2015 LSBC 58
Decision issued: December 31, 2015
Citations issued: April 2, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

GARY RUSSELL VLUG

RESPONDENT

DECISION OF THE BENCHERS ON REVIEW

Review date:	May 1 and June 10, 2015
Benchers:	**First decision:** Haydn Acheson Pinder Cheema, QC Jamie Maclaren **Second decision:** Kenneth Walker, QC, Chair Satwinder Bains Elizabeth Rowbotham **Not participating in decision:** A. Cameron Ward
Discipline Counsel:	Carolyn Gulabsingh
Appearing on his own behalf:	Gary R. Vlug

DECISION OF HAYDN ACHESON, PINDER CHEEMA, QC AND JAMIE MACLAREN

INTRODUCTION

[1] This is a Review of the decision of the hearing panel on Facts and Determination issued February 26, 2014, 2014 LSBC 09 (the "F & D Decision") and the decision of the hearing panel on Disciplinary Action issued September 5, 2014, 2014 LSBC

40 (the "DA Decision") regarding three complaints totalling 11 allegations of professional misconduct against the Respondent, Gary Russell Vlug.

BACKGROUND

[2] On April 2, 2012, the Discipline Committee directed a hearing panel to inquire into 11 allegations of professional misconduct arising from three separate complaints made against the Respondent, with each complaint pertaining to one of three separate family law matters referred to here and by the hearing panel as the ES Matter, the PS Matter and the MW Matter.

[3] Allegations 1 to 6 arose from the ES Matter. Five of those allegations related to representations made by way of affidavit, letter or oral submission to the Law Society, the British Columbia Supreme Court and the British Columbia Court of Appeal. Allegation 6 related specifically to a representation made to the Court of Appeal. For each allegation, the hearing panel found that the Respondent committed professional misconduct by asserting facts that he knew or ought to have known were not true. The hearing panel also found that the Respondent committed professional misconduct by making discourteous and unfounded statements about opposing counsel in letters to the Law Society and submissions to the Court of Appeal.

[4] Allegations 7 to 9 arose from the PS Matter. For allegations 7 and 8, the hearing panel found that the Respondent committed professional misconduct by preparing and filing court documents that he knew or ought to have known were improper and misleading. The hearing panel also upheld the allegation that the Respondent committed professional misconduct by filing a statement of claim containing assertions of fact that he knew or ought to have known were not true.

[5] Allegations 10 and 11 arose from the MW Matter. The Law Society alleged that the Respondent added documents to evidence previously prepared and sworn, and subsequently prepared and commissioned an affidavit containing a statement that he knew to be false. For both allegations, the hearing panel found that the Respondent committed professional misconduct.

[6] As discipline for its 11 findings of professional misconduct, the hearing panel suspended the Respondent from the practice of law for a period of six months, and ordered him to pay $20,000 in costs.

ISSUES

[7] The Notice of Review sets out several overlapping grounds for review that relate to the hearing panel's consideration of submissions and evidence, and subsequent application of the law. The Respondent identified the following issues for this Review panel to consider:

1. That the panel erred in allowing the Law Society to present evidence, and the panel considered evidence, that the Respondent had no knowledge of [sic] (Affidavit Chrysta Gejdos sworn June 12, 2013);

2. That the panel erred in allowing the Law Society to make submissions, and the panel considered those submissions which the Respondent had no knowledge of (submissions of June 13, 2013);

3. That the panel did not allow for any opportunity to address the evidence and submissions aforesaid;

4. That the panel did not require the Law Society to bear the burden of proof and prove its case pursuant to the case law outlined in *Law Society of BC v. Seifert*, 2009 LSBC 17;

5. That the panel erred in not applying the case law set out in *Law Society of BC v. Martin*, 2005 LSBC 16;

6. That the panel erred in engaging in the comparison test rejected by the BC Court of Appeal in *Hamilton v. Law Society of BC*, 2006 BCCA 367;

7. That the panel erred in substituting its own beliefs for the burden of proof on the Law Society, a practice rejected by the BC Court of Appeal in *Sheddy v. Law Society of BC*, 2007 BCCA 96;

8. That the panel erred in finding that the respondent was blameworthy because he attempted to defend himself;

9. That the panel erred in not considering the overall effect of the delay outside of an application to dismiss (and also inside of an application to dismiss, the panel did not accurately assess the issue);

10. As a result of the panel not requiring the proper burden of proof the panel made many mistakes of fact.

[8] At the commencement of this Review, the Respondent made an application to present fresh evidence in the form of his Response to Notice to Admit (the "RNA") dated May 8, 2013, in response to allegation 6. The RNA was marked as Exhibit 1 and after hearing submissions from the Respondent and the Law Society, this Review panel reserved judgment on the application. We decided to dismiss the Respondent's application to present fresh evidence. Our decision and our reasons are set out in a separate decision issued concurrently with this decision.

[9] The resulting issues for this Review panel to decide are summarized as follows:

(a) Did the hearing panel err in its consideration of the Respondent's argument regarding delay and in its conclusion that there was no delay resulting in unfairness to him?

(b) Did the hearing panel err in its application of the onus and standard of proof?

(c) Did the hearing panel err in its findings of fact?

(d) Did the hearing panel err in applying the test for professional misconduct to each of the 11 allegations made against the Respondent?

(e) In light of the determination of the above issues, did the hearing panel impose an appropriate disciplinary action?

STANDARD OF REVIEW

[10] This Review is governed by s. 47 of the *Legal Profession Act* (the "Act"). Pursuant to s. 47(5) of the Act, this Review panel may either confirm the decision of the hearing panel or substitute a decision the hearing panel could have made under the Act regarding each of the 11 allegations of professional misconduct and subsequent disciplinary action.

[11] In *Kay v. Law Society of British Columbia*, 2015 BCCA 303, the Court of Appeal considered the applicable standard of review for decisions made by a Law Society hearing panel. At paragraph 40, the Court confirmed its exhaustive analysis from *Mohan v. Law Society of BC*, 2013 BCCA 489, where it stated:

> [30] The Law Society of Upper Canada's equivalent to the LSBC's Review Board is called an Appeal Panel. Such an Appeal Panel described the two possible standards, correctness and reasonableness for their review of an Ontario Hearing Panel

decision in [*Law Society of Upper Canada v. Kerry Patrick Evans*], 2007 ONLSAP 5. The Appeal Panel held that the Hearing Panel was entitled to deference with respect to findings of credibility. At paras. 79 – 80 the Appeal Panel wrote:

> [79] The jurisdiction of the Appeal Panel is set out in s. 49.35 of the *Law Society Act*. The Appeal Panel is a review tribunal and does not conduct a trial *de novo*. The standard of appellate review is correctness for questions of law, and reasonableness for questions of fact or of mixed fact and law (*Law Society of Upper Canada v. Crozier*, 2005 CanLII 38899 (ON SCDC), [2005] OJ No. 4520 (Div. Ct.), para. 71, and *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 SCR 247, para. 42).
>
> [80] Where findings of facts are based upon credibility assessments, as is the case with regard to Mr. Evans, it is of particular importance for the Appeal Panel to recognize the deference built into the standard of reasonableness. An Appeal Panel is not well-situated to make its own assessments of credibility, nor is it permitted to do so (*Law Society of Upper Canada v. Kadir Baksh*, 2006 ONLSAP 6, para. 13).

[31] In *Kazman v. The Law Society of Upper Canada*, 2008 ONLSAP, another Appeal Panel of the Law Society of Upper Canada engaged in a useful examination of the appropriate standard for their review of a decision of a Hearing Panel, and the basis for that standard. After their review of the principles underlying the appropriate standard, the Appeal Panel stated at para. 37 that bencher-triers generally enjoy the same advantages over bencher-reviewers that triers of fact have over reviewers in respect of questions of fact and credibility. The Appeal Panel then went on to outline the applicable standard of review at para. 38:

...

> i. For questions of statutory and common law including the *Law Society Act* and other statutes and common law closely connected to its functions, constitutional authority, legislative jurisdiction, procedural fairness, natural justice, bias including reasonable apprehension of bias, and Law Society policy, the standard of review is correctness. The

Appeal Panel owes little or no deference to a hearing panel on such questions. The Appeal Panel may interfere with the reasons and decisions of a hearing panel on such questions if the Appeal Panel believes that the hearing panel decided them incorrectly.

ii. *For questions of fact, credibility, mixed fact and law, and penalty, the standard of review is reasonableness*. The Appeal Panel owes higher deference to a hearing panel on such questions. The Appeal Panel may interfere with the reasons and decisions of a hearing panel on such questions only if the Appeal Panel believes that the hearing panel decided them unreasonably.

iii. *The standard of review for the reasons and decisions of a hearing panel as a whole is one of reasonableness. If the Appeal Panel finds that a hearing panel incorrectly decided an issue that the hearing panel was required to decide correctly but nevertheless reasonably decided the case as a whole, the Appeal Panel should correct the error, but otherwise not interfere with the acceptable outcome.*

iv. In performing its functions, the Appeal Panel shall not re‑try the dispute at first instance, but shall conduct a somewhat probing examination of the reasons of the hearing panel to determine whether those reasons, taken as a whole, are reasonable, transparent, intelligible, tenable, defensible in relation to the law and the facts, and supportive of the hearing panel's decisions within a range of acceptable outcomes. If they are, the Appeal Panel shall not interfere with them even if the members of the Appeal Panel suspect that they might have preferred a different acceptable outcome.

v. The Appeal Panel's functions may be expanded only in the not usual circumstances where fresh evidence is permitted before the Appeal Panel, and then only to the extent that the fresh evidence bears upon the case.

[emphasis added by Hinkson, JA (as he was then)]

[12] Following the principles outlined in *Mohan* and confirmed in *Kay*, this Review panel must give deference to decisions made by the hearing panel on questions of fact and questions of mixed law and fact. Such decisions are reviewed on a standard of reasonableness. Where the credibility of witnesses is concerned, this Review panel may only substitute its decision for the hearing panel decision where the hearing panel made one or more clear and palpable errors.

[13] On questions of law, this Review panel must review decisions of the hearing panel on a standard of correctness. Where disciplinary action is concerned, the correctness standard is informed by the reasonableness test. As explained in *Law Society of BC v. Hordal*, 2004 LSBC 36 at paragraph 18, a decision on discipline is correct if it is "reasonable" or within the range of sanctions levied for similar misconduct:

> In considering questions regarding the correctness of the magnitude of a fine, or the duration of a suspension, the Benchers must examine the impugned conduct and determine if the proposed penalty falls within a "range" of penalties that have been applied in similar situations in the past. This examination is often referred to as a "reasonableness" test, and in our view that characterization is sometimes wrongly contrasted with the correctness test. It is the view of the Benchers that to be correct, the proposed fine or suspension duration must be "reasonable" or within the range of appropriate penalties for similar delicts. In other words, the "correctness" test is informed by the "reasonableness" test. If it falls outside of that range, it will not be correct and it will be necessary for the Benchers to substitute their determination of the correct fine amount or the correct suspension in those circumstances.

[14] As further explained in *Hordal* at paragraph 19, this Review panel should not "tinker" with the disciplinary action of the hearing panel:

> Counsel suggested that it would be improper for the Benchers to interfere with the fine quantum and/or suspension duration, as it was suggested that conduct by the Benchers would amount to "tinkering" with the determination of the Hearing Panel. Within certain parameters, we agree that it is inappropriate for the Benchers to "tinker" with determinations made by a Hearing Panel. It would, for example, be inappropriate for the Benchers to determine, in circumstances where a Hearing Panel had levied a fine of $5,000, that a fine of $4,000 or $6,000 would have been more appropriate.

EVIDENCE AND FINDINGS OF FACT

[15] The initial hearing in this matter occupied three days, June 3 to 5, 2013. The evidence led at the hearing included an Agreed Statement of Facts, affidavits, expert opinion, and *viva voce* testimony from four witnesses, including the Respondent.

Allegation 1 from the ES Matter

[16] In 2009 and 2010, the Respondent represented ES in a child custody matter involving *The Hague Convention on the Civil Aspects of International Child Abduction*. ES's wife had filed a petition in Supreme Court seeking the return of their 11 year-old son to her care in Ireland from ES's care in Canada. William Storey represented ES's wife.

[17] On March 31, 2009, Madam Justice Martinson ordered that a Views of the Child Report be prepared to determine the son's preferences concerning his custody. She further directed the Respondent and Mr. Storey to advise her before April 7, 2009 as to who would produce the report. She did not order who was to provide the relevant materials to the report writer.

[18] The Respondent and Mr. Storey agreed that Dr. E would produce the report. On April 1, 2009, Mr. Storey faxed a letter to Dr. E, copied by fax to the Respondent, inquiring as to his willingness and availability to undertake the report. Soon thereafter, Dr. E faxed a letter to Mr. Storey, copied by fax to the Respondent, implicitly confirming his willingness to undertake the report, and asking Mr. Storey to arrange delivery of the necessary documents.

[19] Also on April 1, 2009, the Respondent faxed a letter to Dr. E, copied by fax to Mr. Storey, to call attention to facts that he perceived as missing from Mr. Storey's letter.

[20] On April 2, 2009, Mr. Storey faxed another letter to Dr. E, copied again by fax to the Respondent, briefly outlining the means by which each party would deliver their relevant court pleadings and affidavits to Dr. E for his information (the "Arrangement Letter"). The Respondent admitted to receiving the Arrangement Letter, which stated in part:

> ... by copy of this letter I will advise Mr. Vlug that my office will make copies of and deliver to you the Petitioner's Pleadings and Affidavits and I suggest that he do the same with the Respondent's Pleadings and Affidavits. In addition I will provide you with a copy of the draft of the

> order that was pronounced by the Hon. Madam Justice Martinson on March 31, 2009. I will also ask my client to contact your office to arrange an appointment.

[21] Mr. Storey couriered a second letter to Dr. E on April 2, 2009, with the cover letter copied by fax to the Respondent, enclosing copies of his client's relevant court documents for Dr. E's information.

[22] In court on May 12, 2009, the Respondent informed Madam Justice Martinson that Dr. E had not received his client's relevant court documents contrary to an alleged agreement whereby Mr. Storey assumed responsibility for forwarding both clients' relevant court documents to Dr. E. The Respondent represented to Madam Justice Martinson that Mr. Storey committed to sending both sets of client documents to Dr. E in a telephone conversation on or around April 2, 2009. This representation gave rise to a Law Society complaint from Mr. Storey, and allegation 1(a) of professional misconduct, *viz.* that the Respondent made a representation he knew or ought to have known was not true in submissions made to a judge of the Supreme Court on May 12, 2009.

[23] The Respondent also testified at the hearing that Mr. Storey assured him in court on March 31, 2009 that he would "facilitate the production of the documents to the expert."

[24] For his part, Mr. Storey testified under direct examination that he had no record or recollection of any communications between him and the Respondent regarding the provision of client documents to Dr. E, outside of the letters faxed on April 2, 2009. He recalled having only one telephone conversation with the Respondent in or around April 2009 after Dr. E's report was released.

[25] Under cross-examination, Mr. Storey admitted to being unsure as to whether or not he engaged in telephone conversations with the Respondent in or around April 2009 regarding their clients' parenting time. He attributed his inability to recall the occurrence of such conversations to the fact that four years had since passed.

[26] The Respondent's client ES testified under direct examination that he recalled Mr. Storey, in response to a question posed by the Respondent, assuring Madam Justice Martinson at the end of the court session on March 31, 2009 that he would send "all the documents" to the chosen writer of the Views of the Child Report. The official court transcript for March 31, 2009 has no record of such an interaction.

[27] ES also deposed in an affidavit prepared and commissioned by the Respondent and sworn May 24, 2009 (the "ES Affidavit") that "[w]hen counsel for the Respondent

contacted counsel for the petitioner about whether [Dr. E] had received the materials, counsel for the Petitioner advised that [Dr. E] had received the materials." ES testified under cross-examination that he never heard Mr. Storey make the positive representation, and only deduced it from overhearing one half of an April 2009 telephone conversation between Mr. Storey and the Respondent while sitting in the Respondent's office.

[28] On August 4, 2009, in response to a Law Society investigation into allegation 1(a), the Respondent wrote to the Law Society and represented that there was a telephone conversation between him and Mr. Storey in which:

> I asked [Mr. Storey] if he sent all the materials to [Dr. E]. I asked because I wanted to know if [Dr. E] had the materials or whether there was something that had to be done. Rather than seize this opportunity to report that [Dr. E] needed my materials he stated to me "the materials have been sent." When Mr. Storey denies this telephone conversation took place he is lying.

This representation gave rise to allegation 1(b) of professional misconduct, *viz.* that the Respondent made a representation he knew or ought to have known was not true in a letter to the Law Society.

[29] Applying the long-standing principles for assessing witness credibility outlined in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA), the hearing panel preferred the evidence provided by Mr. Storey over the evidence provided by the Respondent regarding the alleged telephone conversation on or around April 2, 2009. The hearing panel noted Mr. Storey's extensive experience in cases requiring the preparation of a Views of the Child Report, and his established and previously unproblematic practice of copying opposing counsel when writing to third parties.

[30] The hearing panel also noted that neither Mr. Storey nor the Respondent had any notes to file or timesheet entries substantiating the alleged telephone conversation on or about April 2, 2009. Weighing the conflicting testimonies, the hearing panel believed "it made little sense for such a telephone conversation to have occurred when Mr. Storey's two letters specifically indicated what Mr. Storey was doing and what he was not doing. All Mr. Vlug had to do was read the letters and he would know what Mr. Storey was sending." (F & D Decision, para. 38)

[31] The hearing panel did not comment on how much weight it attributed to evidence provided by ES concerning the alleged yet undocumented interaction between Madam Justice Martinson, Mr. Storey and the Respondent in court on March 31,

2009 and the alleged telephone conversation between Mr. Storey and the Respondent on or about April 2, 2009.

[32] The hearing panel found that Mr. Storey had little or no interest in the outcome of the Law Society discipline proceedings against the Respondent, in contrast to the Respondent's significant interest in avoiding a finding of professional misconduct and consequent damage to his professional reputation. The hearing panel identified this finding as a helpful factor in assessing witness credibility per the principles outlined in *Faryna*.

[33] The hearing panel found, on the balance of probabilities, that no telephone conversation concerning the delivery of documents to Dr. E occurred between Mr. Storey and the Respondent on or about April 2, 2009. Consequently, the hearing panel found that the Respondent's representations to the Supreme Court and the Law Society regarding the alleged telephone conversation were not true.

[34] The hearing panel also implied that the Respondent lied to the Supreme Court and to the Law Society: "Lawyers cannot lie to a court or to the Law Society, or for that matter, their colleagues." (F & D Decision, para. 44)

Allegations 2 and 3 from the ES Matter

[35] Allegations 2 and 3 of professional misconduct arose from a representation made in the ES Affidavit to the Supreme Court and later to the Court of Appeal that, "there was an active attempt by the Petitioner to deprive [Dr. E] of the Respondent's materials." In both instances, the Law Society considered the Respondent's inclusion of the statement to be improper on the basis that: a) he knew or ought to have known that the representation was not true; or b) the affidavit was not competently drafted, contrary to Chapter 3, Rules 1 and 3 of the *Professional Conduct Handbook*, as it contained statements that were not identified as being made on information and belief, and the source of such information was not identified.

[36] In light of the admitted fact that the Respondent received the Arrangement Letter outlining Mr. Storey's intention to send only his client's materials to Dr. E, the hearing panel found that the Respondent knew or ought to have known that Mr. Storey did not actively seek to deprive Dr. E of ES's materials.

[37] The hearing panel also referred to ES's testimony where he confirmed having believed the Respondent when he told him that Mr. Storey was attempting to deprive Dr. E of his materials. Therefore, according to the hearing panel, the ES

Affidavit ought to have identified that the impugned statement was made on information and belief sourced from the Respondent.

[38] In its consideration of allegations 2 and 3, the hearing panel did not specifically mention evidence relating to the alleged yet undocumented interaction between Madam Justice Martinson, Mr. Storey and the Respondent in court on March 31, 2009, and the alleged telephone conversation between Mr. Storey and the Respondent on or about April 2, 2009. Nonetheless, "on the totality of the evidence," the hearing panel found that Mr. Storey did not actively attempt to deprive Dr. E of ES's materials.

Allegation 4 from the ES Matter

[39] Allegation 4 arose from a statement made by the Respondent to the Court of Appeal on June 22, 2009. Page 48 of the transcript of the proceeding shows the following exchange:

> The Court: Well did you not get correspondence from Mr. Storey saying, I propose to send my documents and you send yours?
>
> Mr. Vlug: No, I did not.

[40] The hearing panel did not accept the Respondent's explanation that, because the Arrangement Letter was only copied to him and did not specify him as the primary recipient, he was truthful in confirming that he did not receive correspondence from Mr. Storey outlining the arrangement for providing client materials to Dr. E.

[41] The hearing panel also did not accept the Respondent's explanation that the Court of Appeal's question regarding correspondence from Mr. Storey related to another letter sent to the Respondent as the direct recipient and referred to earlier by the Court of Appeal in a non-transcribed or "off the record" portion of the proceeding.

[42] Noting that the Respondent admitted to having received the Arrangement Letter and a second letter from Mr. Storey to Dr. E on April 2, 2009 enclosing copies of his client's materials, the hearing panel found that the Respondent "misstated facts that he knew or ought to have known were untrue." (F & D Decision, para. 55) In the subsequent paragraph of the F & D Decision, the hearing panel further found that the Respondent "lied to a Judge of the Court of Appeal." (F & D Decision, para. 56)

Allegation 5 from the ES Matter

[43] Allegation 5 arose from the Respondent's allegedly "discourteous and unfounded" statements made about Mr. Storey in relation to circumstances surrounding the Arrangement Letter. The Law Society specifically alleged:

(a) in June 22, 2009 at the hearing of the appeal, you made submissions to the Court of Appeal to the effect that Mr. Storey had "duped" you;

(b) in your letter dated December 2, 2009 to the Law Society, you stated words to the effect that Mr. Storey's conduct was aimed at obtaining an advantage of some sort;

(c) in your letter dated December 13, 2009 to the Law Society, you stated words to the effect that Mr. Storey's letter was created with the intent of causing a slip that would further the advantage of providing only the other party's pleadings and affidavits.

[44] Contrary to the Respondent's characterization of them, the hearing panel found that Mr. Storey's letters of April 2, 2009 were "straightforward and clear" and the Respondent's related position before the Court of Appeal and in correspondence to the Law Society was "disingenuous and untrue."

[45] The hearing panel further found that the evidence indicated that "Mr. Vlug was the one who was lying; to the Court of Appeal, the Law Society, and to the Hearing Panel." (F & D Decision, para. 62)

Allegation 6 from the ES Matter

[46] Allegation 6 arose from the Respondent's representation to the Law Society that the Court of Appeal had an "off the record" discussion with Mr. Storey regarding his failure to deliver ES's materials to Dr. E in early April 2009. The Law Society alleged that such a discussion never occurred and that the Respondent knew or ought to have known that his representation was not true.

[47] In a letter dated September 9, 2011, the Respondent repeated his previous written assertions that a Court of Appeal judge chastised Mr. Storey during an "off the record" portion of the June 22, 2009 proceedings for only sending his own client's documents to Dr. E in early April 2009 and for merely copying the Respondent on the Arrangement Letter rather than directly writing to him.

[48] The transcript for the June 22, 2009 Court of Appeal proceedings provides no indication of an "off the record" discussion, a brief adjournment or a reporting

system shutdown during the time period identified by the Respondent. The transcript includes entries for adjournments for the morning, noon and afternoon recesses.

[49] Mr. Storey testified that no "off the record" discussion occurred on June 22, 2009. He could not recall being chastised by a Court of Appeal judge for his conduct in the ES Matter. Nor could he recall any "off the record" discussions occurring in his years of appearing before the Court of Appeal.

[50] The hearing panel preferred Mr. Storey's evidence to the Respondent's evidence. It found, on the balance of probabilities, that an "off the record" discussion would have been captured by the court reporter and reflected in some way by the transcript. Consequently, the hearing panel found that the Respondent knew or ought to have known that his representation that a Court of Appeal judge chastised Mr. Storey in an "off the record" discussion was not true.

Allegations 7, 8 and 9 from the PS Matter

[51] Allegations 7, 8 and 9 arose from another family law matter in which the Respondent represented PS in overlapping divorce applications. In allegation 7, the Law Society alleged that, on or about February 5, 2010, the Respondent committed professional misconduct by filing a second writ and statement of claim in the Vancouver Registry of Supreme Court (the "Vancouver Filing") under a different name for the plaintiff PS "for the purpose of improperly avoiding the procedure to amend the statement of claim" previously filed for the same parties' divorce in October 2008 in the New Westminster Registry of Supreme Court (the "New Westminster Filing").

[52] In allegation 8, the Law Society alleged that, in the Vancouver Filing, the Respondent stated:

> There has been no other proceeding between or any agreement between the parties with respect to a separation between the parties or to the support or maintenance of a party or of party [sic] or a child of a party, or with respect to the division of property of the parties.

[53] In allegation 9, the Law Society further alleged that, in the Vancouver Filing, the Respondent stated:

> It is impossible to obtain a certificate of the marriage or a certificate of the registration of the marriage because there is an emergency need to for [sic] a Certificate of Pending Litigation to stop the transfer of matrimonial

> assets to China OR sale and liquidation of matrimonial assets and then transfer, outside of the jurisdiction of the court. A copy of the Marriage Certificate will be provided shortly.

when he knew or ought to have known that the statement was not true.

[54] The Vancouver Filing was made in PS's Chinese name and expanded the relief claimed in the New Westminster Filing from divorce with no corollary relief to divorce including "division of the family assets" and "other relief," specifically "that the Defendant be restrained and enjoined from disposing of, encumbering, assigning or in any similar manner dealing with family assets" without PS's consent or further Order.

[55] On or about February 5, 2010, an agent instructed by the Respondent's office staff filed a Requisition for an Order for Divorce in PS's Canadian name. The Respondent asserted that he was unaware at that point that his staff filed the Requisition.

[56] The Respondent testified that, on the day prior to making the Vancouver Filing, he recalled the outstanding New Westminster Filing and questioned his paralegal assistant MT about its status. MT subsequently informed him that "the Requisition had been filed," and the Respondent testified to having understood that MT had "put a stop" to the New Westminster Filing.

[57] Called as a witness by the Law Society, MT testified that the Respondent only inquired about the New Westminster Filing after the Vancouver Filing was made on February 5, 2010. She testified that, after she informed him that "the Requisition had been filed," the Respondent instructed her to do nothing more. She further testified that it was not until March 22, 2010, after the requisitioned divorce order was granted and entered on March 19 in the New Westminster Registry, that the Respondent instructed her to discontinue the New Westminster Filing.

[58] The Law Society called Dinyar Marzban, QC, to give expert testimony concerning family law process and procedure in British Columbia. Among other opinions, Mr. Marzban testified that any lawyer who is competent to practise family law in British Columbia would know that he or she cannot properly pursue a new divorce proceeding for the same client, against the same spouse, without first discontinuing any prior divorce proceeding.

[59] The Respondent characterized the duplicate divorce filings as an honest mistake where nothing stood to be gained from the two active filings for the same parties because the Vancouver Filing would ultimately be denied under the circumstances.

He described the situation as a "slight mix-up" arising from miscommunications between him and his staff.

Allegations 10 and 11 from the MW Matter

[60] Allegations 10 and 11 arose from another family law matter in which the Respondent was retained by MW in 2009 to vary the amount of a child and spousal support order made in 2006. The Law Society alleged that the Respondent added documents to a previously prepared and sworn financial statement (allegation 10), and prepared and commissioned an affidavit on behalf of MW that contained a statement that he knew or ought to have known was not true (allegation 11).

[61] On March 29, 2010, MW swore a financial statement containing 28 pages ("Financial Statement 1"), which had been prepared and commissioned by the Respondent. MW's 2009 income and tax information was missing from Financial Statement 1.

[62] On April 7, 2010, the Respondent served opposing counsel, Mr. Shantz, with Financial Statement 1 in support of a Notice of Motion. Mr. Shantz took the position that Financial Statement 1 lacked sufficient disclosure of MW's 2009 income and tax information.

[63] On July 14, 2011, the Respondent filed two new affidavits sworn by MW and Financial Statement 1 with 26 additional pages of MW's previously missing 2009 income and tax information ("Financial Statement 2"). The Respondent admitted to having attached the 26 additional pages to Financial Statement 1 after it had been sworn by MW. He also admitted to having never advised Mr. Shantz that he was adding financial records to Financial Statement 1.

[64] On October 4, 2011, the Respondent prepared and commissioned another affidavit sworn by MW that contained the assertion that Mr. Shantz had complained to the Law Society that the Respondent had "included too much financial disclosure" in Financial Statement 2. Under cross examination at hearing, the Respondent agreed that Mr. Shantz had never complained to the Law Society as asserted by MW.

Respondent's allegation of delay

[65] At the conclusion of final submissions in the initial hearing of this matter, after all evidence had been entered and all witnesses heard, the Respondent argued that the hearing panel should dismiss the entirety of the April 2, 2012 citation against him for reasons of alleged prejudicial delay in the Law Society's investigation and

prosecution of the ES Matter. The hearing panel permitted each party to make written submissions on the issue.

[66] Among other arguments made in his written submissions, the Respondent argued that witnesses' recollections of the circumstances of the ES Matter had sufficiently deteriorated over the four years leading to the initial hearing of the matter and that his ability to recall, submit and challenge evidence was significantly prejudiced.

[67] In reply to the Applicant's written submissions, the Law Society provided an affidavit of Discipline Assistant Chrysta Gejdos (the "Gejdos Affidavit") outlining several instances of the Respondent himself causing delay after the issuance of his citation. The Law Society's reply submissions on delay, including the Gejdos Affidavit, were not provided to the Respondent until the day of the Disciplinary Action hearing on April 28, 2014.

[68] The Law Society took the position that the Respondent's application for a stay of proceedings due to delay should be dismissed for the following reasons identified by the hearing panel at paragraph 140 of the F & D Decision:

(a) there was no inordinate delay by the Law Society in its investigation or prosecution of this matter;

(b) the Respondent did not demonstrate prejudice to the fairness of the hearing by an inability to make full answer and defence due to faded memories;

(c) there was no abuse of process by the Law Society warranting a stay of proceedings or dismissal of the citation.

[69] The Law Society also took issue with the Respondent making his application for a stay of proceedings due to delay at the very end of his closing submissions after the hearing panel had already heard all of the impugned evidence.

[70] Citing the reasons from *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] SCJ No. 43, as "the leading administrative law case dealing with an application for a stay of proceedings due to delay," the hearing panel found that the Respondent failed to demonstrate that the delay was inordinate, unacceptable and resulted in prejudice of such magnitude that it impacted the fairness of the hearing.

[71] The hearing panel outlined its reasons for dismissing the Respondent's application for a stay of proceedings due to delay at paragraphs 148-150 of the F & D Decision:

[148] We do not find the delay is inordinate or unacceptable, either in the investigation stage or in the post citation stage, especially in light of the delays in responding by the Respondent, and the procedural applications and steps taken by the Respondent, which had the effect of delaying the date of the hearing.

[149] We find that there is no evidence of prejudice to the Respondent as a result of witnesses' memories being significantly weakened by the passage of time on material facts in respect to the ES matter.

[150] We find that the alleged delay did not amount to an abuse of process by the Law Society. The Respondent made his delay arguments at the end of the proceedings as an afterthought. If the Respondent were prejudiced by delay, one would expect he would have raised it at the outset of the proceedings.

[72] At paragraphs 1-3 of the Notice of Review, the Respondent alleged that the hearing panel erred in considering the Gejdos Affidavit and the Law Society's reply submissions on delay "that the Respondent had no knowledge of," and in not providing the Respondent "any opportunity to address the evidence and submissions aforesaid."

ANALYSIS OF THE ISSUES

(a) Did the hearing panel err in its consideration of the Respondent's argument regarding delay and in its conclusion that there was no delay resulting in unfairness to him?

[73] The issue of how to assess whether delay resulted in unfairness to the Respondent is a question of law subject to a standard of correctness upon review. The subsequent issue of whether the hearing panel erred in its application of the correct assessment of delay is a question of mixed fact and law. As such, and as recently confirmed by the Court of Appeal in *Kay*, it is subject to a standard of reasonableness upon review.

[74] The hearing panel correctly followed the Supreme Court of Canada's reasons in *Blencoe* in assessing the impact of delay on the Respondent's case. The hearing panel assessed whether the Respondent provided proof of significant prejudice resulting from an unacceptable delay. According to *Blencoe*, the determination of whether a delay is unacceptable is not based on length alone, but on contextual factors, including the nature and complexity of the case, the purpose and nature of

the proceedings, and whether the Respondent contributed to the delay or waived the delay.

[75] In light of the Respondent's lack of specific evidence in his submissions regarding significant prejudice caused to his case by the Law Society's allegedly unacceptable delay, it was reasonable for the hearing panel to conclude there was no abuse of process by the Law Society warranting a stay of proceedings or a dismissal of the Citation. Likewise, the Respondent presented no evidence of the deterioration of his memory or ES's memory since the spring of 2009. Beyond identifying four unexplained periods of time between phases of the Law Society's investigation and prosecutorial processes, he presented no evidence as to how the Law Society contributed to periods of delay. Conversely, by way of the Gejdos Affidavit, the Law Society presented several instances where the Respondent contributed to the overall delay in proceedings.

[76] We find that there was no unfairness to the Respondent stemming from his lack of opportunity to reply to the Law Society's written submissions on delay, including the Gejdos Affidavit. The Respondent first raised the issue of delay in his closing argument at hearing. The hearing panel afforded him the opportunity to expand on his delay argument by way of written submissions. In turn, the hearing panel afforded the Law Society the opportunity to address the Respondent's written submissions by way of written reply submissions. We find that no unfairness resulted from the Respondent's lack of opportunity to further reply to the Law Society prior to the Disciplinary Action hearing.

(b) Did the hearing panel err in its application of the onus and standard of proof?

[77] The issue of what onus and standard of proof to apply to all hearing submissions and evidence is a question of law subject to a standard of correctness upon review. The subsequent issue of whether the hearing panel erred in its application of the correct onus and standard of proof to all hearing submissions and evidence before it is a question of mixed fact and law. It is therefore subject to a standard of reasonableness upon review.

[78] Following the Supreme Court of Canada's decision in *F.H. v. McDougall*, 2008 SCC 53, as adopted in *Law Society of BC v. Siefert*, 2009 LSBC 17 and *Law Society of BC v. Schauble*, 2009 LSBC 11, the hearing panel correctly identified the onus of proof in these proceedings as resting on the Law Society to prove its case on a balance of probabilities with evidence that is clear, convincing and cogent.

[79] At paragraphs 33 and 35(3) of his submissions, the Respondent submitted that the standard of proof for allegations of professional misconduct is "just below beyond a reasonable doubt." He proffered *Law Society of BC v. Lyons*, 2008 LSBC 9, as authority for his position. However, the Respondent admitted at the Review hearing that the applicable standard of proof is indeed one of a balance of probabilities, as confirmed in the Benchers' later decisions in *Siefert* and *Schauble*.

[80] The hearing panel placed the onus on the Law Society to prove each of the 11 allegations made against the Respondent. In its treatment of hearing submissions and evidence in the F & D Decision, allegation by allegation, the hearing panel did not stray from applying the correct standard of proof of a balance of probabilities. The reasonableness of outcomes of such proper application of the onus and standard of proof are assessed below in our analysis of the hearing panel's findings of fact.

[81] We therefore conclude that the hearing panel did not err in its application of onus and standard of proof.

(c) Did the hearing panel err in its findings of fact?

[82] The standard of review for questions of fact is one of reasonableness. Following the test for reasonableness outlined in *Kay*, this Review panel may only interfere with the hearing panel's findings of fact where we determine them to be unreasonable on the whole. Where findings of credibility are concerned, we may only interfere with unreasonable findings derived from clear and palpable errors in judgment.

Allegation 1 from the ES Matter

[83] We differ from the three other Review panel members on this specific issue. This Review panel may only interfere with findings of credibility that are derived from clear and palpable errors in judgment, and are consequently unreasonable on the whole. We must resist the temptation to re-try the case at first instance even where we would have made alternative reasonable findings.

[84] It is worth repeating the prescription for testing the reasonableness of findings of fact from *Kazman* as adopted by the Court of Appeal in *Kay* at para. 40:

> In performing its functions, the Appeal Panel shall not re−try the dispute at first instance, but shall conduct a somewhat probing examination of the reasons of the hearing panel to determine whether those reasons, taken as a whole, are reasonable, transparent, intelligible, tenable, defensible in

> relation to the law and the facts, and supportive of the hearing panel's decisions within a range of acceptable outcomes. If they are, the Appeal Panel shall not interfere with them even if the members of the Appeal Panel suspect that they might have preferred a different acceptable outcome.

[85] Upon weighing the hearing evidence and assessing witness credibility per the principles outlined in *Faryna*, the hearing panel found, on a balance of probabilities, that no telephone conversation occurred between the Respondent and Mr. Storey on or around April 2, 2009 wherein Mr. Storey committed to sending both sets of client documents to Dr. E. The hearing panel referenced the conflicting logistic nature of the Arrangement Letter and the fact that neither the Respondent nor Mr. Storey had any notes to file or timesheet entries substantiating the alleged telephone conversation.

[86] The hearing panel found Mr. Storey to be more credible than the Respondent. It placed a great deal of significance on the clear and incontrovertible content of the Arrangement Letter as at least dissonant from the Respondent's assertion that Mr. Storey subsequently and proactively revised his document delivery arrangements over an undocumented telephone conversation.

[87] The hearing panel also found that Mr. Storey had little to no interest in the outcome of the disciplinary proceedings against the Respondent, in contrast to the Respondent's substantial interest in preserving his professional reputation and resisting one or more findings of professional misconduct against him. It may be that Mr. Storey had more than a little interest in the outcome of the proceedings given that either he or the Respondent would be found to have given false testimony on incompatible fact scenarios, but it is clear that the Respondent had greater interest in the punitive outcome at stake.

[88] The hearing panel did not comment on how much weight it attributed to ES's testimony that he overheard one half of the alleged April 2009 telephone conversation between Mr. Storey and the Respondent while sitting in the Respondent's office. Nor did it comment on the weight it attributed to ES's testimony that he recalled Mr. Storey assuring Madam Justice Martinson on March 31, 2009 that he would send "all the documents" to the chosen writer of the Views of the Child Report—contrary to the subsequent Arrangement Letter. The official court transcript for March 31, 2009 has no record of the alleged interaction between Mr. Storey and Madam Justice Martinson, and such an unrecorded courtroom interaction between counsel and a judge is at least highly unusual.

[89] Finally, the hearing panel did not comment on Mr. Storey's inability to recollect with certainty having engaged or not in other file-related telephone discussions with the Respondent in April 2009.

[90] On the whole, and despite the lack of comments regarding ES's testimony and Mr. Storey's inability to recollect other file-related telephone discussions from four years prior, it is not unreasonable for the hearing panel to have preferred the evidence of Mr. Storey's testimony combined with the documentary evidence of the Arrangement Letter and the lack of documentary evidence substantiating Mr. Storey's alleged courtroom interaction with Madam Justice Martinson, over the evidence of the Respondent's self-serving testimony and ES's recollections of one half of an alleged telephone conversation and an unrecorded courtroom interaction from four years prior.

[91] The hearing panel's reasons for finding, on a balance of probabilities, that no April 2, 2009 telephone conversation occurred as alleged by the Respondent, are reasonable, transparent, intelligible, tenable and defensible within a range of acceptable outcomes.

Allegations 2 and 3 from the ES Matter

[92] Following from the Respondent's admission that he received the Arrangement Letter, and its finding that that no April 2, 2009 telephone conversation occurred as alleged by the Respondent, the hearing panel found that the Respondent knew or ought to have known that Mr. Storey did not actively seek to deprive Dr. E of ES's materials.

[93] Given its previous findings of fact, it was reasonable for the hearing panel to find, "on the totality of the evidence," that Mr. Storey did not actively attempt to deprive Dr. E of ES's materials.

Allegation 4 from the ES Matter

[94] Allegation 4 concerns the Respondent's answer to the Court of Appeal's June 22, 2009 question regarding correspondence that is more than reasonably identifiable as the Arrangement Letter:

> The Court: Well did you not get correspondence from Mr. Storey saying, I propose to send my documents and you send yours?
>
> Mr. Vlug: No, I did not.

[95] It was reasonable for the hearing panel to find that, in denying having received the Arrangement Letter, the Respondent misstated facts that he ought to have known were not true.

[96] The Court of Appeal did not contextualize or follow up on its brief June 22, 2009 question regarding correspondence between the Respondent and Mr. Storey. There was insufficient evidence to establish, on a balance of probabilities, that the Respondent did not indeed misinterpret the question to refer to direct and private correspondence between them. And so, while it was reasonable for the hearing panel to find that the Respondent ought to have known that he misstated facts in reply to the Court of Appeal's question, it was unreasonable to find that he knew his statement was not true and that he intended to mislead or lie to a judge of the Court of Appeal.

Allegation 5 from the ES Matter

[97] The Law Society provided documentary evidence for each of its allegations:

(a) that the Respondent made submissions to the Court of Appeal to the effect that Mr. Storey "duped" him;

(b) that the Respondent stated, in his letter dated December 2, 2009 to the Law Society, words to the effect that Mr. Storey's conduct was aimed at obtaining unfair advantage over him; and

(c) that the Respondent stated, in his letter dated December 13, 2009 to the Law Society, words to the effect that Mr. Storey created the Arrangement Letter with the intent of causing the Respondent a slip that would advantage Mr. Storey's client.

[98] It was reasonable for the hearing panel to find that the Respondent's position before the Court of Appeal and in correspondence to the Law Society that Mr. Storey intended to deceive him was "disingenuous and untrue." It was also reasonable for the hearing panel to find that the Respondent's impugned statements were discourteous and unfounded.

Allegation 6 in the ES Matter

[99] Allegation 6 arose from the Respondent's representation to the Law Society that the Court of Appeal had an "off the record" discussion with Mr. Storey regarding his failure to deliver ES's materials to Dr. E in early April 2009.

[100] Given that the hearing panel preferred Mr. Storey's evidence to the Respondent's evidence on this issue, and that there was no evidence of an "off the record" discussion on the official court transcript, it was reasonable for the hearing panel to find that the Respondent's representation that a Court of Appeal judge chastised Mr. Storey in an "off the record" discussion was not true.

Allegations 7, 8 and 9 from the PS Matter

[101] In allegation 7, the Law Society alleged that the Respondent filed the Vancouver Filing under a different name for the plaintiff PS for the purpose of improperly avoiding the procedure to amend the active New Westminster Filing.

[102] In allegation 8, the Law Society alleged that, in the Vancouver Filing, the Respondent denied the pre-existence of the active New Westminster Filing when he knew or ought to have known that the statement was not true.

[103] In allegation 9, the Law Society further alleged that, in the Vancouver Filing, the Respondent stated that it was then impossible to obtain a certificate of the marriage or a certificate of the registration of the marriage when he knew or ought to have known that the statement was not true.

[104] For each of allegations 7, 8 and 9, it was reasonable for the hearing panel to find that the Respondent ought to have known that his filings and subsequent statements about them were improper and misleading. The documentary evidence of conflicting filings is incontrovertible, and the expert testimony regarding the proper and well-known process for obtaining leave to appeal to file for divorce without a Certificate of Marriage is compelling.

[105] However, in the absence of specific and compelling evidence that the Respondent knew that the Vancouver filing was improper and therefore intended to misrepresent the status of the parties and prior proceedings, it was not reasonable for the hearing panel to find, on a balance of probabilities, that the Respondent knew his filings and subsequent statements about his filings were improper and misleading.

Allegations 10 and 11 from the MW Matter

[106] The Law Society alleged that the Respondent added documents to the previously prepared and sworn Financial Statement 1 (allegation 10), and prepared and commissioned the MW Affidavit that contained a statement that he knew or ought to have known was not true (allegation 11).

[107] The Respondent admitted at hearing to having added documents to Financial Statement 1. He also admitted to having prepared and commissioned the MW Affidavit with the false assertion that Mr. Shantz had complained to the Law Society that the Respondent had included "too much financial disclosure" in MW's updated financial statement.

[108] In light of the Respondent's admissions and relevant filed documents, it was reasonable for the hearing panel to find that the Respondent added documents to Financial Statement 1, and prepared and commissioned the MW Affidavit that contained a statement that he knew or ought to have known was not true.

(d) Did the hearing panel err in applying the test for professional misconduct to each of the eleven allegations made against the Respondent?

[109] The issue of what test to apply for professional misconduct is a question of law subject to a standard of correctness upon review. The subsequent issue of whether the hearing panel erred in its application of the correct test is a question of mixed fact and law subject to a standard of reasonableness upon review.

[110] The hearing panel correctly stated the test for professional misconduct at paragraph 13 of the F & D Decision:

> [13] The test for professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules or the *Professional Conduct Handbook* (which was applicable at the relevant times), but the leading case is *Law Society of BC v. Martin*, 2005 LSBC 16. The test is "whether the facts as made out disclose a marked departure from the conduct the Law Society expects of its members." In that case, the panel stated the essential question this way:
>
> > The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.
>
> [14] The panel decision in *Re: Lawyer 12*, 2011 LSBC 11 stated:
>
> > … the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

> [15] On Review the Benchers confirmed the marked departure test set out in *Martin* and adopted the above formulation of that test expressed by the single-Bencher hearing panel.

[111] In his submissions to this Review panel, the Respondent argued that the presence of *mala fides* is necessary for a finding of professional misconduct. He cited the test at paragraph 35 of *Law Society of BC v. Lyons*, 2008 LSBC 9 as authority for his position:

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[112] The *Lyons* test related to circumstances where an unprecedented breach of the Act or the Rules could meet the threshold for a finding of professional misconduct. As confirmed at paragraph 67 of Law Society *of BC v. Gellert*, 2013 LSBC 22, *mal fides* is not a necessary precondition of professional misconduct:

> Conduct falling within the ambit of the "marked departure" test will display culpability that is grounded in a fundamental degree of fault, but intentional malfeasance is not required – gross culpable neglect of a member's duties as a lawyer also satisfies the test (*Martin*, para. 154; *Law Society of BC v. Singh*, 2013 LSBC 76, paras. 11-12).

Allegation 1 from the ES Matter

[113] On the basis that it was reasonable for the hearing panel to find that the Respondent's representations to the Supreme Court and to the Law Society regarding the alleged April 2, 2009 telephone conversation between him and Mr. Storey were not true, it was reasonable for the hearing panel to find that the facts disclosed a marked departure from the conduct the Law Society expects of its members. It is clearly unacceptable to knowingly misrepresent matters to the Court or to the Law Society. We therefore uphold the hearing panel's finding of professional misconduct for allegations 1(a) and 1(b).

[114] We differ here from the three other Review panel members, and we appreciate that the lack of a majority ruling on this issue may result in a new Review of these particular allegations.

Allegations 2, 3, 4, 5 and 6 from the ES Matter

[115] Allegations 2 and 3 arose from a representation made in the ES Affidavit to the Supreme Court and later to the Court of Appeal that, "there was an active attempt by the Petitioner to deprive [Dr. E] of the Respondent's materials." The Law Society considered both iterations of the Respondent's statement to be improper on the basis that: a) he knew or ought to have known that the representation was not true; or b) the ES Affidavit contained statements that were not identified as being made on information and belief, and the source of such information was not identified.

[116] Allegation 4 arose from the Respondent's denial to the Court of Appeal that he had received the Arrangement Letter. Though it is possible that he misinterpreted the Court's question as referring to direct and private correspondence between him and Mr. Storey, the Respondent ought to have known that he was misstating facts to a judge.

[117] Allegation 5 arose from representations that the Respondent made to the Court of Appeal and to the Law Society that Mr. Storey intended to deceive him. It was reasonable for the hearing panel to find that the representations were discourteous and unfounded.

[118] Allegation 6 arose from the Respondent's representation to the Law Society that the Court of Appeal had an "off the record" discussion with Mr. Storey regarding his failure to deliver ES's materials to Dr. E in early April 2009. It was reasonable for the hearing panel to find that the Respondent's representation was not true.

[119] There is an obvious current of self-serving misrepresentation—wilful at times and at least grossly negligent at other times—running through the circumstances of the above allegations. In each instance, it was reasonable for the hearing panel to find that the Respondent's conduct was a marked departure from the conduct the Law Society expects of its members.

[120] Whether intentional or not, it is unacceptable to misrepresent ascertainable facts to the Law Society and to the courts in the repeated manner of the Respondent. Such reckless and dishonest behaviour offends the values at the very core of the lawyer's role as an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession. We therefore uphold the hearing panel's finding of professional misconduct for each of allegations 2, 3, 4, 5 and 6.

Allegations 7, 8 and 9 from the PS Matter

[121] Allegations 7, 8 and 9 each relate to the Respondent's conflicting divorce filings for his client PS. Given the facts and Mr. Marzban's expert testimony on accepted family law practice, it was reasonable for the hearing panel to find that the Respondent ought to have known that his filings and subsequent statements were improper and misleading. However, in the absence of compelling evidence that the Respondent was more culpable than sloppy, misinformed or confused, it was not reasonable for the hearing panel to find that the Respondent knew his filings and subsequent statements were improper and misleading.

[122] For each of allegations 7, 8 and 9, the Law Society alleges that the Respondent's conduct either constituted professional misconduct or incompetent performance of duties undertaken in the capacity of a lawyer, pursuant to s. 38(4) of the Act. However, the Law Society did not provide more than a cursory argument as to how the Respondent's conduct specifically constituted incompetent performance of his duties.

[123] It was unreasonable for the hearing panel to find that the Respondent possessed the requisite intention or awareness of his improper actions under allegations 7, 8 and 9. There is also an absence of evidence that could reasonably support one or more findings of incompetence against him. As held in *Sheddy v. Law Society of British Columbia*, 2007 BCCA 96, natural justice requires the Benchers to rely on clear evidence supporting an allegation of incompetence, and not to rely on their own opinions as panel members.

[124] We reverse the hearing panel's findings of professional misconduct with respect to allegations 7, 8 and 9, and we find there is insufficient evidence to support findings of incompetence for the same allegations.

Allegations 10 and 11 from the MW Matter

[125] The Respondent admitted to having added documents to the previously sworn Financial Statement 1. He also admitted to having prepared and commissioned the MW Affidavit with a false assertion concerning Mr. Shantz. The hearing panel made no error in fact or law in finding that the Respondent's wrongful actions constituted professional misconduct.

(e) Did the hearing panel impose an appropriate disciplinary action?

[126] As explained in *Hordal*, it is generally inappropriate for this Review panel to "tinker" with the discipline determinations of the hearing panel. We must,

however, reassess the reasonableness of the hearing panel's discipline determination in light of the findings we reversed for allegations 7, 8 and 9, and our inability to reach a majority decision on allegations 1(a) and 1(b).

[127] We adopt the same reasons for discipline as outlined below by the three other panel members. We likewise substitute a suspension of seven weeks for allegations 2, 3, 4, 5, 6, 10 and 11 as upheld. We agree that the Respondent must take a remedial program in family law to the satisfaction of the Practice Standards Committee. We also agree to assess $5,000 plus disbursements in costs for this Review, and to substitute costs in the amount of $12,500 for the hearing below in light of the mixed results of this Review and because a new Review may occur for allegations 1(a) and 1(b).

DECISION OF KENNETH WALKER, QC, CHAIR, SATWINDER BAINS AND ELIZABETH ROWBOTHAM

[128] After the conclusion of the oral hearing in this matter, one of the Benchers in the review panel became ill and was unable to continue with the matter. Under the legislation that governs this review, section 48 of the *Legal Profession Act* as it existed when the citation was issued (see *Teskey v.* Law Society *of British Columbia* (1990), 74 DLR (4th) 146), if a Bencher cannot continue with a review and at least five Benchers remain, "the remaining benchers may continue to hear the review and make a final decision, and the vacancy does not invalidate the review." Accordingly, the remaining six Benchers have continued to complete this review.

[129] Except as explained below, we agree with the decision of the other three Benchers on the Review panel. However, the Review panel is divided on allegation 1 of the citation. The three other panel members would uphold the hearing panel's findings of fact regarding allegation 1 as reasonable. We, on the other hand, would reverse the decision below because of evidence not referred to in the reasons. We are not going to discuss our observations of the evidence in great detail because evidence may be heard at another Review. We note that the hearing panel did not comment on the testimonial evidence of ES. His evidence related to what occurred as Madam Justice Martinson was leaving the Court and what he heard when the Respondent was speaking to Mr. Storey on the telephone. Reviewing the record causes us to believe that the hearing panel did not consider this corroborative evidence.

[130] We believe that ES's evidence was important and required comment in the hearing below. The importance of his evidence required not only reflection but some inclusion in the reasons. As the reviewer, we need to know that consideration

occurred. The authorities support the conclusion that not all evidence is required but that the reviewer at least requires to understand the "pathway" to the original decision. That is not so for *all* evidence in *every* hearing but rather, in our view, *this* evidence in *this* hearing. We find paragraphs 10-12 from *Faryna* instructive here:

> [10] If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 DLR 560 at 566. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.
>
> [11] The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on

> consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> [12] The trial Judge ought to go further and say that the evidence of the witness he believes is in accordance with preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal *must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.*
>
> [emphasis added]

[131] This Review panel must be satisfied that the hearing panel did not base their decision relating to credibility based on "one element only to the exclusion of others, but ... on all the elements by which it can be tested in the particular case." We are not satisfied of this, and we therefore find that the hearing panel erred in its findings of fact regarding allegation 1.

[132] We believe that the hearing panel erred in finding that the Respondent's representations to the Supreme Court and the Law Society regarding the alleged telephone conversation between him and Mr. Storey were not true. For these reasons, we also find that the hearing panel erred in its finding of professional misconduct under allegation 1.

[133] Along with the other three panel members who differ from us on this issue, we are aware of the constraints of s. 47 of the Act, which require us to confirm the decision of the hearing panel or to substitute any decision the hearing panel could have made. The suggestion in s. 47 may be that we do not have jurisdiction to order a new hearing where evidence has not been considered but should have been considered. We considered whether we could stretch the jurisdictional constraints of s. 47. We considered whether in some circumstances a panel below could order a new or fresh hearing. An example might occur where bias or conflict arises during a hearing. Another example may arise where the panel is reduced to two panel members who ultimately disagree on outcome. However, we are divided equally on outcome and are bound by the strict wording of s. 47. Accordingly, we cannot, by majority, uphold or replace the hearing panel's finding of professional misconduct for allegations 1(a) and 1(b). This unfortunately may require a new Review for those allegations only. We can only say that we worked hard and long but found no majority view. It may be that another Review panel may wish to hear

this evidence. That is an option for them to consider after having heard counsel on the matter.

DISCIPLINARY ACTION

[134] We must consider the appropriateness of the disciplinary action imposed by the hearing panel. The panel imposed a six-month suspension considering the findings of professional misconduct on all 11 allegations on the citation.

[135] We have reversed three findings (allegations 7, 8 and 9), and we have not been able to decide with respect to allegation 1(a) and (b).

[136] Accordingly, we must reassess disciplinary action on the professional misconduct found in allegations 2, 3, 4, 5, 6, 10 and 11.

[137] We must not "tinker" but are required to consider the reasonableness of the disciplinary action with our findings.

[138] The Respondent was 47 years of age at the time of the hearing. He practises mainly in family and motor vehicle law.

[139] At the hearing, the Law Society sought a three to six-month suspension on all 11 findings of professional misconduct and costs.

[140] We were urged to be "reasonable" but not tinker at the review. The Respondent continued to press no suspension at the review.

[141] The Respondent testified at the original hearing that he earned between $50,000 and $70,000 per year. He also testified the citations have had a negative impact on his income (reduced by 1/3). He also explained at the original hearing that a suspension of over one month would be very difficult and that his practice might not be sustainable with a longer suspension.

[142] We are reminded of the factors (not intended to be all inclusive) on penalty that are found in Law Society *of British Columbia v. Ogilvie*, 1999 LSBC 17 at para. 10::

(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.

[143] We agree with the hearing panel that a global approach to the various allegations 2 through 6 and 10 and 11 is appropriate.

[144] We find that the Respondent's prior discipline record is poor. That record consists of four prior conduct reviews and one prior citation. The discipline record reveals prior instances of poor communication skills and personal behaviour which was referred to as "arrogant, belittling, demeaning, overly aggressive, threatening and unnecessary." These behaviours also exist in the evidence relating to allegations 2, 3, 4, 5, 6, 10 and 11.

[145] We view the conduct found in the confirmed allegations "serious" and the conduct requires deterrence.

[146] We considered whether a fine would be appropriate but concluded a fine would not send the correct message. The continuing repetitive bad behaviour needs progressive discipline.

[147] So we conclude a suspension is in keeping with the cases. We order a suspension of seven weeks on allegations 2, 3, 4, 5, 6, 10 and 11, bearing in mind that there may be a new hearing on allegation 1(a) and (b) and that we found that allegations 7, 8 and 9 did not meet the threshold for professional misconduct. However, we also conclude some remedial work is required. We require that the Respondent

take a remedial program in family law to the satisfaction of the Practice Standards Committee. We make this order to provide the Respondent with more tools and knowledge in family law. We hope the program will include topics of courtesy and civility, which were in short supply in the circumstances found in allegations 2, 3, 4, 5, 6, 10 and 11 of the citation.

[148] The hearing panel ordered costs of $20,000. We substitute costs in the amount of $12,500 because the results were mixed and a new review may occur. We recognize we must have regard to the tariff, but we exercise our discretion to make a different order Rule 5-11(4) where it is reasonable and appropriate to do so.

[149] On the issue of costs of this Review, we also note mixed results and note a new Review may be required. The Respondent must recognize that he was not successful overall. Accordingly, we fix costs for this Review at $5,000 plus disbursements, which will include the cost of the record/transcript. In the event the Law Society and the Respondent cannot agree, the issue of the amount of the disbursements can be determined by the new Review panel.

CONCLUSION

[150] This Review panel confirms the hearing panel's findings of professional misconduct for allegations 2, 3, 4, 5, 6, 10 and 11. We reverse the hearing panel's findings of professional misconduct for allegations 7, 8 and 9 and substitute the dismissal of those allegations. For the reasons outlined above, we were unable to uphold or replace the finding of the Hearing Panel relating to allegations 1(a) and (b).

[151] This Review Panel substitutes a suspension of seven weeks for allegations 2, 3, 4, 5, 6, 10 and 11 as confirmed. The suspension is to commence on February 1, 2016 unless the parties agree otherwise. We order the Respondent to take a remedial program in family law to the satisfaction of the Practice Standards Committee. We assess $5,000 plus disbursements in costs for this Review, and we substitute costs in the amount of $12,500 for the hearing below.