

2016 LSBC 31  
Decision issued: September 2, 2016  
Oral reasons: June 9, 2016  
Citation issued: January 19, 2016

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**SUSAN MARGARET BEN-OLIEL**

**RESPONDENT**

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

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Hearing date: June 9, 2016

Panel: Lynal Doerksen, Chair  
Dennis Day, Public representative  
Carol Hickman, QC, Lawyer

Discipline Counsel: Carolyn S. Gulabsingh  
Counsel for the Respondent: Robert Cooper, QC

[1] An order was made at the conclusion of the hearing with a written decision to follow. This is the written decision.

**BACKGROUND**

[2] As a result of a complaint to the Law Society from a client of the Respondent, the Law Society began an investigation of the Respondent. As is normal procedure, the Law Society investigator advised the Respondent of the complaint and asked

for her reply and any information or explanation pertinent to the complaint. It is the duty of every lawyer to co-operate with an investigation by the Law Society and to reply promptly and meaningfully.

- [3] After several attempts over several weeks by the Law Society investigator to contact the Respondent, the Respondent contacted the Law Society and requested more time to respond to the complaint. The Respondent was granted more time but did not provide a response by the extended deadline and has not responded by the time the citation was issued or by the time of this hearing.

### **NON-ATTENDANCE BY THE RESPONDENT**

- [4] Before a hearing can commence, Rule 4-41 requires the hearing panel to determine whether the citation has been served in accordance with Rule 4-19. Although counsel for the Respondent was present at this hearing, he was without instructions, having lost contact with the Respondent. The Respondent was not in attendance.
- [5] Law Society counsel provided affidavit evidence that satisfies this Panel on a balance of probabilities that the Respondent has been served with a copy of the citation and a copy of the Notice of Hearing.
- [6] Rule 4-33 permits hearings to proceed with affidavit evidence (or an Agreed Statement of Facts or admissions under Rule 4-18) if the citation concerns, amongst other things, a failure to respond to a communication from the Law Society. As this was the case here, no *viva voce* evidence was called in this matter, and all the evidence submitted was in the form of an affidavit.
- [7] This Hearing Panel notes that, despite the Respondent's absence, the Law Society still bears the onus of proof and that the standard of proof is on a balance of probabilities.

### **FACTS**

- [8] The Law Society submitted an affidavit of Carolyn Anderson (Exhibit 3), a staff lawyer for the Law Society and someone familiar with the facts of this case. The affidavit sets out a timeline and the various correspondence between the Respondent and the Law Society with respect to the complaint and investigation.

#### **The complaint**

- [9] The timing of events is as follows:

- (a) On October 30, 2015 the Law Society received a complaint about the Respondent from TT, a client of the Respondent;
- (b) On November 4, 2015 Ms. Anderson attempted to contact the Respondent by telephone, but there was no answer, and Ms. Anderson was unable to leave a message as the Respondent's voicemail was full;
- (c) Another phone call was attempted on November 6, 2015 with the same result;
- (d) On November 6, 2015 Ms. Anderson attempted to contact the Respondent by email with a copy of the complaint attached. There was no reply to this email;
- (e) On November 13, 2015 Ms. Anderson sent a letter via regular mail and email asking the Respondent to respond to the complaint by December 4, 2015. The letter sets out certain questions for the Respondent to address;
- (f) Later that same day the Respondent replied by email and by phone acknowledging receipt of the email and promising to review the matter "without delay";
- (g) No further reply was received by the Law Society by the deadline of December 4, 2015;
- (h) On December 8, 2015 Ms. Anderson sent another letter to the Respondent via regular mail and email asking for a response by December 15, 2015 or the matter may be referred to the Chair of the Discipline Committee;
- (i) On December 16, 2015 a final letter was sent by Ms. Anderson to the Respondent via regular mail and email asking for a response by December 21, 2015 or the matter would be referred to the Chair of the Discipline Committee;
- (j) On December 16, 2015 the Respondent replied by email to the Law Society asking for a further extension to December 22, 2015. Ms. Anderson replied by email that the Respondent had already had six weeks to reply and that the date of December 21, 2015 was firm and a reply was expected by that date; and
- (k) No further reply has been received by the Law Society from the Respondent.

## LAW SOCIETY SUBMISSIONS

[10] The Law Society submits that the Respondent's failure to respond to the Law Society regarding the complaint of TT is professional misconduct. This Panel was referred to the oft-quoted phrase in *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171, where professional misconduct is defined: "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."

[11] Rule 7.1-1 of the *Code of Professional Conduct for BC* states that a lawyer must:

- (a) reply promptly and completely to any communication from the Society;
- (b) provide documents as required to the Law Society;
- (c) not improperly obstruct or delay Law Society investigations, audits and inquiries;
- (d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;
- (e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and
- (f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[12] Rule 3-5(7) states:

A lawyer must co-operate fully in an investigation under this division by all available means including, but not limited to, responding fully and substantively, in the form specified by the Executive Director

- (a) to the complaint, and
- (b) to all requests made by the Executive Director in the course of an investigation.

[13] Rule 3-5(8)(a) and (b) states:

When conducting an investigation of a complaint, the Executive Director may

- (a) require production of files, documents and other records for examination or copying,
- (b) require a lawyer to
  - (i) attend an interview,
  - (ii) answer questions and provide information relating to matters under investigation, or
  - (iii) cause an employee or agent of the lawyer to answer questions and provide information relating to the investigation,

[14] Rule 3-5(11) states:

A lawyer who is required to produce files, documents and other records, provide information or attend an interview under this rule must comply with the requirement

- (a) even if the information or files, documents and other records are privileged or confidential, and
- (b) as soon as practicable and, in any event, by the time and date set by the Executive Director.

[15] In the matter of *Law Society of BC v. Dobbin*, 1999 LSBC 27 at para. 25, the Benchers held:

... it is the decision of the Benchers that 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. ...

This principle has been followed in the following cases:

*Law Society of BC v. Cunningham*, 2007 LSBC 17;

*Law Society of BC v. Decore*, 2012 LSBC 17;

*Law Society of BC v. Marcotte*, 2010 LSBC 18;

*Law Society of BC v. Niemela*, 2012 LSBC 09; and

*Law Society of BC v. Buchan*, 2013 LSBC 08.

## **SUBMISSIONS OF THE RESPONDENT**

[16] No evidence was presented by the Respondent. However, her counsel did make oral submissions that, in his dealings with his client, he notes that she is having some personal difficulties. Although the explanation is not evidence and was not offered as a defence to the citation, it did provide some explanation. We appreciate counsel attending to this hearing even though he had lost contact with his client. Counsel's attendance was helpful to this Panel (and to his client) and is an example of what it means to be good counsel.

## **CONCLUSION**

[17] The documents and information requested of the Respondent by the Law Society are relevant and necessary to the Law Society investigation into the complaint by TT. The Respondent's silence since December 16, 2015 and continuing to the day of the hearing further confirms the "marked departure" of the Respondent's conduct.

[18] We are satisfied by the evidence before us, on a balance of probabilities, that there has been a persistent failure by the Respondent to respond to Law Society communications and this is *prima facie* evidence of professional misconduct. We therefore find that the Respondent has committed professional misconduct.

## **DISCIPLINARY ACTION**

[19] The Law Society seeks the following:

- (a) a fine in the amount of \$5,000;
- (b) costs in the amount of \$1,272.93; and
- (c) an order pursuant to s. 38(7) directing the Respondent to provide a complete and substantive response to the inquiries made in the Law Society's letters and emails to her dated November 6, 2015, November 13, 2015, December 8, 2015 and December 16, 2015 no later than June 30, 2016.

[20] The Law Society submits that the normal range of sanction is between \$2,000 and \$5,000. It seeks the higher range of \$5,000 as the Respondent has a professional

conduct record (the “PCR”) and the failure to respond continues to the date of this hearing. The PCR consists of a single conduct review in 2010 wherein the Respondent had misled a client because the Respondent was dealing with many stressful personal issues. The Law Society refers to the following cases, which are similar in nature:

- (a) *Buchan* – a \$3,000 fine was ordered as the respondent had a prior history of failing to respond to the Law Society and had a PCR. The respondent was also experiencing personal issues but did ultimately respond to the Law Society before the hearing;
- (b) *Niemela* – a \$5,000 fine was ordered as the respondent had a related PCR and the panel held that specific deterrence was required to curb the respondent’s behaviour;
- (c) *Marcotte* – a \$2,750 fine was ordered as the respondent had a prior related PCR and had not responded as of the hearing date; and
- (d) *Law Society of BC v. Jessacher*, 2015 LSBC 43 – a \$5,000 fine was ordered even though the respondent had an unrelated PCR, but her conduct of non-cooperation was clearly wilful and specific deterrence was required.

[21] Counsel for the Respondent submits that a lesser fine is appropriate given the Respondent’s current personal situation and this is not wilful conduct.

[22] With reference to the numerous factors set out in the case of *Law Society of BC v. Ogilvie*, 1999 LSBC 17, this Panel notes two aggravating factors: the Respondent has a PCR that appears to be similar in nature to the current complaint; and the Respondent’s misconduct continues to the date of this hearing.

[23] However, we do not find that this is a case in which specific deterrence is required. We will give some weight to the submissions of the Respondent’s counsel in that this conduct is not wilful, as was the case in *Jessacher* or *Niemela*. A fine of \$3,500 is appropriate and well within the range of cases of similar misconduct. We order the Respondent to pay a fine of \$3,500 by October 31, 2016.

[24] The Law Society provided details of the costs for this hearing consisting of the half-day tariff of \$1,000 plus the fees for the court reporter and other ancillary costs, and we so order costs of \$1,272.93 payable by October 31, 2016.

[25] The Law Society seeks an order pursuant to s. 38(7) that the Respondent provide a complete and substantive response to the inquiries made in the Law Society’s email

to her dated November 13, 2015, December 8, 2015 and December 16, 2015 by June 30, 2016. It was appropriate to make this order given the Respondent's non-compliance to the date of the hearing.