2015 LSBC 17
Decision issued: April 10, 2015
Citation issued: January 30, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JOHN ROBERT SANDRELLI

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	December 15, 2014
Panel:	**Dissent decision**: Lee Ongman, Chair **Majority decision**: Lance Ollenberger, Public representative Brian J. Wallace, QC, Lawyer
Discipline Counsel:	Kieron Grady
Counsel for the Respondent:	William Smart, QC and Rebecca Robb

MAJORITY DECISION OF LANCE OLLENBERGER AND BRIAN J. WALLACE, QC

INTRODUCTION

[1] On September 17, 2014 the Panel issued its decision on the Facts and Determination hearing of the citation against the Respondent (the "Decision"). The citation contains one allegation, and the essence of that allegation is that the Respondent breached an undertaking imposed on him pursuant to Rule 8 of Chapter 11 of the *Professional Conduct Handbook* then in force, when he instructed his firm's bank to stop payment on a trust cheque payable to PC. The cheque arose out of a commercial transaction with the Respondent's client.

[2] For clarity, Rule 8 reads as follows:

> Except in the most unusual and unforeseen circumstances, which the lawyer must justify, a lawyer who withdraws or authorizes the withdrawal of funds from a trust account by cheque undertakes that the cheque
>
> (a) will be paid, and
>
> (b) is capable of being certified if presented for that purpose.

[3] The specific undertaking under consideration at the disciplinary action phase of the hearing is that, by authorizing the withdrawal of funds from a trust account by cheque, the Respondent undertakes that the cheque: (a) will be paid. There was no case cited to us where a lawyer had unilaterally stopped payment on a trust cheque.

[4] In the Decision, we found that, "It is fundamental to legal ethics that the public can rely on a lawyer's undertaking," a principle that applies to trust cheques. We concluded that, "by stopping payment on the trust cheque without sufficient reason, the Respondent committed professional misconduct."

[5] The Law Society seeks a sanction of a fine of $3,500 and costs of $17,480, both payable by April 30, 2015. The Respondent submits that a reprimand and costs of $8,000 is the appropriate sanction. He accepts the proposed date of April 30, 2015 for payment of costs.

DETERMINATION OF THE APPROPRIATE SANCTION

[6] We accept that the primary purpose of disciplinary proceedings is set out in the following decisions: *Law Society of BC v. Hordal*, 2004 LSBC 36 at para. 51; *Law Society of BC v. Gellert*, 2014 LSBC 05 at para. 36; *Law Society of BC v. Hill*, 2011 LSBC 16. In *Hill*, the hearing panel commented at para. 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.

[7] This cannot be overstated and is reflected in the following oft-quoted passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline* at p. 26:

> The purpose 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.

[8] This leads us to the duty of the hearing panel after professional misconduct is either admitted or proven in light of these objectives.

[9] Section 38(5) of the *Legal Profession Act* provides in part that after a hearing, the Panel must do one or more of the following: reprimand the respondent; impose a fine not exceeding $50,000; impose practice conditions; or suspend or disbar the respondent.

GENERAL PRINCIPLES

[10] In *Law Society of BC v. Ogilvie*, [1999] LSBC 17, the Panel set out a non-exhaustive list of factors to be considered in determining the appropriate disciplinary action. It also looked at criminal law sentencing principles for guidance. This case is often cited and utilized in disciplinary cases in considering the applicable factors and weight to be assigned in the circumstances. We agree that the list of factors are worthy of consideration:

(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 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.

We will consider each of the factors from *Ogilvie*.

The nature and gravity of the conduct proven

[11] The nature and gravity of the misconduct is usually considered of special importance and has been described as a "principal benchmark against which to gauge how best to achieve the key objective of protecting the public and preserving confidence in the legal profession." (*Gellert*)

[12] The inviolability of lawyers' undertakings is fundamental to protect members of the public relying on lawyers in the conduct of transactions. Lawyers honouring undertakings are essential to maintaining high professional standards, and preserving public confidence in the legal profession.

[13] In *Hammond v. Law Society of British Columbia*, 2004 BCCA 560 at paragraphs 55 and 56, the Court of Appeal emphasized the primary importance of undertakings and the reflection on the integrity of the profession as a whole of a breach of an undertaking.

[14] In *Law Society of BC v. Heringa*, 2004 BCCA 97 at paragraphs 10 and 11, the Court of Appeal approved the discipline panel's characterization of undertakings as "the most solemn promises," that they "must be accorded the most urgent and diligent attention possible in all the circumstances," and that "serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers."

[15] As a result, we find that the penalty must reflect the serious nature and gravity of the Respondent's breach of undertaking by stopping payment of a trust cheque.

Age and experience of the respondent

[16] The Respondent submits that "his misconduct ... involved an exercise of judgment in the context of a complex and lengthy insolvency proceeding. His decision to stop payment had to be made relatively quickly, [and] was precipitated by his client's instructions ... ."

[17] This submission is that a sanction that is relatively lower may be justified for misconduct in difficult circumstances. In our view, this submission may have merit where a respondent lacks maturity or experience. However, here the Respondent has extensive experience in this complex and high-pressure field, so that a relatively lower sanction is not justified.

The previous character of the respondent including details of prior discipline

[18] The Respondent has no other discipline record, and he provided us with positive letters of character. The authors of the character references are aware of this citation and are supportive of the Respondent. They describe the Respondent's exemplary record of service to the community year after year. This service includes sitting on community boards, acting as a major fundraiser for the United Way, contributing many volunteer hours as a youth hockey coach, and speaking as a guest lecturer in the area of insolvency law. These facts reflect well on the Respondent, and we have given them positive consideration.

The impact upon the victim

[19] The breach of undertaking deprived PC of $90,000 when the bank advised her that a stop payment was placed on her cheque on October 26, 2012. The payment was not replaced immediately. It was replaced on November 30, 2012, more than a month later, in spite of the letters of November 6, 2012 and November 8, 2012 from PC's counsel requesting a replacement cheque. We consider that these events have had a serious impact on PC.

The advantage gained, or to be gained, by the respondent

[20] The Respondent's client gained the $90,000 advantage by the Respondent's conduct, which was exploited by the Respondent who used it to try to negotiate better terms before providing a replacement cheque.

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

[21] The Respondent did not acknowledge that stopping payment of the trust cheque was misconduct. He only provided PC with a new cheque after unsuccessfully trying to negotiate an advantage for his client from PC. We believe this shows that the Respondent knew stopping payment on the cheque was unprofessional, but wrongly allowed himself to be persuaded that there may be an argument that it was

not. This evidence shows that the Respondent did not accept the gravity of the professional misconduct.

The possibility of remediating or rehabilitating the respondent

[22] In our view, the Decision itself, stating that the Respondent committed professional misconduct, is sufficient to make it most unlikely that the Respondent will reoffend. We do not consider rehabilitation or remediation measures are needed to prevent the Respondent from repeating the behaviour.

The number of times the offending conduct occurred

[23] We are not aware of any other occasion on which the Respondent has stopped payment on a trust cheque. In fact, on three previous occasions, his client had asked him to stop payment on this trust cheque, and each time he concluded he could not stop payment on a trust cheque, and he so advised his client.

The impact on the respondent of criminal or other sanctions or penalties

[24] We are not aware of any criminal or other penalties against the Respondent.

The impact of the penalty on the respondent

[25] We have received no evidence to suggest that the impact of any penalty would be greater or less on the Respondent because of his personal circumstances.

The need for specific and general deterrence

[26] We find that the penalty must be significant to provide general deterrence to make it clear to the profession that it is fundamental to legal ethics that the public must be able to rely on a lawyer's undertaking and specifically that a solicitor's trust cheque will be paid and can be certified if presented to a bank.

The need to ensure the public's confidence in the integrity of the profession

[27] In practising corporate and commercial law in British Columbia, solicitors exchange trust cheques for millions of dollars every day. Some of those transactions are relatively simple, some are more complex. They flow smoothly because of lawyers' undertakings, including solicitors' trust cheques. Damage will be done if the confidence is lost that the public and the legal profession itself have

in accepting a solicitor's trust cheque in a commercial transaction by incidents such as this.

[28] Loss of public confidence in lawyers' undertakings does irreparable harm to the profession. Without that confidence, the public, including the commercial sector, will refuse to accept trust cheques from lawyers, diminishing lawyers' ability to ensure the honest conduct of transactions. It is the object and duty of the Law Society to uphold and protect the public interest in the administration of justice.

The range of penalties imposed in similar cases

[29] The cases that we have been referred to for the range of penalties for a breach of undertaking are cases of breach of undertakings generally and reflect that some circumstances are less grave than others. We can take some guidance from the penalties attracted by the more serious breaches of undertaking. The penalties range from reprimands for the least serious breaches to suspensions for the most serious. Between those extremes are fines ranging from $3,000 to a high of $20,000. In the higher range of discipline we find suspensions. In *Hordal*, the Review Panel ordered a six-month suspension replacing a fine of $12,500 and a two-month suspension.

DECISIONS ON DISCIPLINARY ACTION

[30] A breach of the undertaking specifically expressed in Rule 8 Chapter 11 of the *Professional Conduct Handbook*, then in force, that a trust cheque will be honoured has not previously been considered in discipline proceedings. The Respondent submits that, "as a consequence, there is no case with similar facts from which this Panel can derive guidance on the appropriate penalty." We do not agree. In our opinion, the undertaking to honour a trust cheque is of the same character as other serious undertakings, so that we may look to penalties imposed for breaches of undertaking in other circumstances to give us guidance.

[31] The Respondent submits that a reprimand alone is the appropriate penalty. Law Society counsel submits that a fine of $3,500 is sufficient.

[32] The only decision to which we have been referred as authority that a reprimand could be a sufficient sanction for a breach of undertaking is *Law Society of BC v. Cherney*, [2000] LSBC 09. The breaches at issue were of undertakings given to the Law Society and appeared to relate to the respondent's difficulties while articling. The panel's decision did not disclose the specific undertakings, but it characterized them as "at the lower end of the scale."

[33] The Panel finds that a reprimand is not sufficient because the Respondent's professional misconduct is not at the lower range of seriousness of an offence.

[34] A fine of $3,500 is also not reflective of the gravity of the offence to the profession and the payee who suffered the loss of funds and of the Respondent's attempt to renegotiate the transaction in exchange for a replacement cheque. Only a significant sanction will deter other lawyers, reflect the seriousness of the offence, maintain high professional standards, and preserve public confidence in the legal profession.

[35] We have considered all the decisions to which we have been referred, and we have been most influenced by decisions imposing fines for breaches of undertaking.

[36] The panel in *Law Society of BC v. McRoberts*, 2011 LSBC 04, imposed a fine of $1,000 considering that the respondent had forgotten having undertaken not to register an easement some 12 years before the citation was issued, had done the work *pro bono* for a community project, had admitted he had made a mistake, had no prior undertaking-related discipline record, and had numerous letters of support.

[37] *Law Society of BC v. Lee*, 2002 LSBC 29, was heard as a conditional admission of a disciplinary violation and consent to a specific disciplinary action pursuant to Rule 4-22 of the Law Society Rules. The respondent admitted to failing to provide to opposing counsel post-dated cheques from her client and a copy of a filed document, and consented to a fine of $2,000. The panel characterized the conduct as "not deliberate," and accepted the conditional admission and proposed disciplinary action.

[38] The panel in *Law Society of BC v. Richardson*, 2008 LSBC 05, imposed a fine of $2,500, which it intended to be similar to fines imposed in other cases. The respondent had no prior discipline record, and there was no suggestion he had previously breached an undertaking. However, unlike the present case, the panel concluded there was no real victim, the conduct was not cavalier but misguided, and there was no element of dishonesty.

[39] *Law Society of BC v. Hill*, 2007 LSBC 02, was also heard under Rule 4-22. The respondent admitted to professional misconduct in breaching his undertaking in failing to pay outstanding taxes from mortgage proceeds. The respondent consented to a fine of $2,500.

[40] *Law Society of BC v. McLellan*, 2003 LSBC 40, was also a hearing under Rule 4-22. Contrary to an undertaking, the respondent discharged a mortgage without having delivered to opposing counsel documents for a new mortgage. The breach

appeared to be inadvertent, the opposing party was not prejudiced, and the respondent did not benefit. The respondent consented to a reprimand and a fine of $3,000.

[41] The respondent in *Law Society of BC v. Linge*, 2008 LSBC 07, consented to a penalty under Rule 4-22 of a fine of $3,000. There, in breach of an undertaking, the respondent had paid trust funds to his client without having discharged an easement giving the municipality temporary access. The breach caused no hardship.

[42] In *Law Society of BC v. Epp*, 2006 LSBC 5, the respondent had negotiated a settlement agreement for his client that included undertakings on the payment of funds held in trust by the respondent. His client signed the agreement, but the respondent did not. On his client's instructions, the respondent refused to honour one of the undertakings. The panel accepted that the respondent's conduct was at the lower end of the "undertaking misconducts" and noted that it was a one-time error in judgment, that the respondent had cooperated fully with the Law Society, and that he had provided letters of reference as good as the panel had seen. The panel imposed a fine of $5,000.

[43] In *Law Society of BC v. Choda*, 2011 LSBC 31, the respondent admitted he had breached an undertaking by receiving net proceeds of the sale of real property without discharging a lien within the prescribed time. He had previously gone through a conduct review on compliance with an undertaking. The panel imposed a fine of $5,000.

[44] The respondent in *Law Society of BC v. Clendening*, 2007 LSBC 10, undertook to "use diligent and commercially reasonable efforts to obtain the Discharge [of a mortgage] in a timely manner," but did not do so until approximately 18 months after the transaction closed. The respondent admitted that he thereby breached the undertaking, that he failed to respond to communications from a notary public, and that the conduct was professional misconduct. The panel accepted the joint proposal of the respondent and the Law Society to impose a fine of $7,500. The panel accepted that the effect of the breach of undertaking was at the lower end of misconduct but that it was aggravated by a previous conduct review on breach of undertaking and the failure to respond to the notary.

[45] A fine at the low end of the range is not appropriate here. Fines of $2,000 to $3,000 were imposed for breaches of undertaking referred to as "not deliberate," "not cavalier but misguided" and "inadvertent." Fines of $3,000 were imposed in cases where there was no hardship and the opposing party was not prejudiced. We have found that the Respondent breached the undertaking deliberately, on his

client's instructions, to the prejudice of the opposing party, and for his client's benefit.

[46] The Respondent is an experienced lawyer. The breach of undertaking was the considered disregard of his solemn promise, all for the financial benefit of his client and therefore to his own benefit. The breach was intended to deprive PC of $90,000, which we consider to be a large sum of money. The breach also had an impact on the profession. Stopping payment on a solicitor's trust cheque destroys confidence in our profession. There are no reported cases similar to this one.

[47] A fine of $3,500 suggested by the Law Society is in the low mid-range and not reflective of the gravity of the offence to the profession and the payee. Only a significant penalty will deter other lawyers, recognize the seriousness of the offence, maintain high professional standards and help to preserve public confidence in the legal profession. Having reviewed and applied these factors to the facts, we find that a minor penalty such as a reprimand or a small fine would not be sufficient to ensure the public's confidence in the integrity of the profession.

[48] The statutory limit on fines under the *Act* is $50,000. In the middle are fines ranging from $5,000 to $20,000. In *Clendening* at paragraph 9, the panel said "Penalties for breach of undertaking alone have ranged from fines of $2,000 to $12,000, including in serious cases suspension of the lawyer.

[49] Suspensions follow significant fines in the higher range of discipline. In *Hordal*, the Review Panel ordered a six-month suspension replacing a fine of $12,500 and a two-month suspension.

CONCLUSION

[50] In the present case, the Respondent's misconduct is aggravated because he clearly knew that stopping a trust cheque was wrong. He had considered and refused to stop payment on this cheque for his client on three previous occasions. But ultimately, he was persuaded to ignore his professional responsibility in order to give an advantage to his client. The misconduct violates the promise that a trust cheque will be honoured, which promise underlies the trust of the public, including that of the commercial sector in the legal profession's role in transactions.

[51] We find that this breach of undertaking expressly provided for by Chapter 11 Rule 8 is a serious incident of professional misconduct, and the penalty must reflect that. However, the Respondent's lack of any discipline record and his exemplary volunteer services to the community, are important mitigating factors to be

considered in arriving at the appropriate sanction to best protect the public and ensure confidence in the profession. These mitigating factors have persuaded us to impose a fine substantially less than the amount of money involved in the breach of undertaking and the maximum fine available under the Act. The Panel concludes that a fine of $10,000 and a reprimand is the appropriate sanction under the circumstances.

COSTS

[52] Section 46 of the *Legal Profession Act* authorizes the Law Society to make rules "governing the assessment of costs," and Rule 5-9 of the Law Society Rules provides for a tariff of costs by which a panel must be guided unless, under Rule 5-9(1.2), it concludes "it is reasonable and appropriate for the Society, an applicant or a respondent to recover no costs or costs in an amount other than that permitted by the tariff."

[53] The Respondent submits that this case justifies a reduction from the tariff because Chapter 11 Rule 8 of the former *Handbook* has not previously been the subject of a discipline panel decision, the Respondent made all appropriate admissions, the length of the hearing was determined by the complexity of the underlying transaction, and the costs exceed the seriousness of the misconduct.

[54] We have found that the Respondent's conduct was serious, and we do not accept that the other factors he relies on justify a reduction in costs from those determined under the tariff.

[55] The Respondent submits that the proposed Schedule of Costs submitted by the Law Society should be adjusted downward and we should assess a lower number of units in the range as appropriate for several tariff items and a reduction for the penalty hearing and the related disbursement as it occupied only half a day. We find the following number of units and amounts are appropriate:

For item 1 - 5 units $500

For item 3 - 10 units, the mid-point; $1,000

For item 7 - 15 units, the mid-point; $1,000

For item 10 - 5 units, towards the lower end of the range; 5 units $500

For the penalty hearing under item 13 – FD and DA; $12,000

For the penalty hearing disbursement Dec 15 – reduce $420 to $210 for half day for the reporter;

ORDER

[56] Accordingly the Panel orders that the Respondent:

(a) be reprimanded;

(b) pay a fine of $10,000; and

(c) pay costs pursuant to the Tariff in the amount of $15,210.

Both the fine and costs are to be paid within six months from the issuance of this decision.

DISSENTING DECISION OF LEE ONGMAN

[57] The majority and I agree that this is a serious instance of professional misconduct and that the sanctions proposed by counsel are not adequate to satisfy the obligation of the hearing panel.

[58] As has been stated herein and other cases cited to us, 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* (the Act), to uphold and protect the public interest in the administration of justice. Section 38(5) empowers the Panel to order sanctions ranging from reprimands, to fines, conditions of practice, suspensions and disbarment.

[59] The most important *Ogilvie* factors that apply to this case are: (a) the nature and gravity of the conduct proven; (b) the impact upon the profession; (l) the need to ensure the public's confidence in the integrity of the profession; and (k) deterrence. I agree with the majority's discussion of these important factors except as set out herein and, in particular, for the need to give more emphasis to deterrence.

[60] There has never been an incident reported of a lawyer unilaterally stopping payment of a trust cheque. It is significant that there are no previous reported decisions of a violation of Rule 8 of Chapter 11 as it was then known. There should never be another case such as this. It must be made clear that there will be zero tolerance for this misconduct.

[61] As the majority stated in paragraph 48, and I adopt it, "Only a significant penalty will deter other lawyers, recognize the seriousness of the offence, maintain high professional standards and help to preserve public confidence in the legal profession."

[62] A significant penalty that includes suspension or disbarment is appropriate as a reflection of the seriousness of the offence. Only a significant penalty underlines the nature, importance and the integrity of a lawyer's trust cheque.

[63] In its decision on penalty, the majority refers to mitigating factors; however, those factors evidenced by sincere and eloquent character testimonials are outweighed by the offence itself and the aggravating factors described as follows:

(a) In our decision on facts and determination the Panel found that there was no justification for the Respondent to stop payment on his trust cheque. Further, the Panel found that the Respondent knew it was wrong when he did it, having refused to do so on three prior occasions when requested to do so by his client;

(b) The Respondent did not accept that stopping payment on his trust cheque was wrong, and after stopping payment, he failed to replace the cheque for more than 30 days after demand;

(c) During the time the Respondent failed to replace the trust cheque, he continued to withhold the victim's funds while he attempted to negotiate better terms for his client prior to replacing the trust cheque;

(d) The Respondent failed to recognize any resulting harm to the victim, and in fact, blamed her for his action in stopping payment because, in his view, she should not have delayed in presenting the trust cheque to the bank; and

(e) The Respondent is an experienced practitioner who has been a leader in a commercial practice and is expected to understand the harm to the public's confidence in the legal profession if lawyers fail to honour trust cheques.

[64] General deterrence in this case is required to ensure to our very best ability that the public is aware that hearing panels will deal with this misconduct firmly, and thereby help to restore confidence that it will never happen again. The public, with special mention to the commercial sector, banks, credit unions, financial institutions, public and private corporations and the members of the legal

profession need to know that we will employ whatever measures are necessary to uphold and protect the public interest in the administration of justice, and that will include a suspension or disbarment if members conduct themselves this way.

[65] Based on these factors I would order that the Respondent be suspended for one month, which is the approximate time that he withheld funds from the victim, that he pay a fine of $10,000 and costs as described by the majority.

ORDER

[66] I would therefore order that the Respondent:

(a) be suspended for one month commencing June 1, 2015;

(b) pay a fine of $10,000; and

(c) pay costs pursuant to the tariff as set out in the majority decision, both costs and fine paid within six months from the issuance of this decision.