

2016 LSBC 35
Decision issued: October 4, 2016
Citation issued: July 20, 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

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

Hearing date: September 23, 2016

Panel: Phil Riddell, Chair
Carolynn Ryan, Public representative
Peter Warner, QC, Lawyer

Discipline Counsel: Carolyn Gulabsingh
No on appearing on behalf of the Respondent

INTRODUCTION

[1] Susan Margaret Ben-Oliel (the “Respondent”) is a practising lawyer and a member of the Law Society of British Columbia (the “Law Society”). The citation was authorized on July 18, 2016 and issued on July 20, 2016. The citation states:

1. You [the Respondent] failed to comply with an order made by a hearing panel on June 9, 2016, contrary to Rule 7.1-1(e) of the *Code of Professional Conduct for British Columbia*, by failing to provide by June 30, 2016 a complete and substantive response to the enquiries made by the Law Society’s letter to you dated November 13, December 8 and December 16, 2015.

2. This conduct constitutes professional misconduct or a breach of the Act or Rules pursuant to s. 38(4) of the *Legal Profession Act*.
- [2] This is a summary hearing conducted under Rule 4-33. It proceeded by way of affidavit evidence.
- [3] The Respondent did not appear at the hearing, and the hearing proceeded in her absence.
- [4] At the conclusion of the hearing the Panel found that the Respondent had committed professional misconduct in the manner set out in the citation. The Panel imposed a suspension, being the longer of two months consecutive to any suspension the Respondent has already been ordered to serve, or the date of her compliance with the Order of the hearing panel of June 9, 2016, and with an order for costs in the amount of \$1,258.09, with the costs being payable by October 31, 2016. We advised that our written reasons would follow, and these are our reasons.

NON-ATTENDANCE BY RESPONDENT

- [5] The hearing commenced at 9:30 am, and the Respondent did not appear. The panel stood the hearing down until 9:55 am to be sure that the Respondent had an opportunity to appear if she was just “late.” By 9:55 am the Respondent had still not appeared.
- [6] Section 42(2) of the *Legal Profession Act* permits a hearing panel to proceed in the absence of the Respondent. Section 42(2) requires that, to do so, the Panel must be satisfied that the Respondent was served with the Notice of Hearing.
- [7] The Respondent was served with a copy of the citation by email and courier on July 20, 2016, pursuant to Rule 4-19. Rule 10-1(6) and Rule 10-1(7) deem service on the Respondent on the day after delivery.
- [8] The Respondent was served by courier with the Notice of Hearing and other hearing materials on August 9, 2016.
- [9] On August 25, 2016 the Respondent was served with the materials that counsel for the Law Society intended to rely upon at this hearing.
- [10] The Respondent was advised that the hearing could proceed in her absence in the citation, in the Notice of Hearing, and in correspondence from the Law Society.

- [11] The Respondent sent an email to two staff at the Law Society at 7:30 am on the day of the hearing indicating that she was aware of the hearing.
- [12] In these circumstances, the Panel proceeded in the absence of the Respondent pursuant to s. 42(2) of the *Legal Profession Act*.

SERVICE OF CITATION

- [13] The Law Society served the Respondent with the citation on July 20, 2016. We find compliance with Rule 4-19.

PRINCIPLES

- [14] The Law Society bears the onus of proof on the balance of probabilities: *Law Society of BC v. Tak*, 2009 LSBC 25.
- [15] A lawyer has an obligation to comply with orders made under the *Legal Profession Act* and the Law Society Rules: (Rule 7.1-1 of the *Code of Professional Conduct for British Columbia*).
- [16] In *Law Society of BC v. Jessacher*, 2016 LSBC 11, the hearing panel found, and we agree, that:

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.

- [17] In determining if a respondent's conduct constitutes professional misconduct, the test was set out in *Law Society of BC v. Martin*, 2005 LSBC 16:

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.

FACTS

- [18] On June 9, 2016 a hearing panel made an Order that the Respondent "provide a complete and substantive response to the enquiries made in the Law Society's letters to her dated November 13, 2015, December 8, 2015 and December 16, 2015 by June 30, 2016" (the "Order"). The Order was served on the Respondent in the

manner ordered by the hearing panel and within time limits set out by the hearing panel.

[19] The Respondent did not provide a response of any sort to the Law Society by June 30, 2016.

DETERMINATION ON FACTS

[20] The Respondent has failed to comply with the Order of the hearing panel made June 9, 2016. There has been no explanation provided for the failure to comply.

[21] This is *prima facie* evidence of professional misconduct, and the Respondent has not provided any evidence, let alone evidence to the standard of a persuasive burden, to explain her failure to comply with the Order.

[22] The Respondent's conduct in failing to comply with the Order constitutes professional misconduct. The allegations as set out in the citation have been proved by the Law Society on the balance of probabilities.

DISCIPLINARY ACTION

[23] The purpose of the discipline process is not to punish or exact retribution; it is to discharge the Law Society's statutory obligation as set out in s. 3 of the *Legal Profession Act* to protect the public interests in the administration of justice: *Law Society of BC v. Hill*, 2011 LSBC 16.

[24] The factors in assessing a penalty are set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45. The *Ogilvie* factors that are relevant in this case are:

- (a) The nature and gravity of the conduct proven;
- (b) The previous character of the Respondent, including details of prior discipline;
- (c) Whether the Respondent has acknowledged the misconduct and taken steps to redress the wrong and the presence or absence of other mitigating factors;
- (d) The need for specific and general deterrence; and

- (e) The need to ensure the public's confidence in the integrity of the profession.

[25] The hearing panel in *Ogilvie* said at para. 9:

In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue to practice.

[26] The regulation of the legal profession in the public interest is the principal purpose of the Law Society. The effective regulation of the profession requires that members of the profession comply with the orders made by the Law Society. The failure to comply with an order of the Law Society made pursuant to the *Legal Profession Act* impacts upon the ability of the Law Society to regulate the profession in the public interest and undermines the public's confidence in the integrity of the profession. The breach of an order of a hearing panel requires a penalty that not only specifically deters the Respondent, but also provides a general deterrence to the profession as a whole. We find the Respondent's impugned conduct a grave case of profession misconduct.

[27] The Respondent has been a member of the Law Society since 1994. The Respondent's seniority in the profession is an aggravating factor.

[28] The Respondent has a Professional Conduct Record, as defined by Law Society Rules, which consists of:

- (a) Conduct Review conducted on May 26, 2010 when she misled a client about the status of a file and misled her employer when she was confronted. The conduct review subcommittee recommended that no further action be taken;
- (b) An administrative suspension from April 1, 2016 to May 5, 2016 for failing to report the completion of her 2015 Continuing Professional Development;
- (c) On June 9, 2016 a hearing panel found that the Respondent had committed professional misconduct with regard to a citation issued on January 19, 2016 for failing to provide a complete and substantive response to enquiries made by the Law Society. She was ordered to provide substantive responses to the Law Society enquiries, pay a fine in the amount of \$3,500 and costs in the amount of \$1,272.93. The hearing

panel made the Order, which the Respondent has been found to have breached; and

- (d) On September 1, 2016 a hearing panel found that the Respondent had committed professional misconduct with regard to a citation issued on June 24, 2016 for failing to provide a complete and substantive response to the Law Society with regard to two investigations. She was ordered to provide responses to the enquiries by September 6, 2016, ordered to pay costs of \$1,296.91 and was suspended from the practice of law for a period of four months commencing October 1, 2016.

[29] Her past conduct is an aggravating factor.

[30] The Respondent has not rectified the breach or acknowledged the breach of the Order. This is an aggravating factor.

[31] Counsel for the Law Society has provided several cases with regard to the range of disciplinary action that has been imposed in cases of breach of an order of a hearing panel. These cases are: *Jessacher*; *Law Society of BC v. Welder*, 2012 LSBC 18; *Law Society of BC v. Coutlee*, 2010 LSBC 27; and *Law Society of BC v. McLean*, 2015 LSBC 06. These cases provide a range of disciplinary action from fines to suspensions.

[32] The breach of an Order is a grave case of professional misconduct and requires the imposition of a suspension given the considerations from *Ogilvie* that are applicable in this case, in particular, the maintenance of public confidence in the integrity of the profession, the need for general and specific deterrence, the grave nature of the misconduct, and the Respondent's Professional Conduct Record. But for the fact that the hearing panel of September 1, 2016 imposed a four-month suspension commencing October 1, 2016, a longer suspension would have been imposed.

[33] The Respondent should serve a significant period of suspension, and she should not be allowed to practise law until she has complied with the Order. A suspension that ended upon the Respondent's compliance with the Order could allow her to avoid the suspension that her conduct deserves by her immediate compliance with the Order. It is for this reason that the Respondent will be suspended for two months, consecutive to any suspension the Respondent has been ordered to serve. If, at that time, she has not complied with the Order of the hearing panel of June 9, 2016, she will remain suspended until she does comply. We make that order pursuant to section 38(5)(d) of the *Legal Profession Act*.

COSTS

- [34] The Law Society seeks an order for costs in the amount \$1,258.09. This is composed of \$1,000 for a half-day hearing (Schedule 4 Tariff Item 24) and disbursements in the amount of \$258.09.
- [35] Rule 5-11 requires the Panel to award the tariff costs unless we are satisfied that we should depart from the tariff under Rule 5-11(4). *Law Society of BC v. Racette*, 2006 LSBC 29, sets out some of the factors to determine the reasonableness of an award for costs. Having considered those factors, we award the Law Society costs in the amount of \$1258.09. Given the lack of information regarding the Respondent's personal financial circumstances she will have until October 31, 2016 to pay the award of costs.