2016 LSBC 21
Decision issued: June 9, 2016
Citation issued: November 10, 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

DIEP THANH HOANG NGUYEN

APPLICANT

DECISION OF THE REVIEW BOARD

Review date:	April 7, 2016
Review Board:	Lee Ongman, Chair Paula Cayley, Public representative Lynal Doerksen, Bencher Carol Gibson, Public representative David Layton, Lawyer Sharon Matthews, QC, Bencher William Sundhu, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Counsel for the Applicant:	Henry C. Wood, QC

INTRODUCTION

[1] On April 7, 2015 a hearing panel concluded that the Applicant had committed professional misconduct by fabricating a disbursement on a client's account and by falsely representing to the Law Society that the disbursement was genuine.

[2] The penalty phase of the hearing took place later the same day. The Law Society submitted that the Applicant should receive a one-month suspension. The

Applicant, who was self-represented and had admitted the misconduct, did not oppose the penalty proposed by the Law Society.

[3] On July 6, 2015 the hearing panel released its decision on disciplinary action, suspending the Applicant for 60 days and fining her $10,000.

[4] The Applicant has sought a review of the panel's determination with respect to the appropriate disciplinary action. She takes no issue with the 60-day suspension. But she argues that the imposition of both a suspension *and* a fine was excessive in the circumstances and wrong in principle, and that the fine should therefore be overturned.

[5] The Law Society concurs with the Applicant's submission in this regard.

[6] For the following reasons, we agree with the parties that the fine should be removed from the disciplinary action on review.

FACTUAL BACKGROUND AND THE DISCIPLINE HEARING

[7] The factual background to the citation is set out in the decision of the hearing panel reported at *Law Society of BC v. Nguyen*, 2015 LSBC 32. It suffices here to provide a brief overview of the salient facts.

[8] In September 2009 the Applicant was retained in a personal injury matter to act for a client who resided in Vancouver and Hong Kong. The retainer agreement permitted the Applicant to charge the client a contingency fee of 30 per cent.

[9] In August 2012 the Applicant settled the client's claim. Her account to the client included a disbursement for $30,000 paid to a Hong Kong agent. The Applicant had not, in fact, hired or paid an agent. She had fabricated this disbursement, and reduced her fee by a corresponding amount, in an attempt to avoid paying income tax on $30,000 of her fees.

[10] The Law Society subsequently conducted a routine compliance audit of the Applicant's practice. The auditor asked the Applicant about the $30,000 disbursement. The Applicant provided two explanations. Neither was true. She repeated these explanations in a letter to the auditor.

[11] The Law Society's professional conduct department investigated the disbursement. Initially, the Applicant was not forthright with the Law Society investigator regarding the disbursement, but she eventually admitted to fabricating it so as to reduce her taxes and allow her to pay down personal debt. The Applicant also

admitted to having fabricated a cheque to provide documentary support for the disbursement in the event she was audited by Revenue Canada.

[12] At the April 7, 2015 discipline hearing, the parties submitted an Agreed Statement of Facts, and the Applicant admitted the alleged professional misconduct. After concluding that the Applicant's actions constituted professional misconduct, the panel heard submissions regarding disciplinary action.

[13] The facts relevant to the issue of penalty were not in dispute.

[14] The Applicant intentionally misled her client and the Law Society in an effort to commit a fraud against Revenue Canada. Her dishonesty was carried out for personal gain. It comprised a number of false documents and statements. Though related to a single matter, the falsehoods continued over a significant period of time.

[15] On the other hand, the client suffered no financial loss. The Applicant issued a revised account to correct the falsehood, and made the necessary trust account transfers to properly include the $30,000 in her fees. She was also taking steps to repay all taxes owed. Accordingly, the Applicant ultimately realized no financial benefit.

[16] The Applicant expressed significant remorse for her misconduct, and understood the gravity of her actions. She had suffered considerable negative impact as a result of the citation, having been terminated from her employment as an adjudicator at the Workers Compensation Appeal Tribunal. She did not have a prior professional conduct record.

[17] As noted, the Law Society sought a one-month suspension, plus $2,925 in costs, and the Applicant did not oppose this outcome.

[18] At no point during the hearing did the parties suggest that an appropriate disciplinary action might be a suspension combined with a fine, nor did the panel raise this possibility with the parties or ask them for submissions on the point.

THE PANEL'S DECISION

[19] The panel released its decision regarding disciplinary action on July 6, 2015.

[20] After setting out the relevant facts, the panel noted that counsel for the Law Society had invited it to consider the factors contemplated in assessing penalty in the decision of *Law Society of BC v. Ogilvie,* 1999 LSBC 17. The panel observed that

not all of these factors were necessarily relevant in each case. It nonetheless acknowledged that two factors are pivotal in considering penalty in discipline proceedings: maintaining public confidence in the profession and the rehabilitation of the lawyer.

[21] The panel also relied on *Law Society of BC v. Martin*, 2007 LSBC 20, for the proposition that "when considering the penalty" a hearing panel should take into account: (a) whether the misconduct included elements of dishonesty; (b) whether the misconduct involved repetitive acts of deceit or negligence; and (c) significant personal or professional conduct issues. The panel stated that it had reflected on the factors set out in *Martin*.

[22] The panel then reviewed a number of factual elements in the case. Clearly, the panel considered the Applicant's dishonesty, carried out in a variety of ways over a period of time for the purpose of defrauding Revenue Canada for financial gain, as a significant aggravating factor. The panel stated that, although the Applicant had no prior disciplinary record, her professional conduct warranted both a suspension and a fine.

[23] The panel next indicated that deference was owed to the submissions of the Law Society regarding the proposed disciplinary action. But it held that a one-month suspension was not acceptable in the circumstances, given the importance of protecting the public interest.

[24] In explaining this conclusion, the panel agreed that a suspension was appropriate on the facts of the case, noting that, where a lawyer has been dishonest, a suspension should be imposed in all but the most exceptional circumstances. The question, said the panel, became "the length of the suspension and the amount of fine that should be imposed."

[25] After again reviewing the aggravating factors concerning the Applicant's misconduct, the panel made the following comment:

> In all the circumstances we are of the view that a one-month suspension is not sufficiently appropriate in this case. Some members of the public may view a one-month suspension as something akin to a vacation regardless of the fact that the Respondent would be without income.

[26] The panel acknowledged that a suspension might cause inconvenience to the Applicant's client base, and that she had lost her employment with the Workers Compensation Appeal Tribunal as a direct result of the citation. The panel also

noted that the Applicant faced financial responsibilities as a single mother of three children and that "a suspension would impact that situation."

[27] The panel nonetheless concluded that the Applicant should be suspended for 60 days and fined $10,000. It also ordered costs of $2,925.

ISSUE

[28] The issue to be determined on review is whether the panel's imposition of a $10,000 fine should be overturned, so that the disciplinary action is limited to a 60-day suspension.

ANALYSIS

[29] Our analysis of this issue will address the following matters:

(a) the standard of review to be applied where an applicant challenges a disciplinary action pursuant to s. 47 of the *Legal Profession Act*, SBC 1998, c. 9;

(b) the general principles applicable where a panel is considering imposing a fine or a suspension, or both;

(c) our conclusion that the panel erred in principle by failing to apply these general principles in the case at hand; and

(d) our conclusion that the panel erred in principle by providing inadequate reasons and by denying the parties fair process.

Standard of review

[30] The Applicant does not challenge any findings of fact made by the panel. Rather, she asks us to review the panel's decision on the basis that it did not apply the proper legal principles and/or imposed an inappropriate disciplinary action.

[31] In determining whether a panel has applied the proper legal principles, the standard of review is correctness (*Kay v. Law Society of BC*, 2015 BCCA 303, para. 41).

[32] In ascertaining whether the panel has imposed an inappropriate disciplinary action, the standard of review has been variously described as correctness, correctness informed by reasonableness or correctness as reasonableness. The basic concept is said to be that most cases will give rise to a reasonable range of outcomes. Subject

to the panel correctly applying the legal principles, if the disciplinary action imposed by the hearing panel is within the reasonable range, it should not be disturbed on review, even if the review board might prefer a different spot on the range. See *Law Society of BC v. Hordal*, 2004 LSBC 36, paras. 9, 18-20; *Law Society of BC v. Goldberg*, 2007 LSBC 55, paras. 8, 37; *Law Society of BC v. Chiang*, 2014 LSBC 55, para. 28; *Law Society of BC v. Foo*, 2015 LSBC 34, paras. 9-12; *Law Society of BC v. Vlug*, 2016 LSBC 58, paras. 13-14.

[33] There has arguably been some debate as to the precise parameters of the standard of review described in the preceding paragraph (see, e.g., *Law Society of BC v. McLean*, 2016 LSBC 10, paras. 50-54; *Law Society of BC v. Lessing*, 2013 LSBC 29, paras. 44-47). However, for the purposes of this review we find it unnecessary to weigh in on the debate. For the reasons that follow, we have concluded that in combining both a suspension and a fine the hearing panel: (a) applied incorrect legal principles; (b) provided inadequate reasons and denied the parties fair process; and (c) imposed a disciplinary action that was neither justified on the facts nor within the range of outcomes seen in comparable cases.

General principles: suspension and/or fines

[34] Section 38(5) of the *Legal Profession Act* provides a hearing panel with a number of options in imposing a disciplinary action following a determination that a lawyer has committed professional misconduct, including but not limited to a reprimand, a fine, conditions or limitations on the lawyer's practice, suspension from practice, and disbarment. In addition, s. 38(7) provides the panel with the power to make any further orders and declarations and impose any conditions it considers appropriate.

[35] The language of s. 38(5) expressly provides that the panel may impose one or more of these disciplinary actions. It therefore cannot be said that the option of combining both a suspension *and* fine is never available.

[36] Still, the disciplinary action chosen, whether a single option from s. 38(5) or a combination of more than one of the options listed, must fulfill the two main purposes of the discipline process. The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes. See *Ogilvie*, paras. 9-10; *Lessing*, paras. 57-61.

[37] Sometimes, imposing more than one type of penalty will not promote the policies underlying the *Legal Profession Act*, because a single type of penalty is best suited for doing so, and imposing other penalties in addition will have no salutary effect in this regard. For instance, it is hard to envision circumstances where it would make sense to reprimand a lawyer for professional misconduct in addition to disbarring him or her from further practice.

[38] In most cases, a panel will consider whether the appropriate disciplinary action is a fine *or* a suspension, not both. The reason for this is that a fine and a suspension are usually viewed as lying at different points on a spectrum of seriousness in terms of the sanction imposed. To put it another way, these two types of penalty are generally seen to fall at different locations on an escalating range of restrictions or impositions that may be placed on a lawyer in order to achieve the goals of the disciplinary process.

[39] The leading decision in this regard is *Hordal*. There, the respondent lawyer had breached an undertaking and deliberately deceived opposing counsel. He had previously undergone a conduct review for similar behaviour. The disciplinary action imposed by the panel was a reprimand, a fine of $12,500 and a two-month suspension. The Law Society launched a review of the disciplinary action, arguing that the lawyer should receive a substantially higher suspension. The lawyer asserted that the fine, which equated to a loss of five months' income, had been properly employed by the panel to reduce what would otherwise have been the appropriate (and longer) suspension.

[40] The benchers on review rejected the lawyer's argument, stating:

> [54] We disagree. It is the view of the Benchers that there is significant difference in impact between a fine and a period of suspension. There is no useful purpose served in equating income foregone during a period of suspension with a similar amount in fine quantum. The two remedies, both available to Hearing Panels in penalty determinations, are dramatically different in import and impact. While the analogy is imperfect, it is worthy of consideration to compare the option of a fine versus a period of incarceration for a criminal offense. It is apparent that all offenders would choose the fine as the preferred option, particularly if that fine were calculated in some way as a function of the amount of income that the person would forego during a similar period of incarceration.
>
> [55] The imposition of a period of suspension upon a member who has professionally misconducted himself, is a significantly more severe

> penalty than is the imposition of a fine. In the particular circumstances of this member, it is acknowledged that a fine would have perhaps a greater impact due to the modesty of this member's income, but panels must not seek to balance fine and suspension on a dollar for dollar basis. Suspensions are reserved for the more serious demonstrations of misconduct, and the Benchers on this review are of the view that the conduct demonstrated on these facts is that type of misconduct which warrants a significant period of suspension.

[41] This view of the distinction between a fine and a suspension was endorsed in *Lessing*, para. 116, where the Benchers on review cited *Hordal* for the proposition that both fines and suspensions have financial consequences for a lawyer, but a suspension sends a stronger message of disapprobation.

[42] Accordingly, a suspension is the more severe sanction and is more suitable to address serious misconduct than is a fine. In this respect, it is important to remember that a suspension invariably represents a significant blight on a lawyer's reputation with the public, including potential clients, and seriously detracts from his or her professional standing with other lawyers and the judiciary. What is more, clients must be notified of the suspension, and in most cases arrangements must be made to have the practice maintained during the period in question. See *Law Society of BC v. Pham*, 2015 LSBC 14, para. 94; *Law Society of BC v. Sas*, 2016 LSBC 3, para. 43; *Law Society of BC v. Siebenga*, 2016 LSBC 44, para. 43; *Law Society of BC v. Braker*, 2007 LSBC 42, para. 19; *Law Society of BC v. Johnston*, 2013 LSBC 4, para. 18; *Lessing*, para. 114; *Law Society of BC v. McCormick*, 2015 LSBC 28, para. 20; *Law Society of BC v. Culos*, 2013 LSBC 19, para. 15.

[43] The distinction between a fine and a suspension and the view that they will most often represent alternative forms of sanction, with a suspension being appropriate in more serious cases of professional misconduct, is implicitly recognized in the often-cited decision of *Martin*.

[44] *Martin*, at para. 41, indicates that the salient factors in considering whether to suspend a lawyer, as opposed to imposing a fine, are: (a) whether the misconduct involved elements of dishonesty; (b) whether the misconduct involved repetitive acts of deceit or negligence; and (c) whether the misconduct arises from significant personal or professional conduct issues. See also *Law Society of BC v. Jessacher*, 2016 LSBC 11, para. 54; *Law Society of BC v. Perrick*, 2015 LSBC 42, para. 66; *Pham*, para. 62; *Law Society of BC v. Liggett*, 2012 LSBC 7, para. 14; *Law Society of BC v. Cranston*, 2011 LSBC 24, para. 85.

[45] Where consideration of the factors mentioned in *Martin* indicates that the misconduct is serious enough to warrant a suspension, imposing a fine in addition will often serve no practical purpose because it has been determined that a suspension is the appropriate means of protecting the public and promoting the lawyer's rehabilitation.

[46] This is not to say that the combination of a fine and a suspension will never be justified. However, imposing both types of penalty in a single case should be limited to instances where doing so can reasonably be seen as necessary to further the principles underlying the discipline process.

[47] As a final point, we note that, in the few cases that have come to our attention where a panel has imposed both a suspension and a fine and that determination has not been overturned on review, the issue of when it is appropriate to do so is not discussed and appears not to have been raised by the parties. See, for example, *Law Society of BC v. Strandberg*, 2001 LSBC 26; *Law Society of BC v. Spears*, 2006 LSBC 9.

The panel erred by failing to apply the principles properly bearing on whether to impose a suspension, a fine or both

[48] In our view, the hearing panel failed to correctly apply the general principles discussed above in the course of deciding that the proper penalty for the Applicant was a 60-day suspension *and* a $10,000 fine. This error in principle is comprised of two components.

[49] To begin with, the panel concluded that the suspension proposed by the Law Society was inadequate because "some members of the public may view a one-month suspension as something akin to a vacation regardless of the fact that the Respondent would be without income."

[50] The viewpoint taken by "some members of the public" is not a correct touchstone for determining the appropriateness of a penalty. On most topics, "some members of the public" can no doubt be found to support a wide variety of disparate views, including unreasonable ones. The appropriate question is whether imposing the proposed penalty will protect the public and maintain confidence in the legal profession.

[51] In determining whether the penalty will maintain confidence in the legal profession, a panel can properly consider the perspective of a reasonable member of the public fully informed of the circumstances and cognizant of the operation and goals of the administration of justice, including the role played by lawyers. A

panel should not, however, look to the viewpoint of "some members of the public" as a benchmark for assessing the appropriateness of a proposed disciplinary action.

[52] Applying the proper principle to this case, we conclude that a reasonable and informed member of the public would not equate a one-month suspension with an unpaid vacation. Rather, he or she would recognize that a suspension of almost any length is a serious penalty that results in significant adverse consequences for the lawyer, as described at paragraph 42 above. It is true that a reasonable and informed member of the public might in some instances view a one-month suspension as insufficient, given the severity of the misconduct and the circumstances of the lawyer, but that is not what the panel indicated in this case.

[53] The panel also appears to have misunderstood the import of the *Martin* decision, which is discussed at paragraphs 43-45 above. The panel relied on *Martin* as identifying the factors that should be assessed "when considering the penalty" in any given case. In fact, *Martin* sets out a particular grouping of factors that are to be considered in determining whether a suspension should be imposed. More particularly, the decisions we have considered employ the *Martin* factors to determine whether a suspension should be imposed *instead of* a fine.

[54] In the circumstances of this case, the panel's misapplication of the *Martin* decision may have led it to give insufficient weight to factors militating in the Applicant's favour in terms of whether both a suspension and a fine were required. This is so because *Martin*, in focusing on the discrete issue of whether a suspension should be imposed on the facts of a particular case, does not address the full range of factors that might be relevant in assessing whether other disciplinary measures should be imposed in addition to a suspension.

Errors in reasoning and process

[55] The error in application of the legal principles was contributed to and exacerbated by deficiencies in reasoning and process.

[56] The panel's reasoning was deficient in that both a suspension and a fine were imposed, yet nowhere did the panel explain the difference between the two types of penalty or give any indication as to why both sanctions were necessary to protect the public, maintain public confidence in the legal profession, and ensure the Applicant's rehabilitation.

[57] We are not suggesting that every step in a panel's reasoning must be expressly set out in its decision regarding disciplinary action. A panel's reasons need not verbalize each aspect of the reasoning process or set out every finding and

conclusion made. What is important is that the reasons indicate why the panel decided as it did when they are read as a whole in the context of the evidence, the arguments made by the parties and the history of how the hearing unfolded. See *R. v. REM*, 2008 SCC 51, at paras. 16-18, cited with approval in *Mohan v. Law Society of British Columbia*, 2013 BCCA 489, paras 36-37.

[58] As explained in paragraph 56, the panel's reasons do not meet this standard regarding the issue of whether both a suspension *and* a fine constituted the appropriate penalty in the circumstances of this case.

[59] The hearing panel also imposed the fine of $10,000 without any explanation as to how it determined the amount. In cases where fines are imposed, there is generally reference to other decisions from which a reasonable range of fines can be determined. From within that range, and based on a consideration of the *Ogilvie* factors, the appropriate fine is assessed. There is no analysis of this or any sort supporting the quantum of the fine.

[60] Furthermore, and as already noted, at the penalty phase of the hearing below the Law Society sought a suspension of one month and costs. The Applicant did not oppose this outcome. Obviously, at some juncture the panel became concerned that more than a suspension was required, and that a fine should be imposed as well. Yet it did not raise this concern with the parties. In these circumstances, and in light of the legal principles articulated above, the panel should not have imposed a suspension and a fine without first seeking submissions from the parties on the appropriateness of this combination and the quantum of fine, if any, to be imposed.

No deference owed to submissions of the Law Society

[61] As a final point, the hearing panel explained its decision to impose a penalty different from that suggested by the Law Society by noting that deference should be accorded the Law Society's submission regarding the appropriate disciplinary action only where the suggested outcome is fair and reasonable. The panel's precise words were as follows:

> [27] The Panel recognizes that a degree of deference is appropriately granted to the submissions of the Law Society on proposed disciplinary action. In considering those submissions, the Panel is alive to the remarks found in *Law Society of BC v. Rai*, 2011 LSBC 02. There, the panel observed that, in respect of submissions on proposed disciplinary action, one should ask the question, "is the submission 'fair and reasonable'?" Having considered the submissions, legal principles and evidence before

> us, the Panel has concluded that the Law Society's proposed disciplinary action of a one-month suspension and costs is not acceptable in the circumstances, given our obligation to protect the public interest.

[62] Although the panel's position in this regard had no effect on the outcome, no deference was owed to Law Society's submission regarding the appropriate penalty. The case cited by the panel, *Rai,* is concerned with a very different context, namely, a proposal made by *both* parties pursuant to Rule 4-30 after the lawyer has tendered a conditional admission of misconduct that has been accepted by the Discipline Committee. That was not the situation in this case.

The disciplinary action is not justified based on an application of the proper legal principles and does not fall within the range of outcomes imposed in comparable cases

[63] What flows from the errors in application of the legal principles, in reasoning and in process that we have identified? It could be argued that an error in application of legal principles does not justify a review board in substituting its own decision on penalty for that of the panel absent a reasonable basis for concluding that the error may have impacted the penalty imposed by the panel. See, for example, the approach taken in the criminal context in *R. v. Lacasse*, 2015 SCC 64, at para. 44.

[64] We need not decide whether this sort of approach should apply on a s. 47 review of a disciplinary action, for two reasons. First, we are satisfied that, but for its errors, the panel may well have decided not to impose a fine in addition to the 60-day suspension. Second, and in any event, a proper application of the relevant legal principles leads us to conclude that the imposition of a fine in addition to a 60-day suspension does not fall within the range of outcomes imposed for comparable incidents of misconduct committed by similarly situated lawyers.

[65] In this respect, the Applicant submits that the reasonable range of sanctions for intentionally misleading behaviour is a suspension of one to three months. She relies on *Chiang*, paras. 42-43, which also states that particularly egregious behaviour or repeated instances of misleading behaviour will warrant a suspension at the high end of this range.

[66] The Law Society submits that suspensions of more than three months may be ordered where intentionally misleading conduct is motivated by personal gain, citing *Law Society of BC v. Luk*, 2007 LSBC 13; *Law Society of BC v. Geronazzo*, 2006 LSBC 50; and *Law Society of BC v. Jamieson*, 1999 LSBC 11. The Law Society thus contends that the range starts at one month and can go higher than

three months. It does not, however, suggest that a suspension of more than three months is justified here, and as already noted, took the position before the hearing panel that a one-month suspension was appropriate.

[67] Of course, on review the Applicant does not seek to overturn the 60-day suspension, which we understand she has already served. We are in any event satisfied that a suspension of this length, plus costs, but not with an additional fine, fits within the range of outcomes imposed in comparable cases.

DECISION

[68] We conclude that the panel erred in application of legal principles and imposed an excessive penalty in fining the Applicant in addition to suspending her for 60 days. The appropriate disciplinary action is a 60-day suspension and costs only, and no fine. We therefore substitute this decision for that of the panel pursuant to s. 47(5)(b) of the *Legal Profession Act*.

COSTS

[69] No submissions on costs were made at the hearing of this matter. If they wish to do so, we therefore invite the parties to address this issue by written submissions within 30 days of the release of this decision.