

2016 LSBC 11
Decision issued: March 18, 2016
Oral reasons on Facts and Determination: February 4, 2016
Citation issued: October 9, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KRISTA MARGRET JESSACHER

RESPONDENT

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

Hearing date: February 4, 2016

Panel: Pinder K. Cheema, QC, Chair
Gavin Hume, QC, Lawyer
Graeme Roberts, Public representative

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

BACKGROUND

- [1] This hearing proceeded under Rule 4-33, as a summary hearing by affidavit evidence. At the conclusion of the evidence, this Panel issued an oral decision and indicated that written reasons would be issued later. These are those reasons.
- [2] Krista Margret Jessacher was called and admitted to the Law Society of BC on May 21, 1999. Since July 14, 2010, she has been a non-practising member and, as such, provided an undertaking to the Law Society, dated July 14, 2010, not to practise law.

- [3] A citation was issued to the Respondent on June 25, 2015 for failing to respond to Law Society requests in the course of its investigation of a complaint file. A hearing into that allegation took place on September 2, 2015. The Respondent did not attend. That panel found the Respondent's failure to respond to the Law Society requests amounted to professional misconduct and, as part of its disciplinary action, made the following order:

Pursuant to s. 38(7) of the *Legal Profession Act*, the Respondent provide a complete and substantive response to the enquiries made in the Law Society's letters to her dated February 3, 2015 and March 19, 2015, by September 16, 2015.

- [4] On September 2, 2015, the order was sent to the Respondent by letter and to her last know email address.
- [5] The Respondent did not comply with the order by September 16, 2015.
- [6] On October 9, 2015, the current citation issued, alleging that:

[The Respondent] failed to comply with an order made by a Hearing Panel on September 2, 2015, contrary to Rule 7.1-1(e) of the *Code of Professional Conduct for British Columbia*, by failing to provide a complete and substantive response by September 16, 2015 to the inquiries made in the Law Society's letters to you dated February 3, 2015 and March 19, 2015.

This conduct constitutes professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

PROCEEDING IN THE ABSENCE OF THE RESPONDENT

- [7] The citation was emailed to the Respondent's last known email address on October 9, 2015, together with the September 2, 2015 order, a list of defence counsel and an FAQ sheet about the hearing process.
- [8] On October 13, 2015 the Respondent emailed a response from that email address. She did not address her lack of compliance or acknowledge receipt of the attached documents as requested. The tone of the email was disparaging of the Law Society.
- [9] On November 17, 2015, Michelle Robertson, Hearing Administrator at the Law Society, sent an email to the Respondent's last known email address enclosing the

Notice of Hearing and a cover letter, advising that the hearing would take place on February 4, 2016 at the offices of the Law Society of BC. The Notice of Hearing cautioned the Respondent that, if she failed to appear, the hearing may proceed in her absence. No response or acknowledgment was received.

- [10] On December 4, 2015, legal assistant Chrysta Gejdos emailed the Respondent enclosing a further copy of the Notice of Hearing. No response or acknowledgement was received.
- [11] The hearing commenced at 9:30 am on February 4, 2016. The Respondent was not present and had not filed any materials. The Panel adjourned until 10 am to ensure that the Respondent had not been unavoidably delayed.
- [12] The Respondent has not provided any explanation for her lack of attendance.
- [13] As of the date of this hearing, the Respondent is a former member.
- [14] As of the date of the hearing, the Respondent has not made any formal admissions or acknowledged receipt of any materials pertaining to the citation.
- [15] The Panel, having reviewed the exhibits filed and the submissions of counsel, and being satisfied of service on the Respondent, proceeded in her absence.
- [16] The hearing was conducted in conformity with Rule 4-33, which permits a summary procedure where the respondent is alleged to have breached an order made by a hearing panel. Evidence was adduced by affidavit.

THE LAW

- [17] It is settled law that the onus of proof is on the Law Society at all times to prove the allegation on a balance of probabilities (*FH v. McDougall*, 2008 SCC 53, and *Law Society of BC v. Schauble*, 2009 LSBC 11).
- [18] The Law Society seeks an adverse finding of professional misconduct for failing to respond to inquiries from the regulator.
- [19] *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171, concluded the test for professional misconduct 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.” The panel also stated at paragraph 154 that:

The real question to be determined is essentially whether the Respondent’s behaviour displays culpability which is grounded in a fundamental degree

of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

- [20] The hearing panel in *Re: Lawyer 12*, 2011 LSBC 11 (confirmed on review), commented at paragraph 14:

... the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the *circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members*.

[emphasis added]

- [21] Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* obligates a lawyer to reply promptly and completely to any communication from the Law Society, cooperate fully in any investigation, produce files and documents for examination or copying, and answer questions and provide information as required.

- [22] The principle in *Law Society of BC v. Dobbin*, 1999 LSBC 27 (Bencher review) at paragraph 25, is instructive:

... unexplained persistent failure to respond to Law Society communications will *always* be prima facie evidence of professional misconduct which throws upon the respondent member a persuasive burden to excuse his or her conduct.

[emphasis added]

- [23] As to non-compliance with orders, *Law Society of BC v. McLean*, 2015 LSBC 06, stated:

... non-compliance with the orders of statutory bodies and courts is considered grave.

- [24] Non-compliance with Law Society orders has been found to constitute professional misconduct (see *McLean*).

THE CONDUCT

- [25] The Respondent was the subject of a citation issued on June 25, 2015 and heard on September 2, 2015. It alleged that the Respondent failed to respond to Law Society requests in the investigation of a complaint file. It was a complaint of breaching

her undertaking not to practise law while not authorized. The Respondent did not attend, nor did she file any materials.

- [26] The hearing panel found her failure to respond to Law Society requests amounted to professional misconduct and made an order, pursuant to s. 38(7) of the *Legal Profession Act*, that she respond by September 16, 2015.
- [27] The order was sent to the Respondent by email on September 2, 2015. She did not respond by September 16, 2015.
- [28] The lack of compliance by September 16, 2015 became the subject of the current citation on October 7, 2015. The citation was emailed to the Respondent on October 9, 2015. On October 13, 2015 the Respondent emailed the Law Society as follows:

This is unbelievable. I was moving on September 1st from BC to Alberta.

I can't imagine a more unprofessional organization, than the Law Society of BC.

I have yet to speak to anyone at the Law Society of BC who seems to understand the true role of lawyers in our society.

When I have secured formal office space, I will advise.

Krista Jessacher

- [29] The Notice of Hearing of the citation, together with the Book of Authorities, affidavits and Professional Conduct Record were emailed to the Respondent on December 4, 2015. The Notice of Hearing contained the provision that the hearing could proceed in her absence. She was invited to reply by January 4, 2016 as to whether she wished to tender any evidence or cross-examine any of the affiants. She did not reply.
- [30] On February 2, 2016, the Law Society determined that the Respondent's email was still active.
- [31] There has been no acknowledgment or response (other than the email of October 13, 2015) from the Respondent to this citation or any of the materials emailed to her.

DETERMINATION

- [32] The order that is the subject of the current citation was issued pursuant to s. 38 of the *Legal Profession Act*, and the Respondent was obligated, under Rule 7.1-1 of the *BC Code* to comply.
- [33] This Panel finds that the Respondent failed to comply with the order of September 2, 2015 requiring her to provide a response by September 16, 2015.
- [34] That failure was preceded by a consistent pattern of failing to respond to the inquiries of the Law Society in its role as regulator. At one point, the Respondent advised the Law Society that she refused to participate in a process that she considered “contrived.”
- [35] This Panel finds that the Respondent has offered no explanation as to why she failed to comply with the order by the date of September 16, 2015. The only evidence of her attitude can be gleaned from her October 13, 2015 email which is dismissive in tone and disparaging of the Law Society’s role.
- [36] This Panel finds that the Respondent’s failure to comply with the order, preceded by ongoing failures to respond to Law Society inquiries, constitutes a marked departure from the standard expected of lawyers, reflects gross culpable neglect of her duties as a lawyer and constitutes professional misconduct.

DISCIPLINARY ACTION

- [37] The Law Society submits that the appropriate sanction is a suspension to commence when the Respondent returns to active practice and to end when she has provided the substantive response required by the order of September 2, 2015.
- [38] The Law Society also seeks an order pursuant to s. 38(7) of the *Legal Profession Act* that the Respondent provide a complete and substantive response to the Law Society inquiries in its letters to her dated February 3, 2015 and March 19, 2015.
- [39] The Law Society seeks costs in the amount of \$1,236.25 for this half-day hearing.

PRINCIPLES

- [40] The purpose of disciplinary proceedings instituted by the Law Society is to fulfill its mandate set out in Section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice.

[41] A number of hearing panel decisions, such as *Law Society of BC v. Hordal*, 2004 LSBC 36 at paragraph 51, and *Law Society of BC v. Hammond*, 2004 LSBC 32, have quoted with approval this passage from MacKenzie, *Lawyers and Ethics: Professional Regulation and Discipline*, loose-leaf (Toronto: Carswell, 1993) at page 26-1:

The purposes of Law Society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.

In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

- [42] *Law Society of BC v. Ogilvie*, 1999 LSBC 17 sets out a number of factors a panel may consider when assessing penalty.
- [43] Not all factors need come into play in all cases but the protection of the public and the rehabilitation of the respondent are two that will play an important role in most cases.
- [44] The Law Society submits that non-compliance with orders, issued by the Law Society to secure a certain conduct, can only be considered serious misconduct.
- [45] We agree. Where a hearing panel, having found the citation is proven, issues to a lawyer an order designed to enforce performance, non-compliance with that order is not an option.
- [46] Where non-compliance follows, a penalty must follow to “protect the public, maintain high professional standards, and to *preserve public confidence in the legal profession.*” [emphasis added]
- [47] In determining an appropriate penalty in this matter, we note that the Respondent has a Professional Conduct Record that contains a Practice Standards referral and the citation of June 25, 2015.
- [48] The June 25, 2015 citation related to an initial failure to respond to Law Society inquiries, which led to the September 2, 2015 order.
- [49] The failure to respond to the September order is nothing short of very serious.
- [50] We agree with the Law Society that a strong message must be sent to this lawyer that she cannot escape the consequences of having failed to respond to inquiries, or,

having failed to respond to an order, by absenting herself from the process. To do otherwise, would risk undermining public confidence in the legal profession.

[51] In assessing the appropriate penalty, the hearing panel in *Law Society of BC v. McLean*, 2015 LSBC 06, imposed a fine for a first instance of non-compliance. We note that the Respondent in this case was already fined in September 2015 for failing to respond to Law Society inquiries.

[52] In *Law Society of BC v. Coutlee*, 2010 LSBC 27, the respondent admitted professional misconduct in practising contrary to a restriction imposed on his practice. That hearing panel imposed a suspension of one month. That penalty is distinguishable from this case in that Mr. Coutlee admitted his misconduct and his non-compliance was not a continuing feature of the hearing.

[53] *Law Society of Upper Canada v. Lambert*, 2013 ONLSHP 67, at paragraph 26 and 27 discussed the role of ongoing non-compliance at the penalty phase:

[26] At the end of the day, for me, what is most compelling are two things. One, I believe that it is right to have a suspension when the failure to cooperate — to use that general phrase — continues to the date of the hearing. Where it stopped prior to the hearing and there has been full and helpful compliance, a reprimand is appropriate, but ordinarily, a suspension is required where the misconduct continues to the date of the hearing.

[27] The fact that part of the misconduct arises out of noncompliance with a prior order then brings a second line of cases into play So we really have two lines of authority which come together: The continuing misconduct to the date of the hearing, and the misconduct being a breach of the prior order.

[54] In determining whether a fine or a suspension is the appropriate penalty, *Law Society of BC v. Martin*, 2007 LSBC 20 (Bencher review), sets out the following criteria to consider:

- (a) elements of dishonesty;
- (b) repetitive acts of deceit or negligence;
- (c) significant personal or professional conduct issues.

[55] As we have stated above, the Respondent's conduct in failing to comply with the September order raises significant professional conduct issues and her disparaging

email of October 13, 2015 further supports our finding that she viewed the Law Society's role as regulator with contempt and disrespect.

- [56] We find that the principle of protecting the public is paramount and must be reflected in any penalty we impose.
- [57] Section 38(4)(b)(v) of the *Legal Profession Act* provides that a hearing panel has the jurisdiction to make a finding of professional misconduct against a former member of the Law Society if the conduct of the former member, if he or she had been a member, constituted professional misconduct. We have made a finding that the action of the Respondent in failing to comply with the order of September 2, 2015 requiring her to provide a response by September 16, 2015 constituted professional misconduct. We now have the obligation under Section 38(5) to determine the appropriate sanction as a result of that finding. In doing so, we provide a message to the public that the Law Society takes seriously the misconduct of lawyers and that the fact that the person involved is no longer a member of the Law Society does not protect the person from review by the Law Society. In addition, it alerts the profession to the sanction that misconduct of this kind may attract. (See *Law Society BC v. Power*, 2009 LSBC 23, and *Law Society BC v. Strother*, 2015 LSBC 56).
- [58] Accordingly, we suspend the Respondent from the practice of law, pursuant to s. 38(5)(d)(ii) as of the date of the issuance of this decision or, on the date that this order is served on the Respondent, until the Respondent has fully complied with the s. 38(7) order set out below.
- [59] Pursuant to s. 38(7) of the *Legal Profession Act*, we order that the Respondent must provide a complete and substantive response to Law Society letters to her dated February 2, 2015 and March 19, 2015.
- [60] Accordingly, it will be noted that the length of the suspension will be determined by the actions of the Respondent.

COSTS

- [61] The Law Society filed its Certificate of Costs seeking a total of \$1,236.25 for this half-day hearing. Those costs are reasonable and appropriate.
- [62] We have no information as to the circumstances of the Respondent.
- [63] Accordingly, the costs as set out are granted.

ORDER

[64] We order that the Respondent:

- (a) provide a complete and substantive response to Law Society letters to her dated February 2, 2015 and March 19, 2015;
- (b) is suspended until she has fully complied with the order to respond; and
- (c) pay costs in the amount of \$1,236.25 on or before September 30, 2016.