2016 LSBC 01
Decision issued: January 11, 2016
Citation issued: March 23, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GERHARDUS ALBERTUS PYPER

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	October 27, 28 and 29, 2015
Panel:	Herman Van Ommen, QC, Chair James Dorsey, QC, Lawyer Dan E. Goodleaf, Public representative
Discipline Counsel:	Kieron Grady
Appearing on his own behalf:	Gerhardus A. Pyper

PRELIMINARY MATTERS

[1] The Citation authorized by the Discipline Committee on March 5, 2015 was issued on March 23, 2015, amended on April 29, 2015 and served on the Respondent on April 29, 2015.

[2] The Amended Citation states:

1. Between May 23, 2014 and June 13, 2014 you practised law while suspended, contrary to section 15 of the *Legal Profession Act*, by drafting, signing or sending the following letters on your law firm letterhead during the period of your suspension on behalf of your client, NH:

(a) letter dated May 26, 2014 to counsel for L Corp. in connection with a civil action commenced by L Corp. against your client;

(b) letter dated June 13, 2014 to the Ontario College of Pharmacists in connection with regulatory proceedings commenced by the College against your client.

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

PRELIMINARY MOTION

[3] At the commencement of the hearing, Mr. Pyper advised he wished to bring a preliminary motion that the Panel lacked jurisdiction to conduct the hearing. In the Notice of Motion presented he did not set out the legal basis on which he asserted the Panel lacked jurisdiction. It became clear that part of what he wanted to argue was that the order suspending him was the result of a process that was unfair, including bias of the prior panel, and as a consequence, this Panel lacks jurisdiction to enforce the suspension order.

[4] The unfairness with respect to the prior panel's decision relates to Mr. Pyper's assertion that he was not given notice of the hearing at which he was suspended and further, because of the lack of notice, he did not have an opportunity to properly defend himself. He argued that the prior panel's decision to proceed in those circumstances was evidence of bias, and as a result its decision is void.

[5] The suspension order referred to by Mr. Pyper was made on May 23, 2014. That hearing was held in order to consider amending a previous order made by that panel placing conditions on Mr. Pyper's practice pending the conclusion of the Law Society's investigation into certain matters. The previous order made on March 20, 2014 pursuant to Rule 3-7.1 of the Law Society Rules imposed a deadline of April 22, 2014 for the Respondent to eliminate shortages in his trust account.

[6] Mr. Pyper did not comply with that condition. On May 23, 2014 the Law Society brought an application to vary or rescind the March order.

[7] At the May 23, 2014 hearing, Mr. Pyper objected to proceeding on the basis he asserted before us, namely that he had not received notice of the hearing until minutes before his attendance before the panel that day. Despite that objection, the panel proceeded with the hearing and suspended Mr. Pyper at the conclusion of that day.

[8] The panel considered his objection and, in reasons issued August 6, 2014, wrote as follows:

> [21] By memorandum dated May 7, 2014, we advised Law Society counsel and Mr. Pyper that we understood that Mr. Pyper had not responded to our earlier memorandum pertaining to dates and so the application would be set on our first available date, May 23, 2014 at 9:30 am. We also reiterated our earlier statement that both Mr. Pyper and the Law Society should take whatever steps were necessary to protect the public and to ensure that Mr. Pyper did not operate a trust account. We understand that the Law Society hearing coordinator sent that memorandum to counsel for the Law Society and to Mr. Pyper.
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> [22] When the application for a suspension commenced on May 23, 2014 at 9:30 am, Mr. Pyper was not in attendance. Counsel for the Law Society advised that Mr. Pyper had been in touch with a staff investigator about the application but had not confirmed that he would be attending. We requested that Mr. Pyper be contacted to ascertain whether he intended to attend and we adjourned the hearing to allow that to take place. Mr. Pyper arrived at the Law Society at approximately 10:15 am and we reconvened shortly thereafter. Mr. Pyper advised that he did not see what he described as "the email" setting May 23, 2014 for the application date. He advised us that he had been attending an examination for discovery when his office called to tell him that he was needed urgently at the Law Society. He immediately left the examination for discovery. Later, when Mr. Pyper was giving evidence, he testified that he gets many messages from the Law Society about matters. The inference left by his evidence was that his practice is so busy, the attendance of Law Society auditors at his office so disruptive, and the matters about which he receives messages so stressful, that he is unable to keep track of it all.
>
> [23] We find there is credible evidence that Mr. Pyper was notified on more than one occasion of the application to vary the order to suspend him. As to date and time, he was first advised that he could choose either May 23 or 26, 2014. He was later advised that the application would proceed on May 23, 2014 at 9:30 am. We do not make any finding as to why that information did not cause him to be in attendance when the application was scheduled to

> commence. We note he immediately attended when contacted at his examination for discovery. We do not make a finding about the precise reason for his initial non-attendance since it is not necessary for our decision on the application to vary.

[9] Following that suspension, Mr. Pyper did not seek judicial review in the Supreme Court or appeal to the Court of Appeal under section 48 of the *Legal Profession Act*.

[10] The Law Society's position with respect to Mr. Pyper's preliminary motion is that it is a collateral attack. Generally speaking, that rule prevents a party from attacking the validity of an order when that party has not used the available appeal and/or review procedures.

[11] The Supreme Court of Canada in *Wilson v. The Queen*, [1983] 2 SCR 594 at 599-600 described a collateral attack as follows:

> ... It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. *It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.* Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.
>
> [emphasis added]

[12] In *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 61, the Court affirmed this description of collateral attack and reviewed the principles underpinning the rule:

> The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629, at para. 72:

> The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 SCR 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, *the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it*.
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> [emphasis added by Binnie, J.]

[13] We agree that, to the extent that Mr. Pyper alleges unfairness in the process leading to his suspension or bias of the May 23, 2014 panel, he was required to take the appeal and/or review procedures available to him. He failed to do so, and it would be improper for this Panel to consider and rule on the propriety of the May 23, 2014 panel proceeding as it did. During the hearing we advised Mr. Pyper that we were dismissing his preliminary jurisdiction motion and that we would subsequently provide written reasons for doing so. These are those written reasons.

[14] During the course of submissions on this preliminary motion it became apparent that Mr. Pyper wished to bring forward much more broad ranging allegations of what he described as "institutional bias" against the Law Society. Those issues did not appear to us to be appropriate for a preliminary jurisdictional motion and will be dealt with subsequently.

FACTUAL BACKGROUND

[15] The Respondent was called and admitted as a member of the Law Society of British Columbia on December 9, 2002. He had been previously called to the bar in Namibia in 1993 and in South Africa in 1990. He practised with a small law firm in Surrey for approximately six years and then from January 2009 until October 7, 2014, he practised under the name Pyper Law Group.

[16] On March 20, 2014, a panel of Benchers made an order pursuant to Rule 3-7.1 of the Law Society Rules placing limits on Mr. Pyper's practice. That panel ordered that the Respondent was to eliminate shortages in his trust accounts by April 22, 2014.

[17] On May 23, 2014, the Law Society brought an application to vary or rescind the March order. The application was heard by the same panel of Benchers that made the March order. The application was brought because Mr. Pyper had not provided

the necessary evidence to show that he had eliminated the trust shortages. At the conclusion of the hearing, the panel ordered that he be suspended from the practise of law. He was informed of that orally as follows:

> THE CHAIR: So, Mr. Pyper, we are unanimously of the view that the public interest does require us to take the draconian step of suspending you today. …
>
> I've said to you that we will — we hope that you will focus not on the everyday bit of your practice — because you cannot practise anymore from this day forward until we relieve you of this condition, if we do. …
>
> I'm sorry for the news, but I want to again emphasize we're open to an application by you, but until that application don't you think about practising law from this point until you're relieved of this condition. All right?

[18] In addition to being advised orally, he was sent letters notifying him of his suspension both by email and courier. Enclosed with the letters was an information sheet for lawyers who are suspended, including a list of transactions the suspended lawyer may or may not engage in. A letter enclosing a copy of the suspension order was mailed to Mr. Pyper's office as well.

[19] Prior to May 23, 2014, Mr. Pyper acted for NH, a pharmacist in Ontario who operated a pharmacy located within a department store. When L Corp. purchased the store, a dispute arose over who owned the client files.

[20] L Corp. filed a civil claim in Ontario against NH. L Corp. was represented by counsel at Borden Ladner Gervais ("BLG") in Toronto. In addition, L Corp. filed a complaint against NH with the Ontario College of Pharmacists (the "College"). NH retained Mr. Pyper to represent her, both in the civil claim and the regulatory process with the College.

[21] On May 13, 2014 counsel from BLG wrote to Mr. Pyper as follows:

> We are instructed by our client, L Corp., to discontinue the Action against [NH] and [number] Ontario Limited.
>
> We request that your clients consent to the discontinuance and we enclose a Notice of Discontinuance and Consent to that end. If your clients will not consent, we are instructed to bring a motion for leave to discontinue.

[22] On May 26, 2014, Mr. Pyper signed and caused to be sent a letter he said had been dictated the prior week, which stated as follows:

> Further to your letter dated May 13, 2014 we advise that we have now received instructions from our Client to agree to the discontinuance of the above-noted action on the following condition:
>
> 1. that the complaint made on June 22, 2012 to the Ontario College of Pharmacists by [DM], Vice-President of Pharmacy Operators for L Corp. regarding our Client be withdrawn not later than June 6, 2014 and that we receive confirmation in that respect in writing.

[23] On June 2, 2014, counsel from BLG replied as follows:

> We write in response to your letter dated May 26, 2014.
>
> L Corp. agrees to the condition for the discontinuance of the action. Mr. [DM] contacted the Ontario College of Pharmacists (the "College") to withdraw the "complaint"; however, he was advised that the complaint was placed as a professional concern and not as a formal complaint. The College advise [sic] that there is no mechanism by which the report may be withdrawn. L Corp. confirms that there is no formal complaint on file with the College against [NH].
>
> Please confirm that this satisfies your clients' condition of the discontinuance and provide us with a signed Consent. If not, we are available to discuss matters further.

[24] On June 13, 2014, NH sent an email to Mr. Pyper enclosing a draft letter she had prepared to the Registrar of the College asking Mr. Pyper to communicate with the College to ensure that the investigation that had been commenced did not get to the Discipline Committee. The instructions to Mr. Pyper in that email stated:

> c) We are afraid that panel does not know much about our side of the story on [DM] complaint. It is important for the panel to know who owned the patient files.
>
> d) The letter which we wrote to Registrar for disclosure about [DM]'s complaint will likely not be provided to the panel. Many points raised in that letter are included in this response.

e) we have written all the points we feel are necessary. Please use your judgment to see what needs to be included in the letter going to OCP.

f) Our goal is that this investigation does not get to discipline committee.

[25] Mr. Pyper forwarded that email and draft letter to his assistant who prepared a letter under the letterhead of Pyper Law Group. Mr. Pyper signed that letter on June 13, 2014 and instructed her to send it to the College.

[26] Mr. Pyper's position with respect to these two letters is that they did not constitute the practice of law.

[27] With respect to the May 26, 2014 letter, he said that the letter had been dictated prior to his suspension. Further, he testified that the case had been settled. He said the case was over, and that "I just had to send them a Notice of Discontinuance."

[28] With respect to the June 13, 2014 letter, he said he had his assistant retype the letter prepared by the client on his letterhead. He said "I signed it but not as a Barrister & Solicitor."

[29] He said he told his assistant to remove the designation "Barrister & Solicitor" from his letterhead out of concern about his suspension.

[30] In cross-examination he was shown a form of a letter that he used prior to his suspension and that letter also did not contain the designation "Barrister & Solicitor." He then suggested that what was removed was an asterisk and a reference to his Law Corporation.

[31] Later in a cross-examination, a more complete copy of the June 13, 2014 letter was obtained that showed the reference to his Law Corporation had not been removed at all. It was apparent that the June 13, 2014 letter sent to the College was in exactly the same form as all his prior letters. Mr. Pyper insisted that he had instructed his assistant to remove the reference to a Law Corporation but that apparently she had not done so.

[32] He also asserted that he was not responsible for the June 13, 2014 letter because it was typed and sent by a Law Society employee. When the custodian took over his practice, one of Mr. Pyper's employees was paid by the Law Society to stay in the office and answer the phones. Mr. Pyper continued to attend the office every day and while there, he instructed his former employee to prepare the letter and send it as described above. Whether she was employed by the Law Society at the time is

not relevant. The fact is that she did what she did based on instructions from Mr. Pyper and he is responsible for the actions he directed to occur.

ONUS AND STANDARD OF PROOF

[33] The onus and standard of proof are well established. The Supreme Court of Canada decision in *FH v. McDougall*, 2008 SCC 53, has been adopted by numerous Law Society hearing panels. In *Law Society of BC v. Shauble*, 2009 LSBC 11, the panel quoted from *McDougall* as follows:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "… evidence must scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But … there is no objective standard to measure sufficiency."

[34] To the same effect but stated differently, in *Law Society of BC v. Seifert*, 2009 LSBC 17 at para. 13 the panel wrote:

> ... the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on the balance of probabilities.

"INSTITUTIONAL BIAS"

[35] The majority of Mr. Pyper's evidence and argument was directed to his submission that the Law Society was biased against him. He described this as "institutional bias" and asserted that, as a consequence, this citation ought to be dismissed. The complaints he made are as follows:

(a) the custodian appointed as a result of his May 23, 2014 suspension did not properly take care of his files;

(b) the custodian took control of his general and trust accounts and refused to release the funds in the general account to him;

(c) the Law Society failed to respond publicly to news reports that, he says, falsely asserted that he had "swindled" client's money and that he had "disappeared";

(d) a lawyer, PL, employed by the Provincial Government had called the Law Society and said that the Law Society must keep Mr. Pyper's licence away from him as long as possible;

(e) despite paying the total mandatory fee of $4,060.35 before November 30, 2014, he was told in mid-January 2015 that he could not practise because he had not paid his dues; and

(f) he was subjected to numerous practice reviews and all complaints against him were investigated by the Law Society.

[36] It is clear from his recitation of complaints that he is not using the term "institutional bias" in the sense that there is a lack of independence of this Panel from the investigatory and prosecutorial arms of the Law Society. In his closing submissions he characterized the issue and ended his submissions as follows:

> The only conclusion any tribunal can make is that the charges/citation is motivated by malice and the charges ought to be dismissed.

[37] Mr. Pyper relied on the Supreme Court of Canada case *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623. In that case, Cory J. writing for the court, wrote at page 636:

> All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. …
>
> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. … As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

[38] The focus of Mr. Pyper's evidence and argument was that the investigators and/or prosecutors of the Law Society were biased against him, not that this Panel was biased.

[39] Although he asserted malice and bias on the part of the "Law Society" at large, his evidence fell well short of establishing that any specific person was biased or that the issuance of this citation was motivated by malice.

[40] He said nothing about the Discipline Committee, the body that authorized the issuance of this citation under Rule 4-17 of the Law Society Rules. He provided no evidence that their decision was motivated by malice or tainted by the malice of any Law Society staff.

[41] With respect to his specific complaints, he testified that the custodian did not properly take care of his files. The custodian was appointed pursuant to an Order of the Supreme Court of British Columbia, a copy of which was not provided to us. Although open to him, Mr. Pyper did not make application to the Supreme Court to replace the custodian or compel him or her to act appropriately. The evidence does not reveal to us any connection between the issuance of this citation and the conduct of the custodian as alleged by Mr. Pyper.

[42] He complained that the custodian took control of his general and trust accounts and refused to release funds in the general account to him. He acknowledged that an application was made to Court for directions as to the disposition of those funds and the Court directed that the funds be paid to Revenue Canada in respect of his prior indebtedness.

[43] We see no connection between that conduct and the issuance and prosecution of this citation.

[44] He complained that the radio reports of him "swindling" and "disappearing" ought to have been publicly responded to by the Law Society. He pointed to no authority or precedent for this proposition. He did not make any public rebuttals himself. The suspension in May of 2014 occurred because he failed to correct shortages in his trust accounts as previously directed.

[45] He complained that a lawyer, PL a Provincial Government employee, called the Law Society and told the Law Society to keep Mr. Pyper's licence away from him as long as possible. He did not, in his evidence, identify the person at the Law Society to whom PL spoke, nor did he identify who told him that this conversation occurred. This assertion is second- or third-hand hearsay at best. In the circumstances, this evidence is not reliable and probably inadmissible.

[46] With respect to his membership renewal for 2015, the sum of $4,060.35 was paid on his behalf prior to November 30, 2014. He acknowledged that he owed the Law Society approximately $9,000 in respect of other matters. Rule 2-117 requires the Executive Director to apply any money received from or on behalf of a lawyer *first* to fines, costs, penalties etc. *before* fees.

[47] Mr. Pyper could not renew his membership for 2015 without paying the approximately $9,000 he owed to the Law Society in addition to his annual fee of $4,060.35.

[48] He complained that he was subjected to numerous practice reviews. He provided us with no documentation concerning those orders and provided no evidence as to the state of his practice such that this Panel could determine that the fact of numerous practice reviews was, in any way, improper.

[49] He also complained that all complaints against him were investigated by the Law Society. He did not, however, provide us with details of the complaints that were made against him or the steps the Law Society had taken that he asserts were unnecessary and improper. The only investigation he gave some detail about was a complaint made by a Law Society staff lawyer acting for the custodian.

[50] He asserted, and the staff lawyer agreed when giving evidence, that she had made a complaint that, in his books and records, entries were made transferring funds from trust to general without the issuance of accounts. She did not say that funds in the accounts had been transferred to reflect those entries only that those entries were in his records.

[51] Mr. Pyper did not testify as to the steps taken by the Law Society in connection with that complaint. In fact, we were advised that the investigation had been closed with no action. Without detailed evidence concerning the contents of the complaints and the steps taken in the investigation, this Panel is unable to conclude that the Law Society staff acted inappropriately towards Mr. Pyper.

[52] We find there was no evidence that the Law Society staff have been biased against Mr. Pyper or that they were motivated by malice. We can find no basis in the evidence to suggest that the issuance of this citation was motivated by bias or malice.

DETERMINATION

[53] Professional misconduct is not a defined term in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct* for British Columbia.

[54] The leading case defining professional misconduct is *Law Society of BC v. Martin*, 2005 LSBC 16. The Panel wrote at para 154:

> 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 its displays gross culpable neglect of his duties as a lawyer.

[55] Then at para. 171:

> The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[56] Recently in *Law Society of BC v. Gellert*, 2013 LSBC 22, the panel wrote at para. 67:

> 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 lawyer also satisfies the test.

[57] The citation alleges a breach of the *Legal Profession Act* or Rules or professional misconduct. There is distinction between a breach of the Act or Rules and professional misconduct. Not every breach of the Rules or the Act is necessarily professional misconduct.

[58] In *Law Society of BC v. Lyons*, 2008 LSBC 09 the panel considering this distinction wrote at para. 35:

> 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.

[59] As a first step in the analysis we must determine whether or not the steps taken by Mr. Pyper in signing the two letters constitutes the practice of law. He asserted that it did not because the case had been previously settled and the letters were administrative in nature.

[60] A review of his letter dated May 26, 2014, the letter preceding it, and the response to it, makes it clear that the case had not been settled. His letter was a counter-offer to a prior offer to settle. The fact that it had been dictated prior to his suspension does not change the fact that he was not entitled to sign and send that letter on May 26, 2014.

[61] With respect to the June 13, 2014 letter, he described it as nothing more than putting a draft letter prepared by the client onto his letterhead and then signing the letter. He said this did not constitute the practice of law.

[62] However, a review of the instructions from his client make it clear that she was seeking legal advice and the exercise of judgment on his part. He was clearly practising law by instructing the assistant to put the draft letter on his letterhead, which he then signed and she delivered.

[63] Those steps constitute the practice of law and were therefore a breach of the Order of the panel made May 23, 2014 suspending his right to practise law.

[64] This conduct is a marked departure from the standard expected of lawyers. The Respondent had notice by way of direct warnings from the hearing panel, and there is no doubt that he understood that he was, from that point until the suspension was removed, not entitled to practise law.

[65] Practising law when he did was a clear breach of an order. This is misconduct of a serious nature. Lawyers must pay heed to and obey direct orders of the Law Society. The ability of the Law Society to govern the profession depends on that. This conduct occurred on two separate occasions.

[66] The Respondent's conduct was also a breach of the Act, which prohibits the practice of law by persons not authorized to do so.

[67] In addition to being a breach of the Act, we find that the Respondent's conduct in signing those two letters is a marked departure from the conduct expected of lawyers and constitutes professional misconduct.