2016 LSBC 05
Decision issued: February 12, 2016
Citation issued: July 10, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DOUGLAS EDWARD DENT

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION AND COSTS

Hearing date:	December 21, 2015
Panel:	David Mossop, QC, Chair Bruce LeRose, QC, Lawyer Clayton Shultz, Public representative
Discipline Counsel:	Kieron Grady
Counsel for the Respondent:	Ravi Hira, QC and Jason Jaffer

INTRODUCTION

[1] The decision on Facts and Determination in this matter is found at *Law Society of BC v. Dent*, 2015 LSBC 37. A summary of that decision is set out below.

[2] On February 1, 2011, a long-standing client, the vendor, and the purchaser showed up unannounced at the Respondent's office. Such is the nature of small town practice. There seems to have been no appointment. Being entrepreneurs and wanting the deal to go through quickly and as cheaply as possible, the vendor and the purchaser wanted the Respondent to act for both parties. The deal was for the

sale of land with a commercial element. The deal ultimately went through, and no one suffered any loss or harm.

[3] However, the purchaser was not satisfied with the accounting of monies paid for the purchase of the property. She sought an accounting from the Respondent without success. He took the position that he represented the vendor only and therefore she was not entitled to any accounting of the money. She wrote a letter of complaint to the Law Society of British Columbia.

[4] The Law Society, in fulfilling its statutory mandate, investigated the complaint. The substance of the original complaint did not result in any citation.

[5] However, during the course of a thorough investigation, officials of the Law Society uncovered three issues, arising from the same matter but unrelated to the original complaints that led to this hearing. They are:

(a) the Respondent acted for both parties contrary to the *Professional Conduct Handbook* then in force;

(b) alternatively, the Respondent did not advise the purchaser that he was not protecting their interest;

(c) the Respondent breached an undertaking.

[6] This Hearing Panel dismissed all allegations in the citation except for allegation 2, failing to advise the unrepresented party that he was not protecting their interest.

[7] For approximately four months (from the beginning of February 2011 to the beginning of June 2011), the purchaser believed the Respondent was acting for her and the purchasing corporation in regards to the purchase of the relevant property. The Respondent was of the opposite view; he was acting for the vendor only. There is no doubt the Respondent was in violation of Chapter 4, Rule 1 of the *Professional Conduct Handbook* (then in force) (the "*Handbook*"). He did not give the appropriate warning.

[8] Again, no-one suffered any harm on account of the violation of this provision of the *Handbook*.

POSITION OF THE PARTIES

[9] The parties have made a joint submission on disciplinary action. The only difference between the parties was the amount of time to pay for the fine and costs.

The position of the Law Society was that the Respondent should pay the fine and costs by March 31, 2017. The position of the Respondent is that he should have until June 30, 2017. The Hearing Panel decided to give the Respondent until June 30, 2017 to pay the fine and costs in this matter.

[10] The joint submission recommended that the Respondent pay to the Law Society the following sums:

(a) a fine of $5,000; and

(b) costs in the amount of $5,000.

[11] The Panel adjourned the hearing for a few minutes on December 21, 2015, the date of the hearing on the disciplinary action. The Panel then reconvened and gave an oral decision accepting the joint submission. The Panel also gave the Respondent until June 30, 2017 to pay these amounts. These are the written reasons for that decision.

IS THE PROPOSED DISCIPLINARY ACTION APPROPRIATE?

General Principles

[12] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the Review Panel confirmed that the starting point in determining the appropriate disciplinary action to be imposed under section 38(5) and (7) of the *Legal Profession Act* is a consideration of the Law Society's mandate under section 3 of the *Act*. Section 3 provides as follows:

> **Object and duty of society**
>
> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[13] The Review Panel in *Lessing* noted that the objects and duties set out in section 3 of the *Act* were reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45 at paragraphs 9 and 10 of the disciplinary action report:

> [9] *Given that the primary focus of the Legal Profession Act is the protection of the public interest, it follows that the sentencing process must ensure that the public is protected from acts of professional misconduct*. Section 38 of the *Act* sets forth the range of penalties, from reprimand to disbarment, from which a panel must choose following a finding of misconduct. *In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.*
>
> [10] The criminal sentencing process provides some helpful guidelines, such as: *the need for specific deterrence of the respondent, the need for general deterrence, the need for rehabilitation and the need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its members.* While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration in disciplinary dispositions:
>
> (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.

[emphasis added]

[14] The review panel in *Lessing* observed that not all the *Ogilvie* factors would come into play in all cases and the weight to be given these factors would vary from case to case. But the review panel noted that the protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally) and the rehabilitation of the member, were two factors that, in most cases, would play an important role. The panel stressed, however, that, where there was a conflict between these two factors, the protection of the public, including protection of the public confidence in lawyers generally, would prevail.

[15] The present *Ogilvie* factors are 13 in number. Many times hearing panels feel obligated to go through each and every *Ogilvie* factor. Many times these factors overlap with each other. In addition, depending on the case before the hearing panel, the hearing panel strains to find a rationale for each of the *Ogilvie* factors.

[16] It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.

[17] There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons, if those secondary factors tip the scales one way or the other. However, in most cases, the panel will

determine the appropriate disciplinary action on the basis of the primary factors without recourse to secondary factors.

[18] In addition, it is time to consolidate the *Ogilvie* factors, ("consolidated *Ogilvie* factors"). It is also important to remember that the *Ogilvie* factors are non-exhaustive in nature. Their scope is only limited by the possible frailties that a lawyer may exhibit and the ability of counsel to put an imaginative spin on it.

[19] Therefore, we set out a "consolidated list of *Ogilvie* factors" as indicated below. We have reduced them from 13 to the four general factors outlined below.

Nature, gravity and consequences of conduct

[20] This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

Character and professional conduct record of the respondent

[21] What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

Acknowledgement of the misconduct and remedial action

[22] Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

Public confidence in the legal profession including public confidence in the disciplinary process

[23] Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

[24] We will now go over each of these "consolidated *Ogilvie* factors" for the case at bar.

Nature and gravity and consequences of this conduct

[25] This misconduct is on the lower end of the spectrum of misconduct. It is true, as counsel for the Law Society points out, that this misconduct lasted for over four months. However, no one suffered any harm. In addition, the Respondent at the end of the four-month period insisted that the purchaser obtain her own lawyer. Finally, the Respondent did not obtain any financial gain through this misconduct.

Character and professional conduct record of the respondent

[26] The Respondent is 67 years of age and has practised since September 14, 1976. He originally articled in the Lower Mainland and practised for a short time in the greater Vancouver area. He ultimately re-established himself in 100 Mile House.

[27] Counsel for the Respondent, in his written submission, points out various community activities that the Respondent engaged in over the years. The Respondent should be congratulated for this.

[28] In addition, counsel for the Respondent has submitted a number of letters of reference in regards to the Respondent. It is important to remember that letters of reference have some impact, but it is important that they be drafted in an appropriate manner. They should specifically contain the following elements:

(a) The person writing the letter has read the decision on Facts and Determination or at least read the Agreed Statement of Facts with the necessary attachments.

(b) The person has read the professional conduct record, if any, of the Respondent compiled by the Law Society.

(c) The person should state specifically how they know and can vouch for the character of the Respondent.

[29] The letters presented to this Hearing Panel do not follow this format. Even if the letters had followed the proper format, this Panel would put little weight to them. Letters of reference have little impact if there is a significant professional conduct record. The reason for this is simple. If there is a significant professional conduct record, it speaks to the character of the Respondent with greater weight than a

number of letters of reference. As we review below, there is here a significant professional conduct record.

[30] Letters of reference may be a primary factor if the respondent has an unblemished or near unblemished professional conduct record. That situation does not exist here.

[31] The Respondent has a professional conduct record that consists of the following:

(a) **Conduct Review**: On September 10, 1998, the Discipline Committee authorized a conduct review. This item on the professional conduct record will not be considered by the Hearing Panel as the conduct review exonerated the Respondent.

(b) **Citation**: On December 4, 2001, a hearing panel suspended the Respondent for one month for performing legal services for a client in a matter in which he had a direct or indirect financial interest, failing to advise the same client that she had a potential claim against him, failing to recommend that the client obtain independent legal advice and for failing to report a potential claim to his professional liability insurer.

(c) **Practice Standards**: On July 11, 2013 the Practice Standards Committee accepted various recommendations to address competency concerns on the part of the Respondent, including his failure to properly confirm retainers. As part of its involvement, the Committee required that the Respondent implement various procedures to improve his practice, including that, where he was not retained, the potential client was made aware of this. The Respondent was also required to report periodically to Law Society staff with respect to the foregoing.

(d) **Citation**: On January 27, 2014, a hearing panel ordered that the Respondent be suspended for 45 days commencing February 10, 2014 for his conduct in withdrawing funds from trust to pay his fees when these funds were impressed with a specific purpose that had not been fulfilled, contrary to (the old) Rule 3-57. The conduct in question took place in 2011 before the Respondent's involvement with Practice Standards. The Respondent sought a review of the decision and on review, the suspension was set aside and a fine of $5,000 imposed along with an order of costs. Of note, both the hearing panel and the review board specifically stated that it was not necessary to apply progressive discipline under the circumstances.

[32] Counsel for the Respondent stated at paragraph 37 of his submissions the following:

> As set out above, 12 years ago, Mr. Dent was disciplined. The circumstances leading to the misconduct occurred almost 20 years ago. The impugned conduct occurred during a difficult personal time, involving an acrimonious divorce. His family and financial foundation were crumbling. As noted above, the divorce affected Mr. Dent deeply. Despite his financial circumstances, he met his financial obligations to the complainant. With respect, the W misconduct occurred around the same time as this matter. The penalty therein was not imposed prior to the actions that constitute this misconduct. Applying criminal law principles, a conviction and sentence imposed after the date of the offence in question cannot be considered as part of the sentencing record for the offence in question.

[33] This is a significant conduct record. The Respondent has been held to have engaged in professional misconduct on two occasions in the past. In addition, he has also had a conduct review. In addition, there is a common thread, namely his standard of practice is just below what is expected of a lawyer. Occasionally, this behaviour has come to the attention of the Law society, and he has been disciplined.

[34] In *Law Society of BC v. Siebenga*, 2015 LSBC 44, the hearing panel implicitly recognized that, generally, a lawyer who has engaged in professional misconduct on two previous occasions has a significant professional record. In *Siebenga*, at paragraph 47 the following is stated:

> Lawyers who have been found to have committed professional misconduct on two occasions and fined on both occasions, are candidates for suspension on a third citation. This does not mean "three strikes and you're out." Rather, it means three strikes and you may be out depending on the circumstances. To put it another way, lawyers who have been found to have committed professional misconduct on two occasions are put in a state of "heightened possibility" of being suspended. A hearing panel should seriously consider issuing a suspension, instead of a fine.

[35] Secondly, in *Lessing*, at paragraph 71, the panel makes it clear that a professional conduct record should be considered. The exceptional rare cases would be limited to "minor and distant events." The two previous findings of professional misconduct, at bar, do not fit within this exception.

[36] Thirdly, the timing of the previous findings of professional misconduct plays a limited role. This has been decided in the case of *Law Society of BC v. Taschuk*, 2000 LSBC 22, [2001] LSDD No. 7 at paragraph 45:

> If we assessed Penalty without regard to the other matters, Mr. Taschuk would reap an insupportable benefit from the separation of the proceedings, irrespective of the order in which they were determined. In each of three cases he would have been treated as a "first offender". While that may be correct with respect to "previous convictions" in criminal law, such considerations must usually give way when an administrative body applies penalties with a view, principally, to upholding the public interest. ...

[37] Generally, principles of criminal sentencing should not be applied to regulatory discipline. The prime consideration, in regulatory discipline, is the public interest.

Acknowledgement of misconduct and any remedial action

[38] The Respondent did not explicitly admit his misconduct when he took the stand. His position throughout these proceedings has been that he told the purchaser to get independent legal advice. However, he implicitly admitted he needed to change his ways. He stated on the stand he has reorganized his practice. He now requires written retainer agreements. He also now sends out letters of disengagement to people he does not represent. This Panel believes, in these circumstances, he has acknowledged his error and has taken concrete steps to prevent a reoccurrence.

Public confidence in the legal profession including public confidence in the disciplinary process

[39] The public must have confidence in this disciplinary process. The primary factor under this heading is "similar cases." Does the proposed disciplinary action fall within the range of similar cases? The Panel feels the most similar case is *Law Society of BC v. Ebrahim*, 2010 LSBC 14.

[40] In *Ebrahim*, the lawyer, while acting for his clients with respect to the purchase of three residential strata lots and the proposed assignment of the contract of one of the lots to a third party, failed to advise that third party that he was not protecting his interests. The citation also contained an allegation that the lawyer committed a breach of trust by releasing funds without the third party's authorization, that he then applied on his clients' behalf and for their benefit to the purchase of the two lots in which the unrepresented party had no interest. The lawyer admitted

professional misconduct with respect to both allegations in the citation and was fined $3,000 and ordered to pay costs. The lawyer had no PCR. This provides some guidance to this Panel.

SUMMARY OF THE PRIMARY *OGILVIE* FACTORS

[41] Mitigating in the Respondent's favour, three factors stand out. First, no harm was done. The deal went through. Second, the Respondent did get the purchaser to retain her own lawyer, though four months later. Thirdly, the Respondent has changed his practice. He now has written retainers for all clients and sends out letters of disengagement.

[42] Aggravating the disciplinary action is the fact that the Respondent has a significant professional conduct record. It demands more than a "slap on the wrist."

[43] The *Ebrahim* case provides a benchmark. In that case a fine of $3,000 was imposed. Some sort of surcharge must be imposed on the Respondent because he has a significant professional misconduct record. Therefore, the $5,000 fine is an appropriate fine.

[44] The primary *Ogilvie* factors determine the appropriate disciplinary action. It is not necessary to look at any secondary factors.

COSTS

[45] The parties proposed costs in the amount of $5,000. This amount reflects the fact that the two allegations were dismissed and one was successful. There were also costs associated with this proceeding on disciplinary action. The Hearing Panel finds that this amount is appropriate.

ORDER

[46] This Hearing Panel orders that the Respondent pay the Law Society of British Columbia on or before June 30, 2017:

(a) a fine of $5,000; and

(b) costs of $5,000.