

2016 LSBC 30
Decision issued: September 2, 2016
Oral reasons on Facts and Determination: June 21, 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

SHIRLEY CHU

RESPONDENT

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

Hearing date: June 21, 2016

Panel: Elizabeth J. Rowbotham, Chair
Jasmin Z. Ahmad, Lawyer
Robert Smith, Public Representative

Counsel for the Law Society: Carolyn S. Gulabsingh

Counsel for the Respondent: Henry Wood, QC

BACKGROUND

- [1] This hearing concerns the obligation of lawyers to cooperate with the Law Society's investigation of complaints made against a lawyer and, in particular, to respond to communications from the Law Society concerning its investigations.
- [2] In April 2015, a lawyer (the "Complainant") made a complaint to the Law Society that the Respondent had breached an undertaking in respect of a real estate transaction (the "Complaint").

- [3] As part of its investigation, the Law Society requested that the Respondent provide a written response to the Complaint so that it could properly assess the Complaint.
- [4] The original citation authorized on January 14, 2016 and amended on April 26, 2016 sets out the sole allegation that the Respondent failed to promptly provide a full and substantive response to the Law Society's request for a written response to the Complaint.
- [5] It is alleged that the conduct set out in the citation constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act* (the "Act").

HEARING BACKGROUND

- [6] The Respondent admitted service of each of the original citation and the amended citation.
- [7] As the citation comprised only the allegation that the Respondent failed to respond to communications from the Law Society, this hearing proceeded pursuant to Rule 4-33 of the Law Society Rules (the "Rules"). Together, subrules (1) and (2) of that rule allow a respondent and discipline counsel to adduce evidence at the hearing by affidavit.
- [8] The Law Society relied on the affidavit of Karen Mok sworn March 16, 2016. Ms. Mok is the staff lawyer in the Professional Conduct Department of the Law Society who had conduct of the Complaint.
- [9] In her defence, the Respondent tendered, among other things, her letter dated June 16, 2016 addressed to the Law Society (the "Letter of Explanation") in which she summarized the circumstances relating to the underlying Complaint as well as the circumstances giving rise to her delay in responding to the Law Society's communications. The Respondent also gave oral evidence at the hearing on her own behalf.
- [10] During the course of the hearing, counsel for the Respondent advised the Panel that the Respondent admitted that her conduct in failing to promptly respond to the Law Society's communications constitutes professional misconduct. However, the parties did not agree on the disciplinary action to be imposed in respect of that misconduct.
- [11] At the conclusion of the hearing, the Panel considered the evidence and determined that the Respondent had committed professional misconduct with respect to the allegations made in the citation.
- [12] However, we reserved making a determination with respect to the disciplinary action or costs to be imposed as the result of our finding of professional misconduct.

[13] We have now made that determination, and the following are our reasons with respect to the facts and determination and disciplinary phases of this proceeding.

FACTS

[14] In April 2015, the Law Society received the Complaint, which alleged that the Respondent had breached an undertaking to provide the Complainant with a registrable option to purchase in respect of a real estate transaction.

[15] Over the course of the next seven months, the Law Society and the Respondent maintained communication by telephone in which the Respondent explained the circumstances that resulted in her failure to comply with the undertaking and the steps she was taking to rectify that breach.

[16] During that time, the Respondent also kept in contact with the Land Title Office in an attempt to have the option to purchase registered. She kept the Complainant informed of her attempts and provided him with several options to rectify the situation giving rise to the Complaint.

[17] However, by November 9, 2015, it appeared that there had been no progress in having the option to purchase registered. The Respondent was then still in breach of her undertaking.

[18] For the first time, on November 9, 2015, the Law Society provided the Respondent with a copy of the Complaint and sought a written response, by November 30, 2015, to allow it to “properly assess [the] complaint.”

[19] The Respondent testified that she had been out of town at the time the November 9, 2015 letter was delivered to her office and was not aware it had been delivered until receiving the next communication from the Law Society.

[20] By December 2, 2015, the Respondent had not provided any response to the Law Society’s November 9, 2015 request. By letter dated December 2, 2015, the Law Society reminded the Respondent of her obligation to reply promptly and completely to the Law Society and requested a response to the November 9, 2015 letter, including all requested material, by December 16, 2015. The December 2, 2015 letter also advised the Respondent that her failure to respond to the November 9, 2015 letter may be referred to the Chair of the Discipline Committee.

[21] On December 10, 2015, the Respondent emailed a legal assistant at the Law Society stating that she would respond to the Law Society’s request “next week.” When she did

not do so by December 17, 2015, Ms. Mok left the Respondent a voicemail message asking her to return the call. On December 18, 2015, the Respondent contacted the legal assistant and asked for an extension to respond to the Complaint. The legal assistant advised the Respondent that the Respondent would have to contact Ms. Mok on the next business day, December 21, 2015 regarding the extension request.

[22] Later that same day, December 18, 2015, the Respondent emailed the Law Society's legal assistant and advised as follows:

As I indicated in my telephone message, I am unable to fulfill my obligation to respond to you this week regarding the complaint. I was expecting to testify in a client matter Thursday and Friday last week. However, an issue arose in the trial, and I was unable to give my testimony until this week. I was original [sic] scheduled to testify for one day, but this grew to three days. I returned to my office about an hour ago, and there are a number of matters which require my urgent attention.

[23] On each of December 22 and December 24, 2015, Ms. Mok left voicemail messages with the Respondent asking her to return her calls. The Respondent did not do so.

[24] By letter dated December 24, 2015, the Law Society advised the Respondent as follows:

The Law Society Rules 2015 state that, when a lawyer fails to reply to the Law Society, the matter may be referred to the Discipline Committee or its Chair, pursuant to the summary hearing process. If your full response is not received by **January 7, 2016**, this matter will be referred to the Discipline Committee or its Chair with a recommendation that the Chair issue a citation for your failure to respond to Law Society correspondence. Details about the summary hearing process are set out in Rules 4-5 and 4-32(2) of the Law Society Rules 2015.

[25] The Respondent did not provide a written response to the Complaint, or otherwise reply to the Law Society's communication, by the January 7, 2016 deadline.

[26] The citation was subsequently authorized and issued on January 14 and January 19, 2016, respectively. The citation was originally scheduled to be heard on April 22, 2016.

[27] On April 19, 2016, the Respondent provided a substantive response to the Complaint, as requested in the November 9, December 2 and December 24, 2015 letters.

- [28] During the course of this hearing, counsel for the Law Society advised the Panel that the Law Society was satisfied that the response that the Respondent provided was complete and that no further information or documents were required from the Respondent.
- [29] Notwithstanding the Respondent's delivery of the response to the Law Society, the citation, as amended on April 26, 2016, proceeded for hearing before this Panel.
- [30] As noted, at the hearing, counsel for the Respondent advised the Panel that the Respondent accepted and admitted that her conduct was sufficient to make out a finding of professional misconduct.
- [31] The Respondent testified that her initial failure to respond to the Law Society's request was due to her immediate professional commitments to other clients including a three day attendance in trial and other matters.
- [32] However, overriding the immediate client issues were issues relating to an elderly woman who had been the Respondent's client for almost 20 years and for whom the Respondent had a tremendous amount of compassion. The details of the issues relating to that client are set out in detail in the Letter of Explanation, which describes a situation that was a source of daily concern for her over an extended period of time and, in her words, have been "extremely distressing" for her.
- [33] The Respondent described her failure to respond to the Law Society as being the result of her avoidance of addressing the ethical and moral issues that were raised in the unrelated matter as set out in the Letter of Explanation.
- [34] The Respondent testified that nothing she said in oral evidence nor anything that was contained in the Letter of Explanation was intended to excuse her conduct in failing to respond promptly to the Law Society's request. Rather, the Letter of Explanation was offered solely to provide the context of the issues that the Respondent was facing at or around the time that the Law Society's written request was made.

ISSUES

- [35] The substantive issues to be determined by this Panel are:
- (a) Does the Respondent's conduct in failing to provide substantive response to the Law Society's request concerning its investigation as set in its written communications of November 9, December 2, December 22 and its telephone

messages of December 22 and 24, 2015 constitute professional misconduct pursuant to section 38(4) of the Act;

- (b) If the Respondent's conduct does constitute professional misconduct, what is the appropriate disciplinary action to be imposed?

[36] The ancillary issue to be determined is whether a non-disclosure order should be granted in respect of certain portions of the exhibits and the transcript.

FACTS AND DETERMINATION

The law

[37] The well-settled 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 ..."
(*Law Society of BC v. Martin*, 2005 LSBC 16)

[38] It is also well settled that the onus is on the Law Society to prove that a respondent's conduct amounts to "professional misconduct." (*Law Society of BC v. Tak*, 2009 LSBC 25)

[39] The *Code of Professional Conduct for British Columbia* (the "Code") provides direction with respect to a lawyer's obligation to reply to communications from the Law Society and co-operate with its investigations involving the lawyer or a member of the lawyer's firm. Specifically, Rule 7.1-1 requires lawyers, among other things, to reply promptly and completely to any communication from the Law Society.

[40] The Rules also impose an obligation on a lawyer who is subject of an investigation to co-operate. 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.

[41] This Panel has considered the obligations imposed on a lawyer by the Code and the Rules to respond promptly and fully to and co-operate with the Law Society regarding an investigation. In *Law Society of BC v. Dobbin*, 1999 LSBC 27, [2000] LSDD No. 12, the Benchers noted at paragraph 20:

If the Law Society cannot count on prompt, candid, and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty.

[42] On that basis, the Benchers in *Dobbin* concluded at paragraph 25:

... [I]t 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. ...

[43] That principle has been applied in subsequent decisions including *Law Society of BC v. Cunningham*, 2007 LSBC 17, *Law Society of BC v. Decore*, 2012 LSBC 17, *Law Society of BC v. Malcolm*, 2012 LSBC 04, *Law Society of BC v. Marcotte*, 2010 LSBC 18, *Law Society of BC v. Niemela*, 2012 LSBC 9 and *Law Society of BC v. Buchan*, 2013 LSBC 08.

[44] The panels in each of those decisions concluded that the lawyer's failure to respond to Law Society communications did constitute professional misconduct.

Failure to respond

[45] The Law Society communications of November 9, December 2 and 24, 2015 setting out its request for a written response to the Complaint were clear. Furthermore, each of those letters clearly set out a specific deadline for providing a response. The latter two letters set out the potential consequences for the Respondent's failure to provide a response by those deadlines.

[46] Notwithstanding those clear communications from the Law Society, other than providing an explanation of her failure to respond promptly to the Law Society's request by the December 16, 2015 deadline, the Respondent failed to provide any substantive response to the Law Society's request by the deadlines imposed on her.

[47] Her failure to respond to the Law Society's request by the deadline imposed on her is "*prima facie* evidence of professional misconduct."

[48] In our view, the context in which the failure to respond took place and the subsequent delivery of her written response to the Law Society are factors to consider in the disciplinary action phase of these proceedings. They are not sufficient, however, to rebut the *prima facie* evidence of the misconduct as set out above.

[49] We conclude that the Respondent's failure to provide a substantive written response promptly to the Law Society's communications "disclose[s] a marked departure from the conduct the Law Society expects of its members... ."

[50] Accordingly, under section 38(4) of the Act, we determine that the Respondent has committed professional misconduct with respect to the allegations set out in the amended citation.

DISCIPLINARY ACTION

[51] Having concluded that the Respondent's conduct constituted professional misconduct, this Panel must determine the appropriate disciplinary action to be imposed as a result of that finding.

[52] The primary object of disciplinary proceedings is to fulfil the Law Society's mandate set out in section 3 of the Act "to uphold and protect the public interest in the administration of justice." It is neither the function nor the purpose of the hearing panel to punish anyone. (*Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3)

[53] With that object in mind, we have considered the collective factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, in our assessment of the appropriate penalty as follows:

Factors related to the misconduct

[54] A lawyer's failure to respond to the Law Society pursuing an investigation into his or her conduct is very serious. This failure or refusal to respond goes to the heart of the ability of the Law Society to regulate lawyers. As noted by the Benchers in *Dobbin*, without that ability, the Law Society will be unable to uphold and protect the public interest.

[55] Misconduct of the types set out in this citation is serious.

[56] However, it is notable that, for the seven months prior to the request for a written response, the Respondent fully co-operated with the Law Society and maintained open communications with it in respect of the Complaint. Her failure to respond promptly to the request for a written response was not a deliberate attempt to thwart the Law Society's investigation of the Complaint.

[57] It is also significant that, although three months after the Citation was issued, the Respondent did provide the Law Society with the response that it had requested.

[58] Both the Respondent's pre-November 2015 co-operation with the Law Society and the subsequent delivery of the response are mitigating factors.

Factors related to the Respondent

[59] The Respondent was called to the Bar in August 1985, has practised law for 30 years and had an unblemished professional conduct record.

[60] We found the Respondent to be a forthright witness on her own behalf. She presented her evidence in a thoughtful and considered manner and had clearly given consideration to her failure to respond promptly to the Law Society's request for her written response.

[61] We accept that the circumstances described in the Letter of Explanation were "extremely distressing" for the Respondent. While we are not of the view that those circumstances justify her failure to respond promptly to the Law Society's request, we accept that they were a significant contributing factor to her conduct.

[62] It is also significant that the Respondent has admitted that her failure to respond promptly to the Law Society's request constituted misconduct.

Range of Penalties in Similar Cases

[63] The penalties imposed in similar cases factor into a panel's determination on discipline. In this case, the Law Society referred the Panel to a number of fairly recent cases regarding failure to respond to the Law Society.

[64] However, as is almost always the case, none of the cases referred to by the Law Society are wholly identical to the matter that was before us. For example:

(a) In *Law Society of BC v. Niemela*, 2012 LSBC 09, the Respondent's professional conduct record included three significant notations all of which, in the panel's view, "reflect[ed] a pattern of delay and procrastination... ." The \$5,000 fine in that case reflected the conduct record and was "consistent with the concept of progressive discipline and specific deterrence";

(b) In *Law Society of BC v. Jessacher*, 2015 LSBC 43, after providing an initial response and attending an interview, the Respondent took the position that she would no longer co-operate with the Law Society and did not provide the responses she was asked to provide. She did not attend the summary hearing. She was fined \$5,000;

- (c) In *Law Society of BC v. Kruse*, 2002 LSBC 32, the citation contained an allegation that the respondent had breached an undertaking and an allegation that he had failed to respond to the Law Society. At the time of the hearing, the Respondent had not provided a substantive response to the Law Society's request and had ceased membership in the Law Society. Although the panel did not specifically refer to the respondent's professional conduct record, it noted that, if the respondent were still a lawyer at the time of the hearing, the panel would be inclined to suspend him and place restrictions on his return to practice. He was fined \$3,000; and
- (d) In *Law Society of BC v. Buchan*, 2013 LSBC 08, the respondent did not promptly reply to letters from the Law Society and referred to a variety of personal pressures that rendered her "almost incapable of responding appropriately to the Law Society." She did, however, provide a response approximately two months after the issuance of the citation and approximately two weeks prior to the hearing. The respondent's professional conduct record contained two previous records of issues that had arisen about her responsiveness to letters from the Law Society. She was fined \$3,000.

[65] In this case:

- (a) The Respondent did not have a professional conduct record;
- (b) Prior to the Law Society's request for a written response on November 9, 2015, the Respondent had fully co-operated with its investigation and maintained open communication with it;
- (c) The Respondent provided a response to the Law Society; and
- (d) The Respondent admitted that her conduct constituted professional misconduct.

[66] On the above analysis, and all of the relevant *Ogilvie* factors, we conclude that a fine of \$2,000 is appropriate in this matter.

COSTS

[67] Rule 5-11(1) allows a panel to order that an applicant or respondent pay the costs of a hearing and set a time for payment.

[68] Together, subrules (3) and (4) of Rule 5-11 require a panel have regard to the tariff of costs in calculating costs payable unless satisfied that it would be reasonable and appropriate to depart from the tariff.

[69] In the circumstances, the Respondent will pay the Law Society's costs of the hearing. We see no reason to depart from the tariff of costs in calculating costs.

[70] Counsel for the Law Society submitted a bill of costs prepared in accordance with the tariff. However, as she did not have the benefit of knowing how long the hearing would be at the time the bill of costs was prepared, it contemplated a full day of hearing. The hearing was held in less than 2 ½ hours.

[71] Accordingly, pursuant to Rule 5-11(6), we accept the bill of costs submitted by the Law Society, adjusted as follows:

(a) Item 24 reduced by half from \$2,000 to \$1,000; and

(b) Court reporter fees reduced by half from \$472.50 to \$236.25.

[72] The disbursement of \$40.54 for courier costs is allowed.

[73] Costs are assessed at \$1,276.79.

ORDER

[74] The Panel orders that, on or before October 31, 2016, the Respondent pay to the Law Society:

(a) a fine in the sum of \$2,000, and

(b) costs in the sum of \$1,276.79.

ORDER TO PROTECT CONFIDENTIAL AND PRIVILEGED INFORMATION

[75] At the conclusion of the hearing, the Law Society made an application for an order pursuant to Rule 5-8 (2) that portions of the exhibits entered in evidence and the transcript of this proceeding not be disclosed to the public. The Respondent supported that application.

[76] Openness and transparency are an important part of these disciplinary proceedings. Rule 5-8 (1) provides that every hearing is open to the public. Rule 5-9 permits any person to obtain a transcript of the hearing or a copy of an exhibit entered during a public portion of a hearing.

[77] However, the Rules also recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing. For example, a person's ability to obtain a copy of an exhibit is expressly subject to solicitor-client privilege. Rule 5-8(2) permits a panel to make an order that specific information not be disclosed in order to "protect the interests of any person."

[78] In this case, the evidence of the events giving rise to the Complaint and the evidence given in respect of the amended citation include information that is subject to solicitor client privilege, not only of the Respondent's clients but also of the Complainant's client.

[79] Furthermore, in response the allegations contained in the Amended Citation, the Respondent gave detailed evidence relating to an unrelated client and her personal and sensitive affairs.

[80] In our view, the interest of the Respondent's and the Complainant's clients and other third parties in maintaining the confidentiality of the information given in evidence outweighs the interests of a member of the public in obtaining that information.

[81] Accordingly, pursuant to the discretion afforded by Rule 5-8(2), we order that:

(a) Each of the exhibits entered in evidence and the transcript of this proceeding be redacted prior to being released to a member of the public so as not to disclose any of the following:

- i. any information that would identify any party not named as a party to this proceeding;
- ii. any information of a confidential nature; and
- iii. any information and documents that are subject to solicitor-client privilege; and

(b) Paragraph 1 of the citation and the amended citation be amended to replace the full name of the Complainant with his initials.