2016 LSBC 10
Decision issued: March 15, 2016
Citation issued: April 25, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

DECISION OF THE REVIEW BOARD

Review date: September 16, 2015

Review Board: Tony Wilson, Chair
Don Amos, Public representative
Lynal Doerksen, Bencher
John Hogg, QC, Lawyer
Patrick Kelly, Public representative
Dean Lawton, Bencher
Donald Silversides, QC, Lawyer

Discipline Counsel: Leonard Doust, QC
No-one appearing on behalf of the Respondent

BACKGROUND

[1] The Respondent was cited for failure to pay in a timely manner four invoices from a court reporting service he had hired for services rendered in connection with the representation of his clients; and for failure to provide a substantive response to emails from that service in respect of their outstanding invoices until the service complained to the Law Society about the Respondent's failure to meet his professional obligations to pay his practice debts.

[2] The invoices were unpaid for periods of between four to six months. The Respondent was further cited for failure to provide a substantive response to emails from that court reporter in respect of those invoices until the court reporter complained to the Law Society about the Respondent's failure to pay. The citation was issued April 25, 2014 and the hearing held on September 23, 2014.

[3] This is a Review initiated by the Law Society of the decision of the hearing panel dismissing the allegation of professional misconduct.

[4] Rule 7.1-2 of the *Code of Professional Conduct for British Columbia* states:

> A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

A hearing panel may find that a breach of the *Code* constitutes professional misconduct under section 38(4) of the *Legal Profession Act*.

[5] The hearing panel rendered its decision on Facts and Determination (2014 LSBC 63) on December 16, 2014, determining that the Respondent's conduct, while imperfect and unfortunate, did not constitute professional misconduct, and the citation was dismissed. With respect to the length of time it took to pay the invoices, after a review of prior cases for non-payment of practice debts, the panel held at paragraph 41:

> Each of these cases involved conduct that was much more egregious than the Respondent's. The lawyers in question failed to pay their practice debts for years, if at all. Here, the Respondent paid the accounts within four to six months after they were rendered. While we do not condone his delay, we do not find that it constitutes professional misconduct.

With respect to the failure to respond to the reporter's inquiries, the panel held at paragraphs 46 and 47:

> We do not consider that the Law Society requires a standard of perfection of lawyers in fulfilling their obligation to respond to communications from non-lawyers. Here, the Respondent actually replied to Reportex's communications. ...
>
> While the Respondent could have been more prompt, we find the delays of 17 and 20 days, respectively, in these instances, do not constitute a marked (or pronounced, glaring or blatant) departure from the standard of conduct the Law Society expects of its members.

[6] It is the position of the Law Society in this Review that the Respondent's conduct was a marked departure from the standard of behaviour expected of lawyers, and that he ought to be sanctioned. Furthermore, it is the position of the Law Society that the reputation of the legal profession and the functioning of the justice system suffer when lawyers blatantly disregard their obligations to pay their practice debts and fail to communicate with those to whom the debts are owed. The justice system relies on the timely payment by lawyers of their practice debts to ensure its efficient operation. If service providers, such as court reporters, lose faith in lawyers' commitments to pay practice debts, the entire system could be adversely affected.

[7] Specifically, the Law Society submits that the hearing panel committed numerous errors in determining that the Respondent's conduct did not constitute professional misconduct. Specifically, the hearing panel erred by:

(a) Failing to consider the Respondent's conduct as a whole;

(b) Characterizing a "marked departure" from that conduct the Law Society expects of lawyers as a "pronounced, glaring or blatant departure from the standard of expected conduct";

(c) Concluding that, in order to constitute professional misconduct, the conduct in this matter had to be as egregious in nature as it was in previous decisions involving unpaid practice debts; and

(d) Attaching weight to unproven and irrelevant findings of fact.

[8] The Law Society seeks an order from the Review Board to quash the decision of the hearing panel dismissing the citation, to substitute a determination of professional misconduct pursuant to section 47(5)(b) of the Act and to refer the matter back the hearing panel to impose the appropriate disciplinary action.

NON-ATTENDANCE BY THE RESPONDENT

[9] The hearing of this matter commenced at 9:30 a.m. and the Respondent was not in attendance. The Review Board was provided a letter received by the Law Society from the Respondent the prior afternoon stating that the Respondent would not be in attendance, nor was he represented by counsel. Thus, after noting that the Respondent had been properly notified of the hearing, the hearing continued in his absence.

RESPONDENT'S APPLICATION FOR DISCLOSURE AND ADJOURNMENT

[10] The first issue to consider was an application by the Respondent for an order for further disclosure and the ancillary orders that would necessarily follow, including an adjournment of this Review hearing. This panel heard submissions from Law Society counsel and adjourned briefly to consider the Respondent's application and the written argument provided by the Respondent. Upon resumption of this hearing we advised that the Respondent's application is dismissed. Below are our reasons for doing so.

[11] In a written application, the Respondent sought orders from this Review Board in these words:

> 1. An Order that the LSBC produces all complaints made to the LSBC since its inception that involve the subject matter of this Review and the following particulars regarding the complaints which include but not limited to:
>
>   (a) material facts involving those complaints;
>
>   (b) status involving those complaints;
>
>   (c) reviewers of said complaints;
>
>   (d) recommendations for disposition of said complaints;
>
>   (e) ultimate disposition of those complaints and the reasons for the disposition thereunder; and
>
>   (f) any other particulars that are material to such complaints
>
>   (the "Fresh Evidence").
>
> 2. The Successful Respondent be at liberty to review the Fresh Evidence regarding those complaints and make further written submissions on the dismissal of this review and costs hereunder if there is relevance to how the LSBC handled said complaints;
>
> 3. An Order the hearing is adjourned and stayed pending the disclosure of the Fresh Evidence by the Successful Respondent with the Successful Respondent given 14 days to provide submissions once he has received the Fresh Evidence; and

4. Special costs of this application in favour of the Successful Respondent and against the LSBC payable forthwith.

[12] The basis for the Respondent's application was that Law Society counsel, Ms. Kirby, made submissions before the hearing panel that the type of complaint relating to non-payment or late payment of bills by lawyers "simply does not happen so citations do not exist in the circumstances regarding the case at bar." (para. 9 of Respondent's Notice of Application)

[13] The Respondent argues that this material is relevant because, if the material he seeks shows that there have been numerous similar complaints in the past, then that is highly material and relevant evidence in this review.

[14] The Respondent relies on s. 47(4) of the Act, which provides authority to a Review Board to permit fresh evidence in special circumstances. The section states:

> If, in the opinion of a review board, there are special circumstances, the review board may hear evidence that is not part of the record.

[15] The "record" is determined by Rule 5-23 and includes the citation, transcripts of the proceedings, exhibits in evidence, written arguments, the decision of the hearing panel and any other documents agreed upon by counsel.

[16] The Respondent relies on the case of *Zhu v. Li*, 2007 BCSC 1467, in which Ehrcke, J. set out principles that apply in an application to re-open a trial to adduce fresh evidence.

[17] The Law Society opposes the application on the basis that:

(a) Rule 3-3(1), which provides for confidentiality of complaints, prohibits production of the fresh evidence;

(b) the fresh evidence requested is irrelevant to the issue of whether the Respondent committed professional misconduct and therefore cannot be the subject of an order for production under s. 44(4)(b) of the *Legal Profession Act*;

(c) the Respondent has not met the test for introduction of fresh evidence, set out in *Palmer v. The Queen*, [1980] 1 SCR 759, which has been applied by Law Society review panels; and

(d) practical and policy reasons further militate against the granting of the order requested.

REASONS FOR DISMISSING PRELIMINARY APPLICATION FOR DISCLOSURE AND ADJOURNMENT

[18] The first issue to be settled is whether the material sought is relevant and, if so, is it admissible.

[19] The Respondent refers to the case of *Re. Cartaway Resources Corp.*, 2002 BCCA 461, in which the BC Securities Commission had levied fines against two brokers for trading violations. The brokers were assessed fines that they argued were excessive. The court held that past decisions of the Securities Commission involving circumstances where the Commission entered into settlement agreements with violators were relevant to show that the Security Commission's fines were consistent with prior decisions and not arbitrary.

[20] The Respondent argued that, "if there have been 500 complaints of late payment by lawyers in the last ten years and no citations as alleged by Ms. Kirby, then that is highly material and relevant evidence that Ms. Kirby put into evidence in her submissions before the Hearing Panel." (para. 12 of Respondent's Notice of Application)

[21] The Respondent is referring to the submissions of Law Society counsel at the hearing of this matter when the chair of the hearing panel queried at p. 55, lines 16ff:

> Q Have you got any authorities where this Law Society or another has found a four to six month delay in paying modest invoices like these to constitute professional misconduct?
>
> A There aren't a lot of decisions dealing with failure to pay practice debts because the standard in our province is that they are paid promptly so we rarely get failure to pay practice debts.
>
> What you have are decisions where – again, my comments to Ms. Fung is when a lawyer is able to pay practice debts, we don't get into this situation. We get into this situation in the cases that you see are cases where the lawyer is in financial difficulties and is unable to pay them, which makes this case unusual. So the answer is I have not seen cases where you've got a four to six month delay in paying practice debts by a lawyer who is otherwise able to pay them. It doesn't come up.

> Q Well, does it not come up because it doesn't happen or does it not come up because it doesn't become the subject of a citation?
>
> A In my submissions, it's because the lawyers are paying their practice debts. And certainly, you know, prior to a complaint being filed, a lawyer would have paid his practice debts.

[22] The first question noted in paragraph 21 above was an inquiry to help the panel determine the parameters of what is "professional misconduct" in this case. The submissions of Law Society counsel were an attempt to answer this question and were not evidence. Law Society counsel did not "put into evidence" the issue of what the Law Society had done in similar cases.

[23] The second question, although understandable given the nature of the exchange, is not relevant to the ultimate question. The reason for issuing the citation is not relevant to the ultimate issue of whether the conduct of the Respondent in this case amounts to professional misconduct.

[24] In support of this proposition, the Law Society referred to the case of *Law Society of BC v. Boles*, 2015 LSBC 27, wherein the respondent had sought production of all documents of cases similar to the respondent's. The panel found at paragraph 17:

> We have determined that the argument on relevance fails. The reason for the failure of any other member of the Law Society to report an *Income Tax Act* Certificate against him or her does not assist in any way the determination of the failure of Ms. Boles to report. *We find that each such determination must be developed on its own facts and no fact or circumstance from another lawyer's failure to report a certificate can assist a panel with deciding what caused the Respondent to act in the manner she did.*
>
> [emphasis added]

[25] As for the *Cartaway* decision cited by the Respondent, we find it is not applicable to the case at hand. *Cartaway* concerns the penalty assessed by the Securities Commission in relation to the penalties assessed in similar cases. It was not an inquiry into why the violators were being prosecuted. In the Respondent's case the citation was dismissed and no penalty imposed.

[26] We find that the material sought by the Respondent is not relevant to this Review and there is no "special circumstance" established by the Respondent to justify an exception to s. 47(4) of the Act.

[27] Even if such material were somehow relevant, it would not be admissible pursuant to Rule 3-3(1) which states:

> No one is permitted to disclose any information or records that form part of the investigation of a complaint or the review of a complaint by the Complainants' Review Committee except for the purpose of complying with the objectives of the Act or with these Rules.

The rationale for this Rule, as argued by Law Society counsel is clear:

(a) It protects the privacy interests of a complainant;

(b) It protects lawyers from meritless complaints where the complainant is simply on a fishing expedition.

[28] In general, the disclosure of the records of prior complaints from the date the Law Society was created can serve no useful purpose in the administration of justice. Complaints to the Law Society are made for any number of reasons, and complainants on one matter should not be part of the process on an unrelated matter. To subject a complainant or other witness to scrutiny in an unrelated proceeding is unnecessary and unfair to that complainant or witness.

[29] Further, it would be unworkable, if not impossible, to require the Law Society to produce "all complaints made to the LSBC since its inception that involves the subject matter of this Review" (Respondent's Notice of Application). The Law Society of British Columbia was incorporated in 1884. To require the Law Society to search its records for such material would cause the administration of justice to grind to a halt.

[30] As we find the requested information is neither relevant nor admissible, we need go no further to discuss the cases involving the application of "fresh evidence." The Respondent's application for disclosure is dismissed together with the Respondent's application for an adjournment.

STANDARD OF REVIEW

[31] The Law Society agrees that the determination by the hearing panel that the Respondent's conduct did not constitute professional misconduct is a finding of mixed fact and law.

[32] The Law Society submits that the standard of review to be applied by the Review Board in this matter is that of correctness. It bases this submission on the decision

in *Law Society of BC v. Dobbin*, 1999 LSBC 27, [2000] LSDD No. 12, and several subsequent decisions made by Law Society review panels that the Law Society submits have consistently held that the standard of review to be applied to findings of mixed facts and law made by hearing panels where no controverted *viva voce* evidence is involved, is that of correctness. The Law Society submits that, to be consistent with previous decisions by review panels, the correctness standard of review should be applied by the Review Board to the determination made by the hearing panel with respect to whether the Respondent's actions that were the subject of the citation constituted professional misconduct.

[33] In addition to *Dobbin*, the Law Society relied on subsequent decisions of review panels in *Law Society of BC v. Hops*, 1999 LSBC 29, [2000] LSDD No. 11, (para. 11); *Law Society of BC v. Hordal*, 2004 LSBC 36 (paras. 8-12); *Law Society of BC v. Berge*, 2007 LSBC 07 (paras. 19-21); *Law Society of BC v. Welder*, 2007 LSBC 29 (para. 30); *Law Society of BC v. Foo*, 2015 LSBC 34 (paras. 9-12); *Law Society of BC. v. Chiang*, 2014 LSBC 55 (paras. 27-28); *Re Lawyer 10*, 2010 LSBC 02 (paras. 55-57); *Law Society of BC v. Chan*, 2009 LSBC 20 (paras. 25-26); Law *Society of BC v. Martin*, 2007 LSBC 20 (paras. 11-14); *Law Society of BC v. Geronazzo*, 2006 LSBC 50 (paras. 12-15).

[34] The review in *Dobbin* was conducted by a panel of 11 benchers, nine of whom provided majority reasons and two of whom dissented. The majority decision was summarized in *Discipline Case Digest, 00/7*, including the following with respect to the standard of review:

> In considering the scope of a review under section 47(3) the majority of the Benchers determined that the proper standard for review is correctness, with the sole exception of deference to a hearing panel's advantage in making findings of fact from controverted sworn evidence. The majority declined to adopt a standard of deference to the hearing panel's exercise of judgment or discretion, as may be applied by courts of appeal reviewing triers of fact in certain circumstances. The majority noted a difference in function between the Benchers and the courts of appeal.

[35] The dissenting Benchers did not agree that the appropriate standard of review was correctness. Their reasons on standard of review were summarized as follows:

> Mr. Tretiak dissented from the majority decision. He found the standard of correctness applied by the majority is a departure from the law of appellate review, was unsupported by policy considerations relating to certainty, comity and finality and represented a radical departure in Bencher jurisprudence. The appropriate test, and that applied in most past

> Bencher reviews, is that of "reviewable error," which is often cited as "palpable error," "overriding error" or "clearly wrong." A Bencher review is a review on the record, with the power for Benchers to hear new evidence. Nothing in section 47 authorizes the Benchers to substitute for the hearing panel's discretion where no new evidence has been called.

[36] The Law Society submits that the earlier decision in *Law Society of BC. v. McNabb*, 1999 LSBC 2, by a Bencher review panel came to the same conclusion with respect to the standard of review. This is not clear from what the panel said in *McNabb*. That statements of the majority of the Benchers with respect to the standard of review are set out in their entirety in para. 3, in which they stated:

> Standard of Review -- Our first task is to determine what standard we should apply in determining whether or not to interfere with the facts found by the Hearing Panel. Section 47 gives us a wide discretion to substitute our own judgement for that of the Hearing Panel. Nonetheless, this is a review on the record. Mr. Cuttler submitted that it is common sense that we ought not to interfere readily with the facts as found, and we agree that caution is appropriate. The Hearing Panel had the advantage of seeing and hearing the witnesses for two days, while we have heard only submissions from counsel. Accordingly, we will not interfere with the Hearing Panel's findings of fact unless it is shown that there is no evidentiary basis for those findings.

[37] In *Hops*, the Benchers concluded it was the Benchers in a review, rather than the hearing panel, who are the ultimate arbiters of what constitutes professional misconduct and that the scope of review of the Benchers with respect to the hearing panel's finding of professional misconduct is one of *correctness*. They also found, however, that when a review relates to findings of fact by a tribunal before whom *viva voce* evidence was given, the Benchers should not interfere with such findings unless there have been clear and palpable errors in those findings or if the findings of fact were based on no evidence.

[38] In *Hordal*, the Benchers on review adopted the application of the standard of review of correctness within the parameters described in *Dobbin, McNabb* and *Hops*. The Benchers were of the view that, where a hearing panel has had the benefit of *viva voce* testimony of witnesses and has had the opportunity to assess the credibility of those witnesses by observing their demeanour, the Benchers ought to accord some deference to the hearing panel on matters of fact where determinations were made by the hearing panel on factual matters in dispute. With respect to a review of a determination as to whether professional misconduct had

occurred, the Benchers in paragraph 12 unambiguously stated that, when the panel has made no findings of fact in respect of controversial matters, the appropriate standard of review is correctness, as follows:

> No such deference issues arise on this review as the Panel was not required to make any findings of fact in respect of controversial matters as the hearing proceeded on an Agreed Statement of Facts. In those circumstances, this quorum of Benchers is equally capable of determining an appropriate outcome without being required to defer to the Hearing Panel on findings of fact. This is not to say that we should randomly substitute our judgment for that of the Hearing Panel, but that we must do so if in our view the disposition made by the Hearing Panel, in all of the circumstances, is incorrect.

[39] Similarly, in *Berge*, the Benchers on review stated that, subject to the qualification that, where issues of credibility are concerned, the Benchers should only interfere if the panel made a clear and palpable error, in all other cases the correct standard of review is correctness, which they articulated in paragraph 20 as follows:

> This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:
>
> (i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer; and/or
>
> (ii) whether the penalty imposed was appropriate.

[40] The other decisions cited by the Law Society were consistent with the reasoning in *Dobbin, Hops, Hordal and Berge.*

[41] The Respondent submitted, however, that the Court of Appeal for British Columbia in *Mohan v. Law Society of BC*, 2013 BCCA 489, followed by the Court of Appeal decision in *Kay v. Law Society of BC*, 2015 BCCA 303, established a new standard of review for hearing panel decisions by a review board.

[42] *Mohan* dealt with an application to the Law Society for enrolment as an articled student. The majority of the hearing panel found that the applicant was of good character and repute and, after review, a review board of the Law Society overturned the decision and denied the application. The Court of Appeal set aside the decision of the review board and restored the decision of the hearing panel.

[43] The appellant in *Mohan* contended that the review board applied the incorrect standard of review to what he asserted was the hearing panel's implicit finding that

he was credible. In considering what the appropriate standard of review for the review board is, Mr. Justice Hinkson (as he then was) at paragraph 31 quoted with approval from a decision of a Law Society of Upper Canada Appeal Panel decision:

> In *Kazman v. The Law Society of Upper Canada*, 2008 ONLSAP 7, 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:
>
> > Thus, the Appeal Panel's functions consist in assessing whether a Hearing Panel's reasons and decisions are correct or reasonable under the applicable standard of review, and putting right, where warranted, any matters that fail under that assessment. The principles are as follows:
> >
> > 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.*
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> 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.
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> 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]

[44] The emphasis added by Mr. Justice Hinkson in portions of para. 38(ii) and all of para. 38(iii) of *Kazman* clearly establishes that it is the view of the Court of Appeal that this is the correct standard of review for Law Society review boards.

[45] The Court of Appeal in *Mohan* concluded that the issue before them was not whether the review board applied the correct standard of review. Instead, the Court of Appeal determined the review board was not correct when it found that the majority of the hearing panel made no finding with respect to the appellant's credibility. Mr. Justice Hinkson stated at para. 35:

> If no finding of credibility was made by the majority, then no deference could be given. If a finding was made, then it was entitled to but was not afforded deference from the Review Board.

[46] *Kay* also involved a hearing panel's decision with respect to a credentials matter. In that case, the appellant was a former practising lawyer who ceased to practise and subsequently applied for reinstatement. A review board of the Law Society set aside the hearing panel's decision to reinstate the applicant, and the applicant appealed the review board's decision.

[47] The Court of Appeal in *Kay* considered the standard of review by a review board of a hearing panel's decision to reinstate and quoted para. 38 of *Mohan* as correctly stating the applicable standard of review, including the emphasis added by Mr. Justice Hinkson.

[48] The Court of Appeal in *Kay* upheld the decision of the review board on the basis that the hearing panel made an error of law for which the standard of review by a review board, applying the principles articulated in *Kazman* and adopted by the Court of Appeal in *Mohan*, is correctness.

[49] The Law Society points out that decisions have been published by Law Society review boards subsequent to the release of the decision in *Mohan* on November 18, 2013 and that some of these decisions reconfirm the standard of review as articulated by the decisions in *Dobbin, Hops, Hordal and Berge* and that no subsequent decisions that considered the standard of review adopted the standard of review articulated in *Mohan* that was confirmed by Kay. The Law Society takes the position neither *Mohan* nor *Kay* changed the law regarding the standard of review to be applied by a review board to a decision of a hearing panel.

[50] In analyzing the effect of *Mohan* and *Kay*, it is important to consider the context of the decision made in *Kazman* and the basis for the articulation of the standard of review set out in para. 38 of that decision.

[51] At para. 25 of *Kazman*, the appeal panel analyzed judicial review in terms of whether the trier has either an advantage or no advantage over the reviewer in the decision making process in respect of 15 questions posed by the appeal panel. In its analysis, the appeal panel stated the following with respect to advantages held by the trier over the reviewer:

> A trier has an advantage over the reviewer in respect of the following questions, and is thus owed higher deference by the reviewer in deciding them:
>
> > *Questions of Fact*. The trier receives the documentary and other hard evidence, and hears live from the witnesses, allowing the trier to reach conclusions as to the facts. This evidence may be received over a span of hours, days, weeks, months or even years. The trier is in a more advantageous position than a reviewer to receive and assess such evidence and draw factual conclusions from it.

> *Questions of Credibility*. Credibility is a question of fact but worthy of special comment. The trier has the advantage of hearing and seeing the witness and judging her demeanour – tone of voice, facial expressions, and body language. Words in a transcript often fail to convey shadings of meaning that are apparent only when heard live, especially in person. A trier has a considerable advantage over a reviewer in this regard.
>
> *Questions of Mixed Fact and Law*. If a trier has no advantage over a reviewer as to most questions of law but does have an advantage as to questions of fact, then it follows, mathematically, that a trier has an advantage over a reviewer as to questions that are a mix of the two. The advantage derives from the difficulty in separating questions of fact from questions of law where they intertwine in the web of legal disputes.
>
> *Questions of Penalty*. As a result of the trier's first three advantages over a reviewer, the trier is in the better position to determine what penalties, if any, to impose.

[52] The appeal panel then summarized the effect of its advantage analysis and its effect on the standard of review as follows in para. 26:

> Thus, the nature of judicial review, the application of the standards of review, and the degree of deference derive essentially from advantages analysis. Leaving aside any benefit that may arise out of being beyond the fray at first instance, a reviewer never has an advantage over the trier on any of the 15 Questions. A reviewer has an advantage only when fresh evidence is adduced before the reviewer that was not adduced before the trier. Other than that, the reviewer is either in the same position as the trier or at a disadvantage. Vis-à-vis each other, the trier is in a position of either advantage or non-advantage, never disadvantage; and the reviewer is in a position of either non-advantage or disadvantage, never advantage. Higher deference is owed whenever the reviewer is at a disadvantage compared to the trier, but not otherwise. The principles are summarized as follows:
>
> (i) For issues where the trier has no advantage over the reviewer, the correctness standard applies. The reviewer owes little or no deference to the trier's decisions on such issues, and may correct the decisions if the reviewer believes the decisions are incorrect.

> (ii) For issues where the trier has an advantage over the reviewer, the reasonableness standard applies. The reviewer owes higher deference to the trier's decisions on such issues, and may interfere with the decisions only if the reviewer believes the decisions are unreasonable.
>
> ...

[53] The principles for determining which standard of review applies in which circumstances set out in para. 38 of *Kazman*, which were approved and adopted by the Court of Appeal in *Mohan* and *Kay*, are therefore qualified and must be viewed in the perspective of the analysis and conclusions by the appeal panel set out earlier in paras. 25 and 26.

[54] The statement in para. 31(ii) of *Kazman* that the standard of review for questions and fact, creditability, mixed fact and law and penalty is one of reasonableness must therefore be qualified by limiting that reasonableness standard to circumstances in which the hearing panel has an advantage over the review board. As stated in para. 26(i) of *Kazman*, if the trier has no advantage, the correctness standard will apply.

[55] In the current case, neither the Respondent nor anyone representing him appeared before the hearing panel. The only evidence considered by the hearing panel was a Notice to Admit that sought admission of facts set out in 62 paragraphs and the authenticity of 17 documents. The hearing panel heard no *viva voce* evidence and did not have the opportunity to assess the demeanour or credibility of any witnesses. All of the evidence that was considered and relied upon by the hearing panel to make its decision was available to the Review Board, and the hearing panel was therefore not in a more advantageous position than the Review Board to receive and assess any evidence and draw factual conclusions from it.

[56] The reasonableness standard of review for Law Society review boards enunciated in para. 38(ii) of *Kazman*, and adopted by the Court of Appeal, for questions of fact, credibility, mixed fact and law, and penalty is therefore subject to the caveat that this will apply only where the hearing panel has some advantage over the review board with respect to considering and analyzing evidence it heard.

[57] Once a hearing panel has heard evidence from any live witnesses, the reasonableness standard will be triggered not only for questions of fact and credibility, but also for questions of mixed fact and law (including determinations as to professional misconduct) and penalty. If no such evidence exists then the standard remains one of correctness as was the case prior to *Mohan* and *Kay*.

[58] In this case, since all of the evidence was written and documentary in nature and no witnesses were heard by the panel, the hearing panel had no advantage over the Review Board and the standard of review for all issues being considered by this Review Board is therefore correctness and not reasonableness.

CREDIBILITY AND SUFFICIENCY OF EVIDENCE

[59] The Respondent argued in his submission that the original hearing panel made findings of credibility in its decision and therefore the entire decision of the hearing panel hinged on findings of credibility, and ought to not be disturbed.

[60] We agree with the position of the Law Society that the hearing panel made no findings of credibility, nor could the original hearing panel have made findings of credibility given that the Respondent did not appear and give *viva voce* evidence.

[61] In respect of the Respondent's submission that the Law Society's case suffers from a failure to present *viva voce* evidence, the hearing panel refused to accept the Respondent's blanket denial of the facts set out in the Notice to Admit, and determined that the Respondent was deemed to have admitted the facts and authenticity of documents set out in the Notice to Admit. The Respondent failed to appear at the hearing, although he was properly served with the citation and with the Notice of Hearing and was even involved in selecting a date for the hearing and was also in contact with Law Society staff as recently as the day before the hearing.

[62] In such circumstances, we agree with the position of the Law Society that it was not necessary for the Law Society to call any witnesses at the hearing.

SUFFICIENCY OF EMAIL RESPONSES AND LENGTH OF DELAY IN PAYMENT

[63] The facts accepted by the hearing panel are important to restate because they show a course of conduct with respect to the Respondent's failure to pay his accounts on time and his failure to communicate with the reporting service with respect to those accounts. It is a repeated pattern of conduct with respect to those accounts and that creditor that the Law Society argues is professional misconduct.

[64] Between May and August 2013, the Respondent hired a court reporter to provide services in connection with actions commenced in the Supreme Court of British Columbia and was issued four invoices dated June 12, July 18, July 25 and August 19, of 2013.

[65] On September 9 and 26, 2013 the reporting service reminded the Respondent, by email, of the four outstanding invoices. On September 26 (three and one-half months after the first invoice was issued, and over a month after the final invoices issued), the Respondent replied to the reporting service's communication and inquired about the amounts outstanding. The service totalled the amounts owed by the Respondent and re-sent their invoices.

[66] The Respondent acknowledged receipt but did not send payment, and so, on October 17, 2013, the service sent the Respondent another email requesting payment of the four invoices.

[67] On October 23, 2013 the service sent the Respondent a letter reminding him of his professional obligations to pay practice debts and notified him that further delay would result in a complaint to the Law Society.

[68] Having not received a response to either communication from the Respondent, the reporting service made a complaint to the Law Society on October 29, 2013. The Law Society wrote to the Respondent about the complaint, referencing Rule 7.1-2 of the *Code Of Professional Conduct for BC*, which provides that "A lawyer must promptly meet financial obligations in relation to his or her practice … when called upon to do so."

[69] On November 7, 2013 the Respondent informed the reporting service by email that he would pay one of the invoices and that the others would be paid by his clients. There was no evidence or indication that the service had actually agreed to await payment by his clients rather than look directly to the Respondent for payment. Another letter was sent by the reporting service attaching invoices and payment was not made.

[70] On November 20, 2013 the service again requested payment of all four invoices from the Respondent. The Respondent replied on November 21, 2013 that he would pay three of the invoices and a client would pay the fourth invoice. The service offered to send a courier to pick up the Respondent's payment and asked whether the client had indicated when he would be sending payment. The Respondent answered "yes they have" but failed to provide a date or even an estimated date of payment.

[71] On November 26, 2013 the Law Society sent a letter to the Respondent's solicitor at the time with respect to the complaint, noting that the Law Society's first letter to the Respondent required a written answer from him by November 19 and that no response had been received.

[72] On December 2, 2013 the Respondent provided two cheques in payment of the first three invoices to the reporting service, but one of the cheques was returned NSF and had to be replaced.

[73] On December 13, 2013 the Respondent replied to the Law Society's previous correspondence indicating that he had not paid the invoices because he was "extremely busy."

[74] On December 30, 2013 the Respondent paid the fourth and final invoice.

[75] With respect to the allegation of failure to communicate, the Respondent argues (in his materials) that the evidence demonstrated he did communicate with the reporting service. He argues that "auto-response replies" from his email account, as well as responses from his legal assistant at the time, should constitute responses. He further argued that the question is whether the lawyer failed to respond, not the quality of that response.

[76] This is disingenuous. We agree with the position of the Law Society that, notwithstanding the Respondent's submission that the quality of this response is irrelevant, his delays in responding to the reporting service's communications must be examined in all of the circumstances in order to determine whether the Respondent's communications and delays in paying the invoices justify a finding of professional misconduct.

[77] When the Respondent's conduct, such as auto-responses, repeated requests for copies of invoices previously sent, repeated failure to respond, and finally dealing with the reporting service only after the Law Society had become involved, is looked at in its entirety, it is clear to this Review Board that his communications were totally inadequate in the circumstances. He was, in effect, "gaming the system," or "stringing along his creditor" to avoid prompt payment of his accounts.

[78] Rule 7.2-5 of the *BC Code* provides that "A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments."

[79] We agree with the position of the Law Society that the words "reasonable promptness" requires consideration of all of the circumstances. If we agree with the Respondent's position that the only relevant consideration is whether he responded at all, then a delay of two years or three years would not contravene Rule 7.2-5 because a response was eventually provided. There must be an element of substantive information in the response as much as there must be timeliness in the response. In the context of several invoices left unpaid for months, and the creditor

often receiving no response at all, or only an auto-response from the Respondent's email, the Respondent's communications were totally inadequate and contribute to the appropriateness of the finding of professional misconduct.

[80] It must be remembered that this is not a case where a lawyer has simply not paid an account within 20 days and has been cited by the Law Society for professional misconduct because a creditor complained to the Law Society. If lawyers could be found to have committed professional misconduct by failing to contact or pay trade creditors within 17 and 20 days, it could turn the Law Society to a collection agency for creditors. Indeed, many service providers give law firms 30, 60, 90 or more days to pay their trade accounts, depending upon the provider, the law firm and the circumstances. The Law Society's discipline process should not be used as a collection agency for creditors.

[81] The creditor, in this case, did not use the Law Society's discipline process to collect its accounts. The creditor complained to the Law Society as a last resort to deal with a lawyer who engaged in a pattern, over four to six months, of not paying his accounts, and not providing substantive responses regarding those overdue accounts.

[82] We find, taking all of the circumstances into account, that a finding of professional misconduct is appropriate in this case because the Respondent's conduct is a marked departure from the standard the Law Society expects of lawyers. In short, the Law Society expects lawyers to promptly meet their financial obligations in relation to their practices when called upon to do so, and the Law Society expects lawyers to give substantive responses to creditors inquiring about their unpaid accounts.

MARKED DEPARTURE

[83] The hearing panel determined that the conduct of the Respondent did not amount to a marked departure from the standard of conduct the Law Society expects of lawyers and therefore did not constitute professional misconduct. As noted above, the Review Board disagrees with that finding. The Review Board also disagrees with the hearing panel's interpretation of "marked departure."

[84] The leading case on the issue of "marked departure" is *Law Society of BC v. Martin*, 2005 LSBC 16, where a test for professional misconduct was prescribed and where such test has been applied by the majority of Law Society hearing and review panels. The test is as follows:

> 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.

[85] However, the hearing panel went further than merely stating that the conduct of the Respondent did not amount to a "marked departure." The hearing panel qualified "marked" to mean "pronounced, glaring or blatant." Again, the actual language used by the hearing panel at paragraph 47 is as follows:

> While the Respondent could have been more prompt, we find that delays of 17 and 20 days, respectively, in these instances, do not constitute a marked (*or pronounced, glaring or blatant*) departure from the standard of conduct the Law Society expects of its members.
>
> [emphasis added]

[86] "Pronounced," "glaring" and "blatant" are not synonyms for "marked." *Martin* did not qualify "marked departure" in terms of conduct that is pronounced, glaring or blatant. Such words, in our view, create a higher standard for professional misconduct than that determined in *Martin*, and in other cases that have adopted *Martin*.

[87] Paragraph 46 of the decision of the hearing panel is as follows:

> We do not consider that the Law Society requires a standard of perfection of lawyers in fulfilling their obligation to respond to communications from non-lawyers. Here, the Respondent actually replied to Reportex's communications. ...

The Law Society does not require a standard of perfection. But taking into account all the facts, the Respondent's course of conduct in this matter fell far below the standard expected by the Law Society of lawyers.

[88] Accordingly, we believe the hearing panel erred with respect to the test prescribed in *Martin*. "Pronounced, glaring or blatant" is not part of that test, and it was incorrect for the panel to effectively modify that test.

PRECEDENT

[89] The Respondent submits that there is no precedent for finding of professional misconduct in the circumstances of this matter and that this is fatal to the Law Society's case. This argument is specious, and is therefore rejected by this Review Board. A finding of professional misconduct was open to the hearing panel

notwithstanding the lack of a precedent with similar or identical facts. Indeed, we agree with the Law Society's argument that, if the determination of professional misconduct could only be made in cases where precedent was directly on point, it would be impossible to find professional misconduct for the first time in any circumstances, since there would be no precedent.

ABUSE OF PROCESS ALLEGATIONS REGARDING THE LAW SOCIETY AND ITS COUNSEL/SPECIAL COSTS

[90] The Respondent has submitted that the proceedings in this matter are malicious and constitute an abuse of process and that the allegations in the citation have no merit.

[91] Moreover, notwithstanding his failure to appear at the hearing, the Respondent submits that the Law Society's proceedings against him result from malice and animus and represent a wasteful use of the Law Society's funds; and that discipline counsel for the Law Society was incompetent, negligent and ill-prepared, evasive and untruthful before the hearing panel. He alleged, again without having attended the hearing, that counsel for the Law Society on the review was incompetent, did not know the law, relied inappropriately on his own subjective opinions and was reprehensibly retrying the case.

[92] We agree with the Law Society's position that these allegations are without merit. There was no evidentiary basis for a finding of malice or animus, or malicious prosecution, or abuse of process on the part of the Law Society, or its independent counsel. Accordingly, special costs are not warranted on these or any other grounds.

DECISION

[93] We find that the hearing panel erred for the reasons specified above, and that the Respondent has committed professional misconduct. Under section 47(5)(b) of the *Legal Profession Act*, we substitute this decision for that of the hearing panel.

[94] We refer the matter back to the hearing panel to assess sanction.

COSTS

[95] As no submissions on costs were heard during the Review hearing, we ask the parties to address this issue by written submissions within 30 days of the date of the issuance of this decision.