

2015 LSBC 46
Decision issued: October 27, 2015
Oral reasons: September 23, 2015
Citation issued: July 6, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GRANT DAVID AXWORTHY

RESPONDENT

**DECISION OF THE HEARING PANEL ON
FACTS, DETERMINATION AND DISCIPLINARY ACTION**

Hearing date: September 23, 2015

Panel: Lynal Doerksen, Chair
Shona Moore, QC, Lawyer
Lois Serwa, Public representative

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

BACKGROUND

[1] As a result of two separate complaints to the Law Society from two clients of the Respondent, the Law Society began an investigation of the Respondent. As is normal procedure, the Law Society investigator advised the Respondent of the complaints and asked for his reply and any information or explanation pertinent to the complaint. It is the duty of every lawyer to cooperate with an investigation by the Law Society and to reply promptly and meaningfully.

[2] After initially responding to the Law Society on one complaint, the Respondent became less responsive and timely until he ultimately ceased to respond at all. The Respondent has never responded to the second complaint in a meaningful way.

- [3] On June 28, 2015 a citation was authorized setting out two allegations that the Respondent “failed to provide a full and substantial response promptly or at all” to various letters and emails of the Law Society concerning these two investigations.

NON-ATTENDANCE BY THE RESPONDENT

- [4] The hearing of this matter commenced at 9:30 a.m. and the Respondent was not in attendance. Thus the hearing adjourned until 9:50 a.m. to allow more time for the Respondent to appear in the event something unexpected had delayed him. The Respondent did not appear, and the hearing continued in his absence.
- [5] Before a hearing can commence Rule 4-41 requires the hearing panel to determine whether the citation has been served in accordance with Rule 4-19.
- [6] Law Society counsel provided affidavit evidence that satisfies this Panel on a balance of probabilities that the Respondent has been served with a copy of the citation and a copy of the Notice of Hearing.
- [7] Rule 4-33 permits hearings to proceed with affidavit evidence (or an Agreed Statement of Facts or admissions under Rule 4-18) if the citation concerns, amongst other things, a failure to respond to a communication from the Law Society. As this was the case here, no *viva voce* evidence was called in this matter, and all the evidence submitted was in the form of an affidavit.
- [8] This Hearing Panel notes that, despite the Respondent’s absence, the Law Society still bears the onus of proof and that the standard of proof is on a balance of probabilities.

FACTS

- [9] The Law Society submitted an affidavit of Gurprit Copland (exhibit 5), a staff lawyer for the Law Society and someone familiar with the facts of this case. The affidavit sets out a timeline and the various correspondences between the Respondent and the Law Society with respect to both complaints.

JH complaint

- [10] The timing of events is as follows:
- (a) on May 27, 2014 The Law Society received a complaint about the Respondent from JH, a client of the Respondent;

- (b) on July 10, 2014 the Respondent was provided a copy of JH's complaint and a response was requested by the Law Society investigator;
- (c) the Respondent replied by letter to the investigator on July 29, 2014;
- (d) on September 16, 2014 the Respondent was provided with JH's response to the Respondent's letter of July 29, 2014, and a further response was requested of the Respondent, including his client file materials and his client trust ledgers;
- (e) after two requests by the Respondent for an extension of time to respond, and both requests being granted, the Respondent had not complied with the request by December 9, 2014, and thus a letter was sent to the Respondent requiring him to respond by December 16, 2014;
- (f) the Respondent replied by email on December 11, 2014 stating that he was having personal difficulties but wished to cooperate with the Law Society. The Respondent promised to call the investigator;
- (g) on December 15, 2014 the Respondent spoke with the investigator, and on December 16, 2014 the Respondent met in person with the investigator. The Respondent provided more information about his personal difficulties but promised to reply to the September 16, 2014 letter by December 19, 2014;
- (h) on December 19, 2014 the Respondent called the Law Society investigator and advised that he was unable to provide his trust client ledgers from prior to December 31, 2010 but would provide the data he had for after that date. The Respondent provided this data on December 19, 2014;
- (i) on February 25, 2015 an email was sent to the Respondent requesting the trust ledger for his client JH from 2004. This was as a result of JH providing further information to the investigator on February 24, 2015. He was requested to provide this information by March 23, 2015;
- (j) the Respondent spoke with the Law Society investigator on February 26, 2015 and advised that he would find the information;
- (k) the information was not provided by March 23, 2015 and on March 25, 2015 the Law Society investigator called and spoke with the Respondent who advised his hard drive had been damaged by a water leak but he would provide what he could by March 30, 2015;

- (l) no response was received from the Respondent by March 30, 2015, and on April 1, 2015 a letter was sent to the Respondent by email and regular mail advising the Respondent of his responsibility under Rule 7.1-1 of the *BC Code* and of the consequences of failing to respond;
- (m) no response was received from the Respondent, and another letter was sent by email and hand delivered to the Respondent's office on April 16, 2015;
- (n) on April 16 and 20, 2015 the Law Society investigator left voice mail messages for the Respondent;
- (o) on April 20, 2015 the Respondent sent an email to the Law Society investigator advising that he would contact the investigator on the Respondent's return to Vancouver on April 21, 2015;
- (p) the Respondent did not call until April 24, 2015 and left a message for the investigator;
- (q) the Law Society investigator tried calling the Respondent on April 27 and 28, 2015, leaving voice mail messages;
- (r) the Law Society investigator learned from another staff lawyer that the Respondent may be away in England for a period of time in May, 2015;
- (s) on June 5, 2015 a further voice mail message was left for the Respondent. The Respondent's voicemail greeting did not indicate that he was away;
- (t) on June 11, 2015 KW, a lawyer who has an office next to the Respondent's, advised that a sign had been posted on the Respondent's office door stating that he was away for two to three weeks, returning the third week of May, and that urgent matters could be referred to KW. KW advised that he did not agree to assist the Respondent with his clients in the Respondent's absence; (an affidavit of KW and a copy of the sign was made an exhibit in this hearing, exhibit #7);
- (u) there has been no further communication from the Respondent since April 24, 2015 up to the date of this hearing.

LF complaint

[11] The timing of events in this matter is as follows:

- (a) on March 2, 2015 the Law Society provided the Respondent with a complaint from LF, another client of the Respondent, and requested a response by March 27, 2015;
- (b) the Law Society investigator discussed the matter with the Respondent by telephone on March 25, 2015, and the Respondent advised he would reply by March 30, 2015;
- (c) on the morning of March 30, 2015 the Respondent called and advised the investigator that a pressure valve had broken in his office resulting in water damage. However, the Respondent stated he would send a response the same day;
- (d) no response was received from the Respondent and, as with the JH complaint, further letters and attempts to reach the Respondent by telephone were made by the Law Society, but no further communication has been received from the Respondent since the Respondent left a voice mail message on April 24, 2015.

LAW SOCIETY SUBMISSIONS

- [12] The Law Society submits that the above conduct amounts to professional misconduct. This Panel has been referred to the oft-quoted phrase in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171, where professional misconduct is defined as: “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.”
- [13] The Law Society submits that the evidence proves that the Respondent has not complied with his obligations to the Law Society and that, as this failure has persisted for more than six months since the letter of March 2, 2015 on the LF complaint and even longer on the JH complaint, this is a marked departure from the standard of conduct expected of lawyers and, therefore, professional misconduct.
- [14] Rule 7.1-1 of the *Code of Professional Conduct for BC* states that a lawyer must:
- (a) reply promptly and completely to any communication from the Society;
 - (b) provide documents as required to the Law Society;
 - (c) not improperly obstruct or delay Law Society investigations, audits and inquiries;

- (d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;
- (e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and
- (f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[15] Rule 3-5(7) states:

A lawyer must co-operate fully in an investigation under this division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director

- (a) to the complaint, and
- (b) to all requests made by the Executive Director in the course of an investigation.

[16] Rule 3-5(8)(a) and (b) states:

When conducting an investigation of a complaint, the Executive Director may

- (a) require production of files, documents and other records for examination or copying,
- (b) require a lawyer to
 - (i) attend an interview,
 - (ii) answer questions and provide information relating to matters under investigation, or
 - (iii) cause an employee or agent of the lawyer to answer questions and provide information relating to the investigation,

[17] Rule 3-5(11) states:

A lawyer who is required to produce files, documents and other records, provide information or attend an interview under this rule must comply with the requirement

- (a) even if the information or files, documents and other records are privileged or confidential, and
- (b) as soon as practicable and, in any event, by the time and date set by the Executive Director.

[18] In the matter of *Law Society of BC v. Dobbin*, [1999] LSBC 27 at para. 25, the Benchers held:

... it is the decision of the Benchers 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.

This principle has been followed in the following cases:

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, 2010 LSBC 18;

Law Society of BC v. Niemela, 2012 LSBC 09; and

Law Society of BC v. Buchan, 2013 LSBC 08.

CONCLUSION

[19] The documents and information requested of the Respondent by the Law Society are relevant and necessary to the Law Society investigation into the two complaints. The Respondent's explanation that he had a water leak does not fully explain why he cannot provide the requested information. In fact, it probably raises more questions. The Respondent's silence since April 24, 2015 and continuing to the day of the hearing further confirms the "marked departure" of the Respondent's conduct.

[20] We are satisfied by the evidence before us, on a balance of probabilities, that there has been a persistent failure by the Respondent to respond to Law Society communications, and although there are some reasons given for this failure, the Respondent's unexplained complete lack of communication since April 24, 2015 is

prima facie evidence of professional misconduct. We therefore find that the Respondent has committed professional misconduct.

DISCIPLINARY ACTION

[21] The Law Society seeks the following:

- (a) a fine in the amount of \$3,000;
- (b) costs in the amount of \$1,236.25; and
- (c) an order pursuant to s. 38(7) directing the Respondent to provide a complete and substantive response to the inquiries made in the Law Society's email to him dated February 25, 2015 and the Law Society's letter to him dated March 2, 2015 within 14 days of service of this order on the Respondent.

[22] The Law Society submits that \$3,000 is the appropriate penalty and refers to the following cases, which are similar in nature and range from fines of \$2,000 to \$5,000:

- a. *Buchan* — \$3,000;
- b. *Decore* — \$2,000;
- c. *Niemela* — \$5,000;
- d. *Malcolm* — \$2,000;
- e. *Marcotte* — \$2,750; and
- f. *Law Society of BC v. Kruse*, 2002 LSBC 15, [2002] LSDD No. 24 — \$3,000.

[23] With reference to the numerous factors set out in the case of *Law Society of BC v. Ogilvie*, [1999] LSBC 17, this Panel notes the mitigating factor that the Respondent has no prior Professional Conduct Record; however, this is countered by the aggravating factor that the Respondent's misconduct continues to the date of this hearing.

[24] Thus, a fine of \$3,000 is well within the range of cases of similar misconduct, and we order the Respondent to pay a fine of \$3,000 by April 30, 2016.

- [25] The Law Society provided details of the costs for this hearing consisting of the half-day tariff of \$1,000 plus the fees for the court reporter of \$236.25, and we so order costs of \$1,236.25 payable by April 30, 2016.
- [26] The Law Society seeks an order pursuant to s. 38(7) that the Respondent provide a complete and substantive response to the inquiries made in the Law Society's email to him dated February 25, 2015 and the Law Society's letter to him dated March 2, 2015 within 14 days of service of this order on the Respondent. It is appropriate to make this order given the Respondent's non-compliance to this date.