2015 LSBC 45
Decision issued: October 20, 2015
Citation issued: June 18, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE REVIEW BOARD

Review date: May 14, 2015

Review Board: **Majority decision:**
David Mossop, QC, Bencher, Chair
Don Amos, Public representative
Lynal Doerksen, Bencher
Richard Lindsay, QC, Lawyer
Lois Serwa, Public representative
Tony Wilson, Bencher

Dissent decision:
Donald Silversides, QC, Lawyer

Discipline Counsel: Robin McFee, QC
Counsel for the Respondent: Gerald Cuttler

MAJORITY DECISION OF DAVID MOSSOP, QC, DON AMOS, LYNAL DOERKSEN, RICHARD LINDSAY, QC, LOIS SERWA AND TONY WILSON

SUMMARY

[1] This is a Review pursuant to s. 47 of the *Legal Profession Act* arising from the hearing panel's decision on Facts and Determination issued June 27, 2014 with respect to the Respondent's conduct at a tow lot in Surrey, British Columbia.

[2] The event that gave rise to the complaint and citation is thoroughly set out in the hearing decision but can be summarized as follows for the purpose of this Review.

[3] The Respondent's mother-in-law was involved in a motor vehicle accident on June 25, 2012. As the Respondent's mother-in-law's vehicle was inoperable, it was towed to a local tow yard. The company that towed the vehicle and stored it at their yard is called "Unitow."

[4] Unitow has several security cameras on its property, and much of what was said and done in this matter was recorded and made an exhibit at the hearing and is part of the record before this Review Board. This Review Board has had the opportunity to observe and hear what was recorded. As a result of these recordings there was little in dispute as to what transpired.

[5] The Respondent was assisting his mother-in-law to deal with the matter, and he attended at the Unitow office on June 26, 2012 to take pictures of the damaged vehicle. The Unitow employee refused to allow the Respondent into the yard to take pictures of the vehicle referring to the "Privacy Policy Act" and that "no lawyers are allowed to go in the yard." This was not acceptable to the Respondent, and the interaction between the Respondent and the employees of Unitow quickly degraded.

[6] The Respondent attempted several means of persuading the Unitow employee to allow him to take pictures of the vehicle, including telling the Unitow staff:

(a) he will report this to the Attorney General and "I am going to do everything I can to take his [Unitow's boss] licence away" (pp. 590-2 of the Record); and

(b) if I don't have an answer in less than 10 minutes I'm calling the police.

[7] The Respondent also obtained a written consent from his mother-in-law as required by the Unitow staff. All of these efforts failed. The Respondent then began to take

pictures of the office and of the employees of Unitow. This was not acceptable to the Unitow employees, and they advised the Respondent that taking a picture of them was illegal.

[8] The Respondent then left the Unitow office and, while in the public parking area of Unitow, called the Surrey RCMP detachment on the non-emergency line. The conversation with the RCMP dispatcher was recorded and is also part of the record. The relevant portions of the transcript are set out below (p. 511 of the Record):

> Respondent I come back and they say they won't let me in and ... I told the lady at the switchboard that, I need someone there to talk to these idiots because otherwise you'll have to send a police officer probably to arrest me because I'm going to go get a crowbar and smash up the place.
>
> Dispatcher Well if you'll just standby for one second, this is a recorded line, which you probably no [sic] so let's not even go ... .
>
> Respondent Oh good.
>
> Dispatcher Let's not even go in that aspect because we don't want you to be the one like you mentioned [inaudible] to property.
>
> Respondent Yeah, well I didn't say it to them because I'm not uttering threats, I'm saying it to you 'cause I want you to keep the peace.

[9] The dispatcher then began a commendable attempt to negotiate a resolution of the situation with Unitow and the Respondent by putting the Respondent on hold and contacting Unitow to get their side of the story. It is clear in this conversation that one of the Unitow staff overheard the "crowbar" comment and told the rest of the staff. In the meantime, the Respondent got in his vehicle and moved it from the visitor parking area and parked in front of the gate to the secure parking area (where his mother-in-law's vehicle was being held). This prevented any vehicles from entering or exiting the secured area but, from the video recording, no vehicles are seen attempting to enter or leave the secure area while the Respondent's vehicle was blocking the gate. The Respondent remained in his vehicle until the police arrived.

[10] Prior to the police arrival the RCMP dispatcher talked with the Respondent again and the following exchange occurred (at p. 517 of the Record):

> Dispatcher ... so here's the thing Thomas, the way they are feeling as a staff or a person, they [sic] way you're coming off to them, they are not feeling safe in going forward.
>
> Respondent Send a police officer right now then because ...
>
> Dispatcher Thomas, could you listen to me for a second? I'm not done, I've given you the respect to finish your conversation now it's my turn …

[11] Further in the conversation the Respondent complains that Unitow has taken the vehicle without the registered owner's permission and therefore have committed "criminal theft over 5,000" (p. 518 of the Record). Approximately ten minutes later a police officer with the Surrey RCMP detachment attended to the scene. After a few minutes of discussion the Respondent moved his vehicle back to the visitor parking area. The matter was eventually resolved with Unitow removing the Respondent's mother-in-law's vehicle to another facility.

[12] In a letter dated June 28, 2012 Unitow made a complaint to the Law Society about the Respondent's conduct. During the investigation that followed, the Respondent was asked for his explanation of why he made the "crowbar" comment to the RCMP dispatcher. He replied in a letter dated January 16, 2013 (p. 530 of the Record):

> I was trying to convince the police to attend. They were balking. Raising the issue of "keeping the peace" raises the urgency for police.

[13] Only two witnesses were called at the hearing: a Unitow employee by Law Society counsel and the Respondent in his own defence. When asked in direct examination "Why did you use the words to the effect "get a crowbar and smash up the place"? the Respondent answered (at p. 128, lines 17-25 of the Record):

> I was getting very frustrated. My impression was I was being gamed by the Unitow people. Then I phoned the dispatcher ... I felt like she wasn't listening, and I was concerned that with the allocation of police resources nobody would ever come, and I wanted to let the dispatcher know how frustrated I was, and that's all I meant.

The citation

[14] The amended citation before the hearing panel states:

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

    (a) telling a police dispatcher that he was "going to get a crowbar and smash up the place";

    (b) taking pictures of Unitow personnel and property after being requested not to do so;

    (c) blocking the entrance to the Unitow lot with his motor vehicle.

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

Hearing Panel decision

[15] The hearing panel properly recognized that the Law Society bears the onus of proving the allegations on a balance of probabilities and the main issue was whether the complained of conduct was "*a marked departure from that conduct the Law Society expects of its members*" (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171 (para. 23 of the decision).

[16] The hearing panel addressed each allegation separately and concluded that none of the actions of the Respondent met the test for professional misconduct. With respect to the taking of photographs the hearing panel concluded that this conduct was "aggressive and rude" but since the Respondent was taking the photographs for the purpose of preserving a record for his client's interests and the photographs were taken from a publicly accessible area:

> The fact that Unitow employees refused consent and that Unitow asserted a policy prohibiting photographs does not make taking pictures a marked departure from the standard of conduct the Law Society expects of its members. (para. 41 of decision).

[17] With respect to the blocking of the entrance to the secure storage area the hearing panel concluded at para. 42 of the decision:

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

[18] With respect to the "crowbar" comment the hearing panel found that the comment (at para. 22 of the decision):

> … would have been menacing had it been uttered as a threat to a Unitow employee. But it wasn't. It was made to an RCMP dispatcher to emphasize the volatility of the situation and to persuade her that police attendance was required. As the Respondent said to the dispatcher when she admonished him, "I didn't say it to them because I'm not uttering threats, I'm saying it to you 'cause I want you to keep the peace."

[19] The hearing panel then dismissed the allegation at paragraph 37 stating:

> The crowbar comment was not made as a threat, and it was not gratuitous. Rather it was an intemperate overstatement made in the context of protecting a client's interest. Lawyers are required to comply with standards of conduct expected of them as professionals, not with standards of perfection. We cannot say that this statement, viewed in context, represented a marked departure from the standard of conduct expected of the Law Society's members.

POSITION OF THE PARTIES

[20] The Law Society has sought a review of the hearing panel decision. Law Society counsel argues that the "marked departure" test has been reframed in light of the Supreme Court of Canada case of *Doré v. Barreau du Quebec*, [2012] 1 SCR 395, wherein the court held that a lawyer is required to behave with "transcendent civility" (at para. 68).

[21] The Respondent argues that *Doré* does not establish a new standard but is an aspirational statement by the court. Further, the Respondent argues that the Ontario case of *Law Society of Upper Canada v. Groia*, 2015 ONSC 686 (Divisional Court), requires a further element: not only must the conduct be uncivil, the complained of conduct must "bring the administration of justice into dispute" (at para. 75).

ISSUES

[22] There are two issues:

3. 1. Does the standard for "professional misconduct" now include the additional elements of "transcendent civility," or that the conduct could "bring the administration of justice into dispute"?

4. Did the hearing panel correctly apply the appropriate test to determine if the conduct was professional misconduct?

STANDARD OF REVIEW

[23] The standard of review is well set out in *Law Society of BC v. Berge*, 2007 LSBC 07, [2007] LSDD 153:

> [19] The standard of review to be applied by the Benchers on this Review is one of correctness. See *Law Society of BC v. Dobbin*, [2000] LSDD No. 12.
>
> [20] This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:
>
> i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer; and/or
>
> ii) whether the penalty imposed was appropriate.
>
> [21] The standard of review described above is subject to one qualification, namely, that where issues of credibility are concerned, the Benchers should only interfere if the Hearing Panel made a clear and palpable error. See *Law Society of BC v. Hops*, [1999] LSBC 29 and *Law Society of BC v. Dobbin (supra)*.

[24] This standard was recently approved by the British Columbia Court of Appeal in *Mohan v. Law Society of British Columbia*, 2013 BCCA 489.

[25] There are few issues of credibility in the matter before us, and as stated earlier, as the events were mostly recorded, there is little doubt about what happened in this matter. Thus, this Review Board is bound by any findings of credibility. For example, at para. 36 of the decision the hearing panel accepts the Respondent's evidence that the "crowbar" comment was made in a moment of frustration. This Review Board cannot disturb that finding.

[26] Another example: the hearing panel found that the "crowbar" comment was not intended as a threat and therefore was not a threat. Law Society counsel argued that the hearing panel erred in finding that the comment was not a threat. This is an area of mixed fact and law and, for reasons that will be stated later, this Review Board will not disturb the hearing panel's finding that, in this case, the comment was not a threat or intended as a threat.

DEFINING PROFESSIONAL MISCONDUCT

[27] Professional misconduct has been firmly established, at least since the decision of *Martin*, as conduct that is "*a marked departure from that conduct the Law Society expects of its members."* What constitutes a "marked departure" will depend upon the facts of each case. Have the recent cases of *Doré* and *Groia* changed this? Has *Doré* replaced the "marked departure" test with any conduct that is a breach of "transcendent civility," or has *Groia* raised the bar by requiring conduct that brings the "administration of justice into disrepute" in addition to conduct that is a "marked departure"?

[28] This Review Board will not be pulled in either direction. *Doré* considers the issue of a hearing panel's decision in the context of a person's right to freedom of expression enshrined in the *Canadian Charter of Rights and Freedoms*. A plain reading of the decision makes it clear that the Supreme Court of Canada has not set a new standard to be applied by all law societies. The comment that lawyers are "called upon to behave with transcendent civility" is an aspirational goal that all lawyers should strive for. Falling short of this goal however is not, in and of itself, professional misconduct.

[29] With respect to *Groia,* this Review Board does not accept that, in addition to a "marked departure," a hearing panel must find that the conduct would bring the administration of justice into disrepute. First, the decision is from another jurisdiction and is therefore not binding on hearing panels in British Columbia. Second, *Groia* confines itself to "in-court conduct." At paragraph 77 the court held:

> I would also repeat that this standard or test is directed at in-court conduct. I recognize that conduct outside of the courtroom may attract different considerations and, thus, a different standard or test.

[30] What occurred between the Respondent and Unitow did not occur in a courtroom. Thus, this Review Board will remain with the *Martin* test already set out above.

ANALYSIS

[31] This Review Board will not disturb the findings and conclusions of the hearing panel with respect to the Respondent's conduct in taking photographs of the Unitow employees or parking his vehicle in front of Unitow's gate. Lawyers are sometimes required to do things that others may not agree with, for example, as in this case, the taking a photograph of someone, but that does not necessarily mean that the lawyer has committed professional misconduct. Sometimes lawyers may be aggressive to protect their client's interests, the question is: when does a lawyer cross the line into professional misconduct? Additionally, as Unitow was taking a video recording of the Respondent at all times in its office, it is difficult to find that the Respondent was acting inappropriately in these circumstances.

[32] Of course, these matters are very dependent upon the facts. For example, if the Respondent had refused to move his vehicle when someone tried to enter or exit the gate, or left his vehicle in front of the gate if the police asked him to move it, the hearing panel may have reached a different conclusion. It is clear in the hearing panel's decision that the Respondent came close to crossing the line on these two occasions. This Review Board points out that merely because the Respondent was not found guilty of professional misconduct does not mean the conduct itself is condoned or approved or a "best practice." Lawyers who conduct themselves in this manner do so at the risk of crossing the line into professional misconduct. It is noted that the Respondent's technique in negotiation in this case was fruitless.

[33] That leaves the "crowbar" comment for analysis. This Review Board has considerably more concern about the conclusion of the hearing panel that this comment did not amount to professional misconduct.

[34] The hearing panel referred to two recent decisions that concerned comments made by a lawyer. In both cases the lawyer was found to have committed professional misconduct. The cases are *Law Society of BC v. Foo*, 2013 LSBC 26, and *Law Society of BC v. Johnson*, 2014 LSBC 8.

[35] In *Foo* the lawyer stated to a social worker whom he did not know that he should "shoot her" because she "takes away too many kids." The comment was made inside a courthouse (but outside a courtroom) with other persons present. The social worker felt threatened by the comment, the lawyer said it was a poor attempt at a joke. The hearing panel found the remarks constituted a marked departure from the conduct the Law Society expects of lawyers. This decision was upheld upon review (see: *Law Society of BC v. Foo*, 2015 LSBC 34).

[36] In *Johnson* the lawyer said "fuck you" in an "angry, insulting, hostile or belligerent manner" to a police witness in a courthouse outside of a courtroom. The hearing panel found this remark amounted to professional misconduct.

[37] The hearing panel in this case distinguished *Foo* as the "crowbar" comment was not directed at any Unitow employee and therefore was not intended as a threat, although the hearing panel found the comment "ill-advised" and that "he should not have made it" (at para. 33 of the decision). The hearing panel accepted the Respondent's explanation that he made the comment to motivate the police to attend the scene (at para. 36 of the decision).

[38] The hearing panel distinguished *Johnson* as the Respondent did not use a profanity and, although the Respondent spoke "aggressively and condescendingly," he "maintained his composure" throughout the event (para. 35 of the decision).

[39] It is this Review Board's view that the hearing panel erred by reasoning that, since the crowbar comment was not a threat, its utterance was therefore not professional misconduct. One further step in the analysis was required. The words of the review panel in *Berge* are apt here:

> [37] The Benchers specifically reject the Applicant's submission that only conduct that is criminal or overtly dishonest should warrant investigation as conduct unbecoming and potential sanction.
>
> [38] … Conduct unbecoming not only includes the obvious examples of criminal conduct and dishonesty, but it also includes "any act of any member that will seriously compromise the body of the profession in the public estimation." See *Hands v. Law Society of Upper Canada* (1889), 16 OR 625.

[40] There is no misconduct in calling for the assistance of the police to deal with a dispute. However, the reason given to the police in order to encourage them to attend is another matter.

[41] In *Foo*, at paragraph 49 the hearing panel held:

> Even *if the Respondent did not intend to intimidate or threaten* AM with his comments, the Panel finds that he was irresponsible and did not adequately consider the impact that his words (specifically, that he "should shoot" her and that she "takes away too many kids") would have in this emotionally charged situation where parents are in conflict with the

> Ministry and where others outside the courtroom would overhear his comments.
>
> [emphasis added]

[42] The hearing panel should have asked: accepting the Respondent's explanation, and even if this comment was not intended as a threat, in the context in which these words were said was it *a marked departure from that conduct the Law Society expects of its members*?

[43] It is arguable that the hearing panel did implicitly make the above analysis. If so, this Review Board disagrees with their conclusion that this conduct, in context, is not professional misconduct.

[44] As in *Foo* the words said by the Respondent were found by the hearing panel to be irresponsible. Unlike *Foo*, where the hearing panel in that decision found that Foo "*did not adequately consider the impact of his words*," the Respondent knew full well what the impact of his words would be – it would cause the police to attend when they otherwise may not have, or may have come at a later time. This is the problem with the Respondent's comment and the intention behind those words: one cannot say whatever one likes in order to motivate, or manipulate, a person or entity, such as a peace officer, to do something they may not have otherwise done. You cannot yell "fire" in a crowded theatre when there is no fire.

[45] The Respondent knew full well that raising the possibility of violence, even if he did not actually intend any violence, would cause the police to attend. This is wrong, and it is difficult to see how this is not professional misconduct. A lawyer not getting his way and then behaving in a manner that is described as "aggressive and rude" and "aggressive and condescending," in and of itself, may or may not "cross the line." However, if in addition to that the lawyer then escalates the situation by raising the spectre of violence by saying something (the "crowbar" comment) that is "ill-considered," "ill-advised" and "should not have been made" with the intent of causing the police to attend, this is "a marked departure from that conduct the Law Society expects of its members."

[46] Lawyers are often unfairly accused by disgruntled litigants of manipulating the system when, in fact, the lawyer is properly using the laws and rules of advocacy to protect and push their client's interests. This is not what occurred here. By making the "crowbar" comment, the Respondent stepped outside of his professional obligations.

CONCLUSION

[47] We reverse the finding of the hearing panel and find that the Respondent committed professional misconduct when he made the "crowbar" comment. In similar circumstances, past review panels have referred the matter to the hearing panel to assess the appropriate sanction. In this case, the President has informed us that the hearing panel is no longer available to adjudicate on the matter of sanction. That being the case, it appears that there are two options available; (1) this review board conducts a disciplinary action hearing and makes a decision under section 47(5) of the *Legal Profession Act*; or (2) the matter is referred to a new hearing panel appointed by the President under Rule 5-2. We ask counsel to make written submissions with respect to the appropriate way to proceed with this matter. We will consider any submissions received within 30 days of the issuance of this decision and any reply received within ten days after that. The matter of costs can be addressed at a later date.

DISSENTING DECISION OF DONALD SILVERSIDES, QC

[48] I have had the opportunity to read and consider the decision by the majority of the members of this Review Board.

[49] I agree with and adopt the decision by the majority of the Board with respect to the Respondent's conduct in taking photographs of the Unitow employees and parking his vehicle in front of Unitow's gate. I disagree, however, with the decision of the majority of the Board to reverse the findings of the hearing panel with respect to what they describe as the "crowbar" comment and the hearing panel's determination that, when the Respondent made the crowbar comment, he committed professional misconduct.

[50] I agree with the majority that the standard of review that is applicable to this Review is correctness, except where issues of credibility are concerned, as recently confirmed by the Court of Appeal in the *Mohan* decision. When findings made by a hearing panel are based on credibility, those findings must be given deference by a reviewing panel.

[51] I do not agree, however, that there are few issues of credibility in this case and that the hearing panel's decision with respect to the crowbar comment did not involve issues of credibility. The Respondent gave evidence over a period of two days, and the transcript of his testimony consists of 128 pages. At the hearing he was questioned extensively about the crowbar comment, why he made that comment and what he intended by it.

[52] As the majority states in paragraph 12 of its decision, the Respondent explained during his examination in chief (page 128 of the record) that he made the crowbar comment because he was "getting very frustrated" and he wanted to let the dispatcher know "how frustrated I was, and that's all I meant." In paragraph 36 of their decision, the hearing panel found that the remark was made in a moment of frustration, and they accepted this explanation. This is a finding based on credibility and must be given deference.

[53] The hearing panel also decided that the crowbar comment was merely an intemperate overstatement made in the context of protecting a client's interest (paragraph 37). In my view, this specific finding must also be given deference. Implicit in this finding is that the hearing panel did not believe the crowbar comment was made with the intent that the RCMP would be led to believe he intended to become violent.

[54] The transcript of the Respondent's conversation with the dispatcher (page 510 of the record) shows he gave a fairly accurate description of the events that had earlier occurred at the Unitow Yard, his apparent concerns about the conduct of Unitow and what it was he was seeking to accomplish. Taken as a whole, I do not think it is fair to categorize his conversation with the dispatcher as saying "whatever it takes in order to motivate, or manipulate, a person or entity, such as a peace officer, to do something they may not have otherwise done" or that the crowbar comment was akin to yelling "fire" in a crowded theatre when there is no fire, as stated by the majority of the panel in paragraph 40 of their decision.

[55] The hearing panel found that the crowbar comment was not intended as a threat. The evidence shows that the Respondent, when questioned by the dispatcher about this comment, immediately clarified that he was not intending to threaten violence. In my view, it was open to the hearing panel to decide, as they did, that the crowbar statement was merely an inappropriate and intemperate statement made in a moment of frustration. I believe this finding was based on the credibility of the Respondent and I defer to it.

[56] The majority of the Board acknowledge they are bound by findings of credibility. In paragraph 23 they state they accept that the crowbar comment was made in a moment of frustration. They also state in paragraph 24 that they accept the finding that the crowbar comment was not a threat and was not intended as a threat.

[57] The majority of the Board purport to give deference to the findings and determination of the hearing panel whenever they are based on credibility. In my respectful opinion, however, the majority of the Board did not give deference to the hearing panel's findings based on credibility when the majority stated in paragraph

41 that the crowbar comment was made to escalate the situation and raise the spectre of violence with the intent it would cause the police to attend. In my view, this contradicts the finding by the majority of the Review Board that the crowbar statement was merely an inappropriate and intemperate statement made in a moment of frustration.

[58] If the Respondent had deliberately made the crowbar comment with the intent that the police would conclude that he intended, or might intend, to engage in violence, then the statement would have been a threat, or intended as a threat. This was not what the hearing panel found and the majority of the Review Board have accepted this finding.

[59] In paragraph 38 of their decision, the majority state the hearing panel should have asked whether making the crowbar comment, in the context in which it was made, was a marked departure from the conduct the Law Society expects of its members, even if they accepted the Respondent's explanation and found the comment was not intended as a threat. This is exactly what the hearing panel did in paragraphs 36 and 37 where they state they did accept his explanation and they made a specific finding that the comment was not a threat and then concluded:

> We cannot say that this statement *viewed in context*, represented a marked departure from the standard of conduct expected of the Law Society's members.
>
> [emphasis added]

[60] The standard against which lawyers' conduct should be measured cannot be one of perfection. Many lawyers make isolated statements in a moment of frustration that they later regret. In most cases, making an isolated intemperate or ill-considered statement with no improper intent will not amount to professional misconduct and that is what the hearing panel concluded in this matter.

[61] I would therefore not disturb the findings of fact or determination made by the hearing panel with respect to the crowbar comment.