

2015 LSBC 06
Decision issued: February 25, 2015
Citations issued: July 18, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KEVIN ALEXANDER McLEAN

RESPONDENT

**DECISION ON FACTS, DETERMINATION
AND DISCIPLINARY ACTION**

Hearing date: December 4, 2014

Written submission: February 5, 2015

Panel: Sharon Matthews, QC, Chair
Carol J. Gibson, Public representative
B. William Sundhu, Lawyer

Discipline Counsel: Kieron G. Grady
No-one appearing on behalf of the Respondent

INTRODUCTION

- [1] Two citations were authorized against Kevin Alexander McLean on July 11, 2014. The first Citation (“Citation #1) alleges a failure to respond to the Law Society. The second citation (“Citation #2”) alleges non-compliance with a Rule 4-43 Order.
- [2] These citations arise from two separate investigations. Citation #1 pertains to a complaint from a lawyer alleging Mr. McLean failed to respond to correspondence, failed to attend a case planning conference, failed to attend an examination for discovery and failed to comply with an order of a judge of the

BC Supreme Court. Citation #2 arises out of an investigation commenced after a compliance audit of Mr. McLean's practice.

- [3] Citation #1 was originally scheduled to be heard on September 29, 2014 but was adjourned as a result of non-attendance by Mr. McLean, on terms including that the next hearing be preemptory on Mr. McLean. The hearing of Citation #1 was subsequently scheduled to be heard on December 4, 2014.
- [4] On October 24, 2014, Chambers Benchers Ken Walker QC ordered that Citation #1 and Citation #2 be heard together at one hearing on December 4, 2014.
- [5] On December 4, 2014, Mr. McLean did not attend. For the reasons given below, the Panel decided to proceed in his absence.
- [6] The Law Society proceeded by summary hearing pursuant to Rule 4-24.1, which requires the Law Society and the respondent to adduce evidence by affidavit or agreed statement of facts and permits the panel to consider facts, determination, disciplinary action and costs at one hearing and make one decision respecting all aspects of the proceeding.
- [7] After hearing the evidence and submissions, we determined that Mr. McLean had committed professional misconduct as alleged in both citations. We made an order requiring Mr. McLean to take specific steps to cooperate with the Law Society on both investigations that had given rise to the citations.
- [8] After making the order, we then heard submissions on disciplinary action. We reserved our decision and reasons on disciplinary action.
- [9] These are our reasons for our findings on facts and determination, and our decision and reasons on disciplinary action.

THE CITATIONS

Citation #1

- [10] Citation #1 sets out an allegation of failure to respond to the Law Society. The allegation reads as follows:

You failed to provide a full and substantive response promptly or at all to communications from the Law Society concerning its investigation of Law Society complaint file number [number], arising from your representation of your client ST, contrary to Rule 3-5(6) and (10) of the Law Society

Rules and Rule 7.1-1 of the *Code of Professional Conduct for British Columbia*. In particular, you failed to respond substantively to one or more of letters dated April 11, 2014, April 24, 2014 and May 2, 2014 by one or both of the following:

- (a) not providing your complete client file; and
- (b) not answering all the requests for information set out in one or more of the letters.

This conduct constitutes professional misconduct or a breach of the Act or Rules pursuant to s. 38(4) of the *Legal Profession Act*.

Citation #2

[11] Citation #2 alleges failure to comply with a Rule 4-43 Order. The allegation reads as follows:

You failed to comply with a Rule 4-43 Order made by the Chair of the Discipline Committee on May 27, 2014, contrary to Rule 4-43(2)(b) of the Law Society Rules and Rule 7.1-1(e) of the *Code of Professional Conduct for British Columbia*, and in particular you failed to provide some or all of the following:

- (a) your working login and password information for your GoDaddy account;
- (b) access to your email transmissions;
- (c) your working login and password information for your Dropbox account;
- (d) your laptop computer for imaging;
- (e) your home office desktop computer for imaging; and
- (f) your Blackberry device and other mobile device or devices for imaging.

This conduct constitutes professional misconduct or a breach of the Act or Rules pursuant to s. 38(4) of the *Legal Profession Act*.

ISSUES

- [12] Should the hearing of these citations proceed notwithstanding that Mr. McLean did not attend?
- [13] Did Mr. McLean commit professional misconduct by failing to provide substantive and prompt responses to the Law Society in connection with its investigation into a complaint? In particular, is failing to provide a complete client file and failing to answer the requests for information made by the Law Society professional misconduct?
- [14] Did Mr. McLean commit professional misconduct by failing to comply with a Law Society order to produce certain information and access to electronic information for the purposes of its investigation?
- [15] What is the appropriate disciplinary action for either or both of these allegations of professional misconduct, if established?

DECISION TO PROCEED NOTWITHSTANDING MR. McLEAN'S NON-ATTENDANCE

Facts

- [16] Citation #1 was initially set to be heard on September 29, 2014. Mr. McLean was served with the notice of hearing. He did not attend on September 29, 2014.
- [17] Based on his auto reply to emails, there is some evidence that he may have been involved in an accident and required hospitalization on July 28, 2014.
- [18] The panel on September 29, 2014 ordered that the hearing be adjourned, that Mr. McLean provide medical evidence and records pertaining to the July 28, 2014 accident injuries, and that the next hearing date be preemptory on him.
- [19] Citation #2 was set to be heard on October 8, 2014; however a panel was not available, and it was adjourned.
- [20] Chambers Benchers Ken Walker, QC subsequently ordered that the two citations be heard at the same time on December 4, 2014 and that the December 4, 2014 hearing of Citation #1 was preemptory on Mr. McLean.
- [21] The citations, notices of hearing and orders were served on Mr. McLean in accordance with the rules.

[22] Mr. McLean did not communicate with the Law Society pertaining to hearing dates, including communications seeking his input on the selection of the date. On the date ordered for this hearing, December 4, 2014, in the course of communications from the Law Society to him pertaining to this hearing, after the order of Mr. Walker referred to above had been served on him, Mr. McLean delivered an appointment to examine for discovery Law Society counsel on these matters and the Law Society lawyer investigating the matters underlying Citation #1 and Citation #2. That appointment was delivered in BC Supreme Court Action No. S-148231, an action Mr. McLean has commenced against the Law Society and several Law Society employees pertaining to Law Society investigations into his conduct. We were not provided with the details of that action. At this juncture, the appointment to examine for discovery is simply evidence that demonstrates that Mr. McLean was available on December 4, 2014, at least up until the time he issued the appointment to examine for discovery.

Analysis and decision

- [23] We find Mr. McLean was available on December 4, 2014, was aware that the hearing of these citations was set to proceed on this date, did not attend and provided no reason for his non-attendance.
- [24] Mr. McLean failed to attend the September 29, 2014 hearing of Citation #1 without providing any advance notice that he would not or could not attend. The panel at that time gave him the benefit of the doubt by adjourning that hearing but also ordered that the next hearing date (this hearing) be preemptory on him. He has not provided an explanation for his failure to attend the September 29, 2014 hearing, nor has he complied with the order of the September 29, 2014 panel to provide records and particulars of his July 28, 2014 accident injuries. He did not heed the order that the December 4, 2014 hearing of Citation #1 was preemptory.
- [25] Citations #1 and #2 are about allegations that Mr. McLean's conduct is impeding and delaying the Law Society investigations into serious complaints and allegations against him. A self-regulatory body cannot do its work if its orders are ignored; that is why hearing these citations in a timely way is necessary for the integrity of the process.
- [26] For all of these reasons, we decided to proceed.

FACTS

[27] Mr. McLean was born in 1983. He was called and admitted as a member of the Law Society on August 27, 2010.

[28] The Law Society led evidence by way of affidavit. Some of the affidavit exhibits contain correspondence from Mr. McLean to the Law Society. Although Mr. McLean failed to attend and present any evidence, we do have some limited insight from those exhibits as to his possible explanations and position. We bear that in mind, but we are left with a lack of perspective and a lack of evidence from Mr. McLean that might have been relevant to our determinations.

Citation #1

[29] The allegation in Citation #1 is that Mr. McLean failed to respond promptly or substantively to communications from the Law Society. The allegation arises from an investigation into Mr. McLean's conduct in litigation in the Supreme Court of British Columbia in which Mr. McLean was acting for the plaintiff. The defendant in that litigation filed a notice of application alleging that Mr. McLean or his client:

1. failed to communicate with defendant's counsel,
2. failed to attend court on various occasions,
3. stated in a Case Plan proposal that a List of Documents and other documents had been provided to defence counsel when they had not; and
4. was in violation of court orders, including orders to produce lists of documents, provide authorizations for the release of medical records, conduct examinations for discovery by certain dates and participate in mediation by a certain date.

[30] In the Supreme Court application, the defendant sought orders that the plaintiff's action be dismissed with costs or that the plaintiff was in contempt of a Case Plan Order made by Madam Justice Fitzpatrick; special costs for attendance at the application and the Case Planning Conference; and special costs for preparation and attendance at an examination for discovery that did not proceed.

[31] The potential issues being investigated in the Law Society complaint file include:

- (a) failure to respond to opposing counsel;

- (b) inadequate quality of service in relation to his failure to communicate with other counsel and his client's failure to comply with court orders; and
- (c) misleading the court.

- [32] On or about April 11, 2014, the Law Society wrote to Mr. McLean and advised him of the complaint. The letter set out the issues being investigated and advised that the Law Society was seeking Mr. McLean's response to them. It also asked for his file, asked him to address four specific allegations and asked him to provide any other information he believed to be relevant to the allegations.
- [33] On April 16, 2014, Mr. McLean sent six emails to the Law Society. A number of documents were attached to the emails. In one of these emails, Mr. McLean advised the Law Society that he was in the process of printing out the correspondence, which would take ten hours, because he was not allowed to forward it. The inference we draw from the evidence is that those six emails contained documents from his file, but not all of the correspondence.
- [34] None of the April 16, 2014 emails provided responses to the specific allegations as requested in the letter of April 11, 2014.
- [35] On April 24, 2014, the Law Society wrote to Mr. McLean and asked for responses to the specific inquiries regarding his alleged conduct as set out in the April 11, 2014 letter and advised that it had not received anything from him since his April 16, 2014 email stating that it would take ten hours to print out his correspondence.
- [36] On April 28, 2014, Mr. McLean sent an email in which he stated that he "faxed the remainder" of his file but could re-fax it if it had not been received.
- [37] The Law Society was unable to confirm that Mr. McLean had in fact sent a fax enclosing documents to the Law Society on or about April 28, 2014. On May 2, 2014, the Law Society wrote to Mr. McLean and advised him that it was unable to locate the April 28, 2014 fax. That letter also asserted that the Law Society understood there to be correspondence that was not included with Mr. McLean's emails and requested that he send the missing correspondence or documentation. The letter went on to repeat the specific allegations to which he had not responded. A full response was requested by May 7, 2014, failing which the matter would be referred to the Discipline Committee or its Chair with a

recommendation that the Chair issue a citation for his failure to respond to Law Society correspondence.

- [38] Mr. McLean's only communications providing information responsive to the requests for information made by the Law Society are the six email messages of April 16, 2014 enclosing file materials. Those email messages do not provide a response to staff's inquiries regarding his conduct.
- [39] As of the date of this hearing, the requested responses to the specific allegations had not been provided. Some documents had been provided, but the evidence demonstrates, by Mr. McLean's email of April 28, 2014, that there were documents and correspondence that were not provided to the Law Society.
- [40] The evidence demonstrates, and we find as a fact, that Mr. McLean failed to provide responses to the specific allegations notwithstanding three requests to do so. In addition, the evidence demonstrates, and we find as a fact, that Mr. McLean failed to provide his entire file including correspondence and failed to respond to a query in this regard, notwithstanding one request and two follow up requests.

Citation #2

- [41] The investigation underlying Citation #2 arose out of concerns raised by the Law Society Trust Assurance Department during a compliance audit of Mr. McLean's practice. These concerns included that Mr. McLean was not maintaining his accounting records as required by the Law Society Rules and that his records revealed numerous accounting deficiencies and concerns.
- [42] When the investigation was commenced, an order referred to as a "Rule 4-43 Order" (so named for the Rule that provides the authority to make such an order) was made by the Chair of the Discipline Committee. It ordered production of records of Kevin McLean and Kevin A. McLean Law Corporation as follows: all files, vouchers, records, accounts, books and other evidence, regardless of the form in which it is kept. The order requires cooperation in providing explanations and access to records including passwords and encryption keys.
- [43] The scope of the Rule 4-43 Order is very broad. It provides for an exclusion process in the event the lawyer who is subject to the order is concerned about privilege, relevance or privacy of material contained in records to be copied in the investigation. The process is set out in a document appended to the order. This document provides an explanation of the nature of a Rule 4-43 Order, how electronic records will be copied and dealt with during the investigation, and

describes the process by which the lawyer being investigated can identify information or records that may be personal, irrelevant or privileged. A written request to exclude certain records of information must be made to the Law Society investigator within seven days of the service of the Rule 4-43 Order. If the Law Society investigator does not agree with the exclusion request, the lawyer is entitled to have the request referred for adjudication. The document also provides for the process for adjudication of the exclusion request.

- [44] The Rule 4-43 Order was served on Mr. McLean on June 3, 2014.
- [45] Commencing June 3, 2014, several communications were exchanged between the Law Society and Mr. McLean as the Law Society attempted to collect the records and information covered by the Rule 4-43 Order. Law Society investigators also attended at Mr. McLean's office to collect information and interview him. A significant amount of file material and information was collected, but not all of the requirements of the Rule 4-43 Order were met.
- [46] On June 3, 2014, Mr. McLean emailed the Law Society and advised, among other things, that his office is kept in a paperless form and he was reading the remainder of the documents regarding the exclusion request.
- [47] Email exchanges between the Law Society and Mr. McLean on June 4, 2014 included an auto reply from Mr. McLean's email address stating that he was out of the office. The reply also stated that he could be reached by text, BBM, or PIN to his mobile.
- [48] Between June 5, 2014 and June 18, 2014 there were also many communications between Ms. Chan, a Law Society accounting investigator, and Mr. McLean pertaining to requests for answers to written questions. Some written responses were provided by Mr. McLean. On June 20, 2014, Ms. Chan met with Mr. McLean at his office to conduct a follow-up interview at which the following occurred:
- (a) Mr. McLean provided his password for DropBox. He stated that it is the same password as for his computer;
 - (b) Mr. McLean advised that his email services are provided by GoDaddy. He uses one email account for both personal and business purposes. He said that only 15 per cent of the transmissions through the email account are for the purposes of his law practice. He stated that he had made an exclusion request regarding his emails but he had not received a response

from the Law Society. He did not provide Ms. Chan with his password to his email service; and

- (c) Mr. McLean advised that he has a desktop computer at his home on which he conducts work. He advised that he uploads his work product to DropBox (a cloud-based document storage service).

[49] The login and password information that Mr. McLean provided to Ms. Chan for DropBox did not work. On July 1, 2014, Mr. McLean sent Ms. Chan an email advising he had made a formal request for adjudication of the exclusion of various documents and folders in his DropBox account and suggested waiting for the outcome of the adjudication to continue the process.

[50] From the service of the citation through to the exclusion process described below, Mr. McLean took the following positions pertaining to information and/or information storage devices sought by the Law Society:

- (a) he would not consent to providing his Blackberry device; he also later advised that it was non-operative and he no longer used it;
- (b) he would not attend at his office to respond to questions;
- (c) his mobile phone was for personal use; he later advised that the cell phone was not in his name and he did not have the owner's consent to provide it to the Law Society;
- (d) he did not provide access to his home office computer, or his login and password for his GoDaddy and DropBox accounts; instead he engaged the exclusion request process on these issues but did not participate in it.

[51] Mr. McLean's assertions that his Blackberry device was inoperative and that his mobile phone was only used for personal purposes are contradicted by the office auto reply email referred to above, which advised that he can be reached by text, BBM or PIN to his mobile.

The Exclusion Request

[52] On June 10, 2014 Mr. McLean requested exclusion of his cell phone from the Rule 4-43 Order because it was only for personal use, and he requested exclusion of all email communications.

[53] On June 12, 2014, the Law Society advised McLean that it did not agree with the exclusion requests and provided reasons why.

- [54] On June 25, 2014, the Law Society sent Mr. McLean a letter by both email and courier. It requested Mr. McLean's login and password information for his GoDaddy and DropBox accounts. It also requested that Mr. McLean produce his home office computer for imaging. It reminded Mr. McLean of his rights and obligations, given that the Law Society did not agree with his exclusion requests.
- [55] On June 26, 2014, Mr. McLean requested that an independent solicitor be appointed to adjudicate his exclusion request. He also reiterated his objection to the "seizure" of his cell phone and "intrusion" into his principal residence and the viewing of his "personal and irrelevant materials".
- [56] On June 27, 2014, the Law Society sent Mr. McLean a list of Law Society approved solicitors from which to choose an adjudicator of his exclusion request. On July 16, 2014, Mr. McLean advised the Law Society that his selection for an independent solicitor to adjudicate over the exclusion request was Robert Deane.
- [57] On July 2, 2014, Mr. McLean informed some Law Society staff that he was ill.
- [58] Commencing July 28, 2014, the independent adjudicator communicated with the Law Society and Mr. McLean regarding deadlines for the parties to make submissions regarding Mr. McLean's exclusion request.
- [59] On July 28, 2014, the Law Society received an auto reply from Mr. McLean's email, in reply to an email responding to the dates proposed by the independent adjudicator. It stated that Mr. McLean was out of the office.
- [60] On July 28, 2014, another Law Society email replying to a communication from the independent adjudicator generated an auto reply from Mr. McLean advising that he had been hospitalized after a serious accident. On August 13, 2014, an auto reply from Mr. McLean's office also advised that he was hospitalized after a serious accident. Presumably these auto replies are what prompted the September 29, 2014 hearing panel to adjourn that hearing and order he provide his medical records pertaining to the accident.
- [61] Mr. McLean did not reply to the communications regarding the adjudication process except through the auto replies described above. The Law Society provided its submissions to the independent adjudicator. Mr. McLean did not. Mr. Deane advised the parties that, if he still had not received any submissions from Mr. McLean by September 12, 2014, he would proceed to decide the

matter in light of the original exclusion request and the Law Society's submissions.

- [62] As noted above, there have been communications with the Law Society and Mr. McLean in the fall of 2014 that are consistent with him not being disabled or ill during the fall of 2014. One example is the appointment he issued to examine Law Society Counsel Mr. Grady and Mr. Bussanich, a Law Society staff lawyer, for discovery on the day of this hearing.
- [63] To date, Mr. McLean has not provided access to his home office computer, nor has he provided his working login and password information for his GoDaddy and DropBox accounts. He has also not provided his cell phone or cell phones or other mobile devices for imaging.

LAW

Onus and Standard of Proof

- [64] The onus is well established: it is on the Law Society to prove the allegations on a balance of probabilities: *FH v. McDougall*, 2008 SCC 53, adopted by the Law Society in *Law Society of BC v. Schauble*, 2009 LSBC 11.

Professional Misconduct

- [65] "Professional misconduct" is not a defined term in the *Legal Profession Act*, the Law Society Rules or *Code of Professional Conduct for British Columbia*, but has been the subject of consideration by hearing panels in several cases, including *Law Society of BC v. Martin*, 2005 LSBC 16. At para. 171, the hearing panel in *Martin* considered the question of what constitutes professional misconduct and concluded that the test 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."
- [66] The Panel must look at all of the circumstances: *Re Stevens and Law Society of Upper Canada* (1979), 55 OR (2d) 405 (Div. Ct.), *Law Society of BC v. Harding*, 2014 LSBC 52 at paragraphs 68 and 78.
- [67] In *Law Society of BC v. Lyons*, 2008 LSBC 9, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:

- (a) the gravity of the misconduct;
- (b) the duration of the misconduct;
- (c) the number of breaches;
- (d) the presence or absence of *mala fides*; and
- (e) the harm caused.

[68] The gravity of the misconduct can also be assessed by measuring it against the *Code of Professional Conduct for British Columbia* and applicable rules. Not every breach of the *Code of Professional Conduct* will necessarily amount to professional misconduct. However, the Benchers 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.

[69] This principle has also been followed subsequently in many cases, including *Law Society of BC v. Cunningham*, 2007 LSBC 17; *Law Society of BC v. Decore*, 2012 LSBC 17; *Law Society of BC v. Malcolm*, 2012 LSBC 04; *Law Society of BC v. Marcotte*, 2012 LSBC 18, *Law Society of BC v. Niemela*, 2012 LSBC 9 and *Law Society of BC v. Buchan*, 2013 LSBC 08.

[70] Chapter 7.1(1) of the *Code of Professional Conduct for British Columbia* and Law Society Rules 3-5(6) and (10) set out the obligations of lawyers with respect to regulatory compliance. These obligations include

- (a) replying promptly and completely to any communications from the Law Society,
- (b) providing documents as required to the Law Society,
- (c) not improperly obstructing or delaying Law Society investigations,
- (d) cooperating with Law Society investigations, and
- (e) responding fully and substantively to all requests made by the Executive Director in the course of an investigation.

[71] Rule 4-43 sets out the obligations of a lawyer who is the subject of Rule 4-43 Order. The obligations include providing the information sought to be copied,

answering questions and providing encryption keys and/or passwords. Engaging in the exclusion process does not relieve a lawyer of complying with the Rule 4-43 Order and producing the material in the first instance.

ANALYSIS

- [72] It is obvious, and many panels have held, that member compliance with investigations is critical to the Law Society fulfilling its role of self-regulation and retaining public confidence as the self-regulator. See, for example: *Cunningham* at paragraph 22 and *Marcotte* at paragraph 48.
- [73] On Citation #1 we apply the *Lyons* factors as follows:
- (a) failure to cooperate with an investigation and to respond to communications is grave unless an explanation is provided. The Law Society simply cannot discharge its duty to the public without communication with and cooperation from lawyers who are under investigation. Mr. McLean has provided no explanation for his failure to cooperate with the Law Society investigations;
 - (b) the misconduct commenced with the first request on April 11, 2014 and continued up until the time of the hearing of Citation #1 on December 4, 2014. The Law Society provided a number of reminders and provided deadlines by which the responses should be provided to avoid this discipline action. The failure to respond has been protracted;
 - (c) there were a number of breaches. While Mr. McLean did provide some file material, he did not respond at all to the requests to respond to the specific allegations. After the initial request made by the Law Society, two follow up requests were made asking for responses to the specific allegations. Mr. McLean received and failed to respond to three requests in total;
 - (d) the evidence demonstrates a cat and mouse quality to the responses and non-responses that were given. We have no explanation from Mr. McLean for his conduct; and
 - (e) the harm caused by Mr. McLean's conduct is significant delay and added expense in the investigation of the serious allegations made in the complaints that underlie Citation #1. Those allegations include failure to show respect for and comply with court processes. They affect the court, Mr. McLean's client, opposing counsel and the other party in that

litigation. Those interests, and the public interest, are ill-served by an investigation that does not proceed efficiently and effectively.

- [74] With regard to Citation #2, the same analysis applies as on Citation #1 for each of the factors.
- [75] In addition, with regard to factor (a), we note that, while cooperation with Law Society investigations in all respects is important, Mr. McLean's conduct constitutes non-compliance with an order. Non-compliance with the orders of statutory bodies and courts is considered grave: *Law Society of BC v. Welder*, 2014 LSBC 58. In addition, with regard to factor (e), the harm caused is the delay of an investigation into the underlying concerns regarding the operation of his trust accounts and his accounting practices generally. The public interest in ensuring that lawyers are financially responsible is profound. Delays in investigations of this nature undermine the Law Society's obligation to protect the public.

DETERMINATION

- [76] We find that Mr. McLean's conduct on Citation #1 is professional misconduct. We find that Mr. McLean's conduct on Citation #2 is professional misconduct.
- [77] At the hearing on December 4, 2014, we made an order that Mr. McLean provide a complete and substantive response to the outstanding matters in Citation #1 or provide a valid reason for not providing a complete and substantive response by December 18, 2014. The order was structured in that way because this Hearing Panel was not in a position to assess the validity of any reasons he has for not responding. We are only in a position to assess that he has not responded and that he has provided no reason for not responding. The failure to respond coupled with the failure to provide a valid reason for non-response to date is what grounds the finding of professional misconduct.
- [78] With regard to Citation #2, at the hearing on December 4, 2014 we ordered that he comply with the terms of the Rule 4-43 order by providing certain enumerated pieces of information and electronic devices that the evidence showed to be likely in existence and used by Mr. McLean in his practice. Since the evidence was controversial on whether he had a mobile device, such as phone, other than a Blackberry (which he asserted at one point that he no longer used), we ordered production of the Blackberry and any other mobile device or devices Mr. McLean used in any way in his practice.

DISCIPLINARY ACTION

[79] The Law Society submits that the appropriate disciplinary action in respect of the Respondent's failure to respond to the Law Society is a fine of \$3,000 payable by April 30, 2015. The Law Society also seeks costs of \$3,630 payable by April 30, 2015.

[80] The Law Society submits that the appropriate disciplinary action in respect of the Respondent's failure to comply with the Rule 4-43 Order is a fine of \$4,000 payable by April 30, 2015 and costs of \$1,210, both payable by April 30, 2015.

[81] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate set out in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice. This purpose is recognized in the following often-cited passage from MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* at p. 26-1:

The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[quoted in *Law Society of BC v. Hordal*, 2004 LSBC 36 at paragraph 51]

[82] In *Law Society of BC v. Hill*, 2011 LSBC 16, the hearing panel commented at paragraph 3 that:

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.

[83] A non-exhaustive list of factors to be considered in assessing penalty are set out in the 1999 decision of *Law Society of BC v. Ogilvie*, [1999] LSBC 17, as follows:

- (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 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.

[84] Mr. McLean's Professional Conduct Record consists of a Conduct Review, a Practice Standards referral, an administrative suspension (in the past and currently) and a Rule 3-7.1 referral. The Conduct Review was ordered, in part, to discuss the Respondent's conduct in failing to respond promptly or at all to emails from his former firm requesting that he attend to firm and client matters. Therefore, the Respondent has a history of failing to respond to communications.

Citation #1

[85] The cases involving failing to respond to Law Society communications suggest a range of a reprimand at the low end, to fines of \$1,500 to \$5,000 in the mid-range to suspension at the high end: *Decore*; *Law Society of BC v. Kruse*, 2002 LSBC 15; *Law Society of BC v. Marcotte*, 2010 LSBC 18; *Malcolm*; *Buchan*.

[86] The failure to respond after a citation was issued; the length of the period the response has been outstanding; and Mr. McLean's previous conduct record,

which includes incidents of poor communications, are factors that may be considered in determining the appropriate disciplinary action: *Decore; Malcolm; Marcotte*.

- [87] Mr. McLean has not acknowledged this misconduct, nor taken any steps to remediate it.
- [88] There is a need for both specific and general deterrence with respect to Mr. McLean's failure to respond to the Law Society. Specifically, he has been and remains the subject of these two ongoing investigations, without any apparent appreciation or understanding of the nature and consequences of non-cooperation with the Law Society. His continued failure to do so is an aggravating and troubling factor.
- [89] With regard to general deterrence, the public's confidence in the integrity of the profession is compromised if the Law Society is seen to not be doing everything it can to properly regulate its members.
- [90] There is no evidence that Mr. McLean has gained any financial or personal advantage as a result of the misconduct.
- [91] The Panel would have preferred to have the benefit of Mr. McLean's submissions and evidence of his personal circumstances. Tailoring discipline to the circumstances of the person being disciplined optimizes the chance of its justness and effectiveness. We are left to determine the appropriate disciplinary measure without his participation despite that he was given appropriate notice of the hearing and opportunity to attend and make submissions.
- [92] In all of the circumstances, we conclude that a fine is warranted. We are of the view that it should be above the bottom end of the fine range, given the number of breaches in this complaint and that this complaint is followed by a second complaint for failing to follow a Rule 4-43 Order. As discussed above, we view the second citation as an aggregated form of failing to respond. We set the fine at \$2,500.
- [93] Costs are sought for this hearing for half a day (\$1,000) and for the September 29, 2014 hearing for one full day (\$2,000). Counsel for the Law Society advises the September 29, 2014 proceeding commenced at 9:30 and the order was not signed until 1:30. Four hours is one full day. Apparently there were several breaks to consider matters and to allow for the signing of the order.

- [94] We appreciate that the September 29, 2014 panel was concerned about a possible medical reason for Mr. McLean's non-attendance and gave him the benefit of the doubt on that, but the evidence suggests the actual hearing did not require four hours.
- [95] The time it took to draft the order and have it signed by the chair of the panel is not integral to the hearing on the issue of whether it should be adjourned or proceed and often takes place after hearing has concluded. We have adjusted the award of costs to allow costs for half a day for both September 29, 2014 and half a day for this hearing, for a total of \$2,000 plus court reporter costs of \$420.

Citation #2

- [96] The precedent decisions on failing to respond provide guidance on the range of discipline and principles applicable to failure to comply with the Rule 4-43 Order.
- [97] It is unknown whether the Mr. McLean has gained any financial or personal advantage as a result of the misconduct. A failure to comply fully with the Rule 4-43 Order has hindered the investigation that was prompted by concerns raised during a compliance audit.
- [98] There is need for specific deterrence with respect to the Respondent's non-compliance with the Rule 4-43 Order. Despite being repeatedly advised that he must provide the requested information and hardware, Mr. McLean has refused to comply.
- [99] We determine that a fine in the amount of \$4,000 and costs of \$1,210 to be appropriate.
- [100] We set May 15, 2015 as the time by which all the fines and costs shall be paid.

SUMMARY

- [101] We find Mr. McLean committed professional misconduct by failing to respond completely and substantively to requests made by the Law Society in its investigation into the complaint underlying Citation #1. We impose a fine of \$2,500 and costs of \$2,420, payable by May 15, 2015.
- [102] We find Mr. McLean committed professional misconduct by failing to comply with the Rule 4-43 Order that is the subject of Citation #2. We impose a fine of \$4,000 and costs of \$1,210, payable by May 15, 2015.

