2016 LSBC 43
Decision issued: November 29, 2016
Citation issued: October 8, 2013

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a review hearing concerning

RONALD WAYNE PERRICK

APPLICANT

DECISION OF THE REVIEW BOARD

Review date:	September 15, 2016
Review Board:	Gregory Petrisor, Chair Jeff Campbell, QC, Bencher Gavin Hume, QC, Lawyer Dean Lawton, Bencher Laura Nashman, Public representative Lance Ollenberger, Public representative Sandra Weafer, Lawyer
Discipline Counsel:	Mark Bussanich
Appearing on his own behalf	Ronald W. Perrick

BACKGROUND

[1] Ronald Wayne Perrick (the "Applicant") has applied pursuant to s. 47 of the *Legal Profession Act* for a review of disciplinary action in which he was found to have committed professional misconduct contrary to s. 38(4) of the *Legal Profession Act* and suspended from practice for 30 days.

[2] On September 3, 2014, a hearing panel decided (2014 LSBC 39) that the Applicant had committed professional misconduct in two respects. The first finding of

misconduct related to his duty to provide legal services to his former client SM. The Applicant had represented SM in two personal injury claims. The hearing panel found that he had not kept his client informed about important developments in the litigation, had not filed necessary pleadings on her behalf, and had generally failed to advance her claim over a period of several years. The panel found that the cumulative effect of this conduct was a failure to serve his client in a conscientious, diligent and efficient manner, as required by Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook* (then in force).

[3] The second finding of professional misconduct arose from his failure to reply within a reasonable time to a number of communications from opposing counsel related to the same client, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook* (then in force).

[4] On September 8, 2015, the hearing panel issued its decision on disciplinary action (2015 LSBC 42), suspending the Applicant for a period of 30 days and ordering that he pay costs in the amount of $19,315.81.

[5] The Applicant has set out his grounds for review as follows:

(a) whether Bencher Herman Van Ommen, QC, Chair of the Discipline Committee at the time the Discipline Committee directed the citation, should have participated in the process when his wife was involved in litigation with the Applicant and the Applicant's wife, and when Mr. Van Ommen was involved in an earlier citation against the Applicant (this will be referred to as the "Conflict Issue");

(b) whether the hearing panel erred in the Facts and Determination Decision by ignoring the conduct of ICBC counsel, SM's subsequent counsel and SM herself related to the Applicant's representation of SM; and

(c) whether the Hearing panel erred in its findings in the Disciplinary Action Decision and in ordering that the Applicant be suspended for 30 days.

THE DECISION ON FACTS AND DETERMINATION

[6] The hearing panel heard from several witnesses over the course of three days, including the Applicant. After the Law Society closed its case, the Applicant advised that he was prepared to make certain admissions. The Applicant then admitted to all but two of the allegations of failing to provide conscientious service to the client. The Applicant also admitted that he failed to respond promptly to all

but two of the letters listed in the citation. The Law Society agreed to withdraw the few remaining allegations that the Applicant did not admit.

[7] Specifically, the Applicant admitted that he failed to:

(a) keep the client reasonably informed by providing her with copies of material correspondence about the accidents or inform her about that correspondence;

(b) disclose to the client the service of a Demand for Discovery of Documents dated December 14, 2004 and her obligations pursuant to that Demand;

(c) disclose to the client that a mediation had been scheduled for September 19, 2008 until after the mediation was cancelled;

(d) disclose promptly to the client that opposing counsel was seeking to have the claims dismissed and adequately explain to her the chances of that occurring;

(e) provide the client with copies of application materials provided by opposing counsel in February 2009 and July 2009 seeking to dismiss her claims;

(f) promptly file a Statement of Claim in respect of the April 9, 2002 accident as required by the Supreme Court Rules;

(g) promptly file a Statement of Claim in respect of the December 2, 2004 accident as required by the Supreme Court Rules; and

(h) take substantive steps, promptly or at all, to advance the client's claims to settlement or trial.

[8] The Applicant also admitted that, in the course of representing SM, he failed to reply reasonably promptly to letters from opposing counsel dated December 14, 2004; March 3, 2005; April 5, 2005; May 13, 2005; October 14, 2005; December 8, 2005; September 26, 2006; and February 6, 2007, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook* (then in force).

[9] The Applicant further admitted that each of these two general patterns of conduct constituted professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.

[10] Notwithstanding the Applicant's admissions, the hearing panel issued detailed reasons in its decision on Facts and Determination considering whether the evidence was sufficient to meet the legal test for professional misconduct. The panel considered that professional misconduct contrary to s. 38(4) of the *Legal Profession Act* requires a "marked departure" from the conduct that the Law Society expects of its members. The panel concluded that the numerous acts and omissions over the course of the litigation went beyond mere negligence to amount to gross neglect of duty. The panel concluded that there was professional misconduct with respect to both the quality of service and the failure to respond to communications from opposing counsel.

STANDARD OF REVIEW – DECISION ON FACTS AND DETERMINATION

[11] Section 47(5) of the *Legal Profession Act* provides that a review board may either confirm the decision of the hearing panel or substitute any other decision that the panel could have made under the *Act*.

[12] The standard of review for the decision on Facts and Determination is correctness. The review board must determine whether the decision of the hearing panel was correct. If the decision is found to be incorrect, the review board is to substitute its own decision: *Law Society of BC v. Hordal*, 2004 LSBC 36 at paras. 8-10; *Law Society of BC v. Goldberg*, 2007 LSBC 55 at para. 8; *Re Lawyer 12*, 2011 LSBC 35 at para. 3.

[13] While the standard of review for the hearing panel's finding of professional misconduct is correctness, this Review Board should generally defer to findings of fact. The hearing panel had the advantage of hearing *viva voce* evidence and was in a better position to assess the evidence. Accordingly, any factual findings are deferred to unless there is a clear and palpable error: *Hordal* at para. 12; *Law Society of BC v. Berge*, 2007 LSBC 07 at para. 21.

THE APPLICANT'S ATTEMPT TO WITHDRAW ADMISSIONS

[14] At the hearing before this Review Board, the Applicant (who is self-represented) made submissions in which he appeared to retreat from the admissions that he had made before the hearing panel. One of the Review Board members questioned the Applicant about whether he was attempting to resile from the admissions. The hearing was then adjourned briefly so that the Applicant could consider his position. When the hearing resumed, the Applicant stated that he wished to withdraw the admissions. He said that he would not have made the admissions if

he had known that the hearing would result in a suspension. He also suggested that the admissions were not consistent with the evidence. Counsel for the Law Society was opposed to the suggestion that the admissions made before the hearing panel could be withdrawn. Following further submissions, the Respondent advised that he was not seeking to withdraw the admissions. The hearing continued.

[15] After the completion of the hearing, the Applicant sent a letter dated September 20, 2016, to the Law Society stating the following:

> Notwithstanding the discussion and how it ended I wish to hereby confirm it was my intention to withdraw those admissions when I filed my Notice of Review, particularly paragraph 2, and that remains my position today.

[16] The Notice of Review does not provide any indication that the Applicant was seeking to withdraw admissions. The Notice of Review does not refer to the admissions at all. Further, the Applicant did not file any application or provide any notice prior to the hearing to either the Law Society or the Review Board that he was seeking to withdraw admissions.

[17] The admissions before the hearing panel were agreed to on the third day of the hearing. The former client SM and other witnesses had testified. The Law Society had closed its case. During the Applicant's testimony, he advised the hearing panel that he was prepared to make admissions. The hearing was adjourned in order to provide an opportunity for the Applicant to discuss admissions with counsel for the Law Society. After the adjournment, the Applicant admitted to most of the allegations set out in the citation. Other allegations were withdrawn by the Law Society on the basis that the evidence either did not support the allegation or the Applicant did not agree with them. The Applicant and counsel for the Law Society presented the admissions to the hearing panel, including the Applicant's admission that the conduct amounted to professional misconduct. The Applicant confirmed the admissions on the record. The hearing panel Chair discussed the import of making admissions with the Respondent:

> ... an admission is an admission … if you admit something, you admit it … if you're going through the citation with counsel, if you can't admit all of them sort of unqualified, then it is not an admission.

[18] The Applicant was clear and unequivocal in his agreement to the admissions that were presented to the hearing panel.

[19] We note that the admissions in this case were agreed to after the Law Society had presented extensive testimonial and documentary evidence. The admissions

occurred near the conclusion of the hearing, during the Applicant's testimony. Accordingly, the hearing panel had the benefit of extensive evidence, and did not rely solely on the Applicant's admissions in assessing the evidence. In the decision on Facts and Determination, the hearing panel considered the admissions along with other evidence in terms of whether they were satisfied that the evidence established professional misconduct. The hearing panel did not treat the Applicant's admissions as determinative, but rather considered the evidence as a whole in reaching the conclusion that professional misconduct was proven.

[20] The Law Society Rules set out a process for making admissions of fact, prior to a hearing. Pursuant to Rule 4-28 (Rule 4-20.1 at the time of the hearing), either party may request admissions not less than 45 days before the hearing. The other party has 21 days to respond. In this case, counsel for the Law Society had sent a Notice to Admit to the Applicant pursuant to Rule 4-28. The Applicant admitted certain facts as proven (such as service of the citation and the Applicant's date of call), but the admissions pursuant to Rule 4-28 were limited.

[21] The Law Society Rules also set out a process for the withdrawal of Rule 4-28 admissions. A party who wishes to withdraw an admission of fact under that rule after a hearing has commenced must apply under Rule 4-28(9) for leave from the hearing panel:

> (9) A party who has admitted or is deemed to have admitted the truth of a fact or the authenticity of a document under this rule may withdraw the admission with the consent of the other party or with leave granted on an application
>
> (a) before the hearing has begun, under Rule 4-36 *[Preliminary questions]* or 4-38 *[Pre-hearing conference]*, or
>
> (b) after the hearing has begun, to the hearing panel.

[22] There is no express authority in the Law Society Rules for a party to apply to withdraw Rule 4-28 admissions within the context of a section 47 review hearing.

[23] The admissions at issue in this case, however, are not pre-hearing admissions that were agreed to pursuant to Rule 4-28. The admissions were made by the Applicant before the hearing panel in the course of the hearing. The hearing panel had heard extensive evidence by that point, including *viva voce* and documentary evidence that supported the allegations that were admitted to by the Applicant. The Applicant did not attempt to lead evidence contradicting or even responding to most of the allegations in the citation.

[24] That hearing in this case concluded in June, 2014, over two years before the Applicant raised any concerns about the integrity of the admissions. There has been no proper application to withdraw admissions, either at the initial hearing or at this section 47 review hearing.

[25] Admissions cannot be simply retracted at will. As is the case with pre-hearing admissions pursuant to Rule 4-28, the unilateral withdrawal of admissions made by a party during a hearing would require leave of the hearing panel. We accept that there may be circumstances where the interests of justice require that a hearing panel permit the withdrawal of admissions. A hearing panel is empowered to control its own process to protect the fairness of the proceedings. It is our view, however, that the discretion to permit the withdrawal of admissions would be exercised only in limited circumstances. This may include circumstances where there has been a genuine mistake or where the factual record is clearly contrary to the admissions. As set out in our analysis of the second ground of appeal below, we do not accept that the evidence in this case is contrary to the admissions. It is our view that the evidence in this case firmly supports the admissions.

[26] Further, an application to withdraw admissions made after the initial hearing has concluded or in the context of a section 47 review hearing would require exceptional circumstances that are simply not present here. Regrets about tactical decisions made at the initial hearing do not qualify as appropriate circumstances that would support an application to withdraw admissions. There has been no information put before the Review Board that would support the extraordinary result of permitting the withdrawal of admissions at this stage of the proceedings.

[27] Accordingly, in this Review we will consider all of the evidence in the record as required by section 47 of the *Legal Profession Act*, including the admissions.

CONFLICT OF INTEREST ISSUE

[28] The Applicant's first ground of review is that one of the Benchers involved in authorizing the citation was in an alleged conflict of interest.

[29] We have reviewed the transcripts of the proceedings before the hearing panel. The Applicant did not elicit any evidence with respect to any alleged conflict of interest. During the hearing on June 17, 2014, there was some reference to Mr. Van Ommen in the Applicant's examination-in-chief of a Law Society staff lawyer who was involved in the investigation of the Applicant. The witness was asked whether Mr. Van Ommen chaired the discipline meeting at which the Applicant's conduct was

reviewed. The question was not answered and there was no comment or discussion as to why it was asked.

[30] On June 18, 2014, the Applicant testified on his own behalf at the hearing. There was no mention in his evidence of Mr. Van Ommen, although the Applicant discussed the litigation in which it appears that Mr. Van Ommen's wife's law firm was involved.

[31] Subsequent to the decision on Facts and Determination, a hearing was held for the purpose of determining the penalty to be imposed. After some delay in order to accommodate the Applicant's schedule, the hearing began on April 28, 2015. On that day, the Applicant provided sworn testimony but also applied to adjourn the hearing. The hearing panel granted the application but decided to hear submissions from the Law Society before adjourning to allow the Applicant to present further evidence and submissions. A review of the transcript indicates that there was no reference to the Conflict Issue during the hearing on April 28, 2015, either during submissions or when the Applicant gave evidence. Although he did not raise it at the hearing, the Applicant had sent an email on April 27, 2015 to the Law Society asking, amongst other things, who was at the Discipline Committee meeting when the citation against him was authorized. The information was provided to him on that date. The minutes of the September 26, 2013 Discipline Committee meeting authorizing the citation indicate that Mr. Van Ommen was present. These emails were not before the hearing panel but the Applicant has provided them to the Review Board.

[32] The hearing on disciplinary action continued on July 6, 2015. With the exception of a peripheral reference during the Applicant's oral argument, there was no submission with respect to any alleged conflict arising as a result of Mr. Van Ommen chairing the Discipline Committee meeting that led to the issuance of the citation.

[33] The peripheral reference was as follows:

> All I was doing was protecting the deal. There was a 20 million potential, there was 5.75, there was other property, square footage. Mr. Van Ommen's law firm phoned me and said who is the signing authority? I phoned them and they said we don't have one. I thought they did. Anyway – incidentally, we talked about conflicts of interest and Mr. Van Ommen acted for C Co., C Co. sold to O Co., he acted for O Co. I filed a *lis pendens*, we were making a court application and he and I were dealing with that and he was sitting on the disciplinary – he was chair of the

> disciplinary panel when the citation was issued. I think he's covering some ground there.

[34] In the Notice of Review, the Applicant questions whether Mr. Van Ommen should have participated in the Discipline Committee meeting that resulted in the citation in these proceedings. The Applicant framed the issue as whether Mr. Van Ommen should have participated in the decision when his wife was involved as counsel in litigation with the Applicant and his wife, and when Mr. Van Ommen had participated in a previous citation issued against the Applicant (which resulted in *Law Society of BC v. Perrick*, 2014 LSBC 03 and *Law Society of BC v. Perrick*, 2014 LSBC 25, which are also under review). The material provided to this Review Board indicates that Mr. Van Ommen was not involved in the issuance of the previous citation as he had recused himself. He was Chair at the meeting that resulted in the citation that ultimately led to this review.

[35] The Applicant's submission on this point essentially consisted of the Notice of Review where he raised the issue of Mr. Van Ommen's involvement and a reference in his written submission to the email exchange on April 27, 2015 described in paragraph 30 above. He did not meaningfully address the Conflict Issue in oral submissions at this hearing, despite having received the written submission of the Law Society prior to the commencement of the Review hearing, which raised a number of objections to the Conflict Issue as a ground of review.

[36] The Law Society submitted the following in its written submission:

(a) The Applicant is barred from raising the Conflict Issue. He presented no evidence to the hearing panel on the issue. He made no submissions to the hearing panel on the issue at the facts and determination stage.

(b) The Applicant has made no application to adduce fresh evidence on review. If he does, the Law Society does not consent to the admission of any fresh evidence.

(c) Even if the Applicant makes an application to adduce fresh evidence, the application must fail on the application of the law.

[37] Section 47 of the *Legal Profession Act* provides that "… the ... respondent may apply in writing for a review *on the record* by a review board" [emphasis added].

[38] Rule 5-23 of the Law Society Rules defines the record for the purpose of a review. It reads as follows:

(1) Unless counsel for the respondent and for the Society agree otherwise, the record for a review of a discipline decision consists of the following:

(a) the citation;

(b) a transcript of the proceedings before the panel;

(c) exhibits admitted in evidence by the panel;

(d) any written arguments or submissions received by the panel;

(e) the panel's written reasons for any decision; the notice of review;

(f) the notice of review.

[39] As set out above, the Conflict Issue was not raised in any aspect of the hearing before the hearing panel. There was no evidence before the hearing panel with respect to the composition of the Discipline Committee at the time that the citation in this matter was authorized. The Applicant questioned a Law Society staff witness about Mr. Van Ommen's participation in the citation, but the question was not answered or pursued. There was a passing reference to Mr. Van Ommen in the Applicant's argument. However, that reference cannot be considered an objection or a motion by the Applicant on the basis of an alleged conflict of interest. At no time did the Applicant even make a submission that Mr. Van Ommen should not have been involved in the Discipline Committee meeting that led to the issuance of the citation. There was no evidence regarding the role, if any, of Mr. Van Ommen's wife in any litigation involving the Applicant. We agree with the submission of the Law Society that the alleged conflict was not an issue raised before the hearing panel. There was no basis for the hearing panel to consider any alleged conflict of interest, as it was not raised by the Applicant.

[40] Section 47(4) of the *Legal Profession Act* and Rule 5-23 (2) of the Law Society Rules provide that if, in the opinion of the review board, there are special circumstances, the review board may admit evidence that is not part of the record.

[41] As set out above, the Applicant first raised the Conflict Issue in his Notice of Review. The Review Board was provided with the email exchange of April 27, 2015. However, there was no application to adduce this or any other evidence with respect to the Conflict Issue. The test to be applied with respect an application to introduce fresh evidence was first discussed in *Law Society of BC v. Kierans*, 2001 LSBC 6, [2001] LSDD No. 22. The panel had the following to say about the introduction of new evidence:

[13] The leading authority on the exercise by an appellate court of its discretion under the provisions of the *Criminal Code* to admit fresh evidence is *Palmer v. The Queen*, [1980] 1 SCR 759, in which the Supreme Court of Canada established the following tests:

> The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
>
> The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[14] In a civil context, the test is established by the Court of Appeal decisions in *Cory v. Marsh* (1993), 77 BCLR (2d) 248 and *Appel (Public Trustee of) v. Dominion of Canada General Insurance Co*. (1997) 39 BCLR (3d) 113 (CA), as being:

> That the evidence was not discoverable by reasonable diligence before the end of the trial;
>
> That the evidence is wholly credible;
>
> That the evidence will be practically conclusive of an issue before the court.

[42] The panel in *Kierans*, after adopting the test set out in *Palmer*, noted at para. 25 that, if the proffered evidence fails to meet any of elements of the *Palmer* test, it cannot be admitted. The *Kierans* decision was followed in *Law Society of BC .v Golberg*, 2007 LSBC 55, and *Law Society of BC v. Vlug*, 2015 LSBC 59.

[43] The grounds upon which fresh evidence can be admitted were discussed in some detail in *R v. Dunbar, Pollard, Leiding and Kravit*, 2003 BCCA 667. The British Columbia Court of Appeal clarified that the *Palmer* test may be modified where the new evidence is offered to challenge the integrity of the trial process. In that instance, the due diligence test is relaxed. The question becomes whether or not a miscarriage of justice has occurred, though the evidence must meet the generally applicable rules of evidence.

[44] There has been no application to this Review Board to adduce any new evidence. As a result, there is nothing before the Review Board upon which it could determine whether there are special circumstances that would support the admission of fresh evidence. Based on the material that the Applicant has put before the Review Board, it appears that, if there had been an application to adduce fresh evidence, it would have been dismissed in any event. Clearly the Applicant was aware of the role of Mr. Van Ommen in the Discipline Committee meeting giving rise to the citation and could have raised the matter before the hearing panel. He did not do that.

[45] In view of the failure to adduce appropriate evidence before the hearing panel, the failure to make an application to introduce new evidence before this Review Board, and our conclusion that the evidence that has been identified does not meet the appropriate standard for admission, this ground of review is dismissed.

WHETHER THE HEARING PANEL ERRED IN THE DECISION ON FACTS AND DETERMINATION

[46] The second ground of review relates to the decision on Facts and Determination, and whether the hearing panel erred by failing to consider certain evidence. As we understand it, the Applicant's position is that, notwithstanding that he admitted to several specific allegations and that his behaviour constituted professional misconduct, he is now taking the position that the evidence at the hearing did not support the allegations in the citation or establish professional misconduct. It is in this context that he wished to "withdraw" the admissions.

[47] The Applicant referred the Review Board to lengthy excerpts from the transcripts of the proceedings before the hearing panel. Much of this evidence has little or no relevance to the allegations in the citation and the question of whether the conduct amounts to professional misconduct.

[48] For example, the Applicant referred us to evidence related to the following issues that he had raised before the hearing panel:

(a) an allegation that SM swore a false affidavit in her subsequent legal action against the Applicant with respect to whether she was working full-time at the time of the accident;

(b) opposing counsel in the personal injury matter filed a Statement of Defence before a Statement of Claim was issued;

(c) the Applicant had handled another legal matter on behalf of one of SM's relatives to their satisfaction; and

(d) during the time period that he represented SM, the Applicant was pre-occupied with a number of other litigation matters in which he was a party.

[49] These are examples of matters that the Applicant has asked that we take into account in this review. We have reviewed this evidence but find that much of it has little or no probative value to the specific allegations in the citation or the issues to be determined on this review.

[50] We accept that at least some of the evidence that the Applicant has cited is arguably relevant to allegations in the citation. An example is evidence that the Applicant made certain efforts in 2010 to pursue settlement funds on behalf of SM. This may be considered relevant to the question of whether the Applicant had failed to take steps to advance the claim, as alleged by the citation. Further, the Applicant has referred us to his testimony that when he first accepted the retainer, he believed that it was a limited retainer where he was to allow the client to continue to deal with the adjuster directly. There was no written retainer. We accept that the scope of this unusual solicitor-client relationship was relevant to whether the Applicant had failed in his duties to provide services to his client. However, the hearing panel did consider that the solicitor-client relationship in this case involved a limited retainer or "unbundled" legal services. The hearing panel nonetheless found that the services provided (which included failing to disclose to the client critical events and obligations related to the litigation) was a marked departure from the quality of service that was required in the circumstances.

[51] The evidence to which the Applicant has referred does not undermine the general conclusion reached by the hearing panel that the Applicant did not serve his client in a conscientious, diligent and efficient manner equal to that expected of a competent lawyer in similar circumstances.

[52] The findings of the hearing panel were firmly supported by the evidence. The Applicant was retained by the client in two civil actions arising from motor vehicle accidents. He represented the client for a period of approximately seven years, during which time he failed to file pleadings within a reasonable time, although he was requested to do so by opposing counsel on a number of occasions. He failed to tell his client about critical developments in the litigation. For a number of years, there was little or no action taken to advance the claims to a timely resolution. He failed to keep his client informed or respond to her inquiries. He failed to respond

to important correspondence from opposing counsel. This eventually led to opposing counsel making applications to have the claims dismissed.

[53] The duty to provide competent services was set out in the *Professional Conduct Handbook* (then in force) in Chapter 3, Rule 3. It required that a lawyer serve each client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. The Rule specifically identified the following duties:

> (a) keeps the client reasonably informed,
>
> (b) answers reasonable requests from the client for information,
>
> (c) responds, when necessary, to the client's telephone call,
>
> ...
>
> (f) answers within a reasonable time a communication that requires a reply,
>
> (g) does the work in a prompt manner so that its value to the client is not diminished or lost,
>
> (h) prepares documents and performs legal tasks accurately.

[54] These duties continue to operate in Chapter 3.2 of the current *Code of Professional Conduct*. They represent the fundamental level of service that is expected of a lawyer.

[55] The hearing panel found that the conduct in this case was not simply a breach of the rules, but cumulatively amounted to professional misconduct contrary to s. 38(4) of the *Legal Profession Act*.

[56] Professional misconduct is established where there is a marked departure from conduct that is expected of members of the legal profession. It has been described as gross culpable neglect of a lawyer's duties: *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 15.

[57] The Applicant's conduct in this case went far beyond a single isolated act of negligence. It involved a lengthy pattern of disregard for the client, opposing counsel and the legal matter with which he was entrusted. It is our view that the cumulative conduct of the Applicant involved gross neglect of his duties. It was a marked departure from the conduct that is expected of lawyers.

[58] It is our view that the findings of the hearing panel in the decision on Facts and Determination were correct and should be confirmed on this review.

THE DECISION ON DISCIPLINARY ACTION

[59] The third ground of review is that the hearing panel erred in its decision on Disciplinary Action and in suspending the Applicant for a period of 30 days. In particular, the Applicant submits that the hearing panel erred in its consideration of his professional conduct record. The Applicant's professional conduct record included a 1993 conduct review involving a conflict of interest, which the panel did not consider should attract much weight. However, the panel placed significant weight on a more recent disciplinary action involving the Applicant.

[60] In *Law Society of BC v. Perrick*, 2014 LSBC 03, the Applicant was found to have committed professional misconduct. This included:

(a) improper use of an expired power of attorney;

(b) back-dating an assignment of shares to a date prior to the death of the parents of a client;

(c) failure to respond to communications from another lawyer;

(d) three allegations of failure to provide quality of service; and

(e) five incidents of breach of rules.

[61] The Applicant focused this ground of review on the hearing panel's consideration of the prior record. The Applicant submits that his recent disciplinary record should not have been considered by the hearing panel, as he had filed for a review of that matter pursuant to section 47 of the *Legal Profession Act*. The section 47 review of that matter had not yet been decided at the time of the hearing panel's decision on penalty. It has not yet been decided at the time of this review.

[62] We consider the issue of whether it is appropriate to consider a professional conduct record when the prior decision is under review to be a question of law. The standard of review for questions of law is correctness: *Kay v. Law Society of BC*, 2015 BCCA 303 at para. 41.

[63] Rule 4-44(5) of the Law Society Rules (Rule 4-35(4) at the time of the hearing) states that a panel may consider any professional conduct record in determining a disciplinary penalty. "Professional conduct record" is a defined term under the

Law Society Rules. The definition includes an action taken under s. 38(5), (6) and (7) of the *Legal Profession Act*, which sets out the findings and penalties that may be ordered by a hearing panel in disciplinary action.

[64] A hearing panel constituted to consider disciplinary action against a lawyer is required to make a decision pursuant to section 38 of the *Legal Profession Act*. The decision may be the subject of a review pursuant to section 47 of the *Act*, or an appeal to the Court pursuant to section 48 of the *Act*. Although a decision may be reviewed or appealed, it is in force from the time that the decision is rendered. It is presumed to be valid, unless it is subsequently overturned by a review board or on appeal. The mere fact that a review is pending does not affect the validity of a decision or make an otherwise admissible record inadmissible.

[65] Although the Applicant had applied for a review of the earlier disciplinary decision, there has been no finding by any reviewing authority that the decision is incorrect or otherwise in error. At the time of this hearing, well over a year following the initial hearing, the prior record continues to remain in force.

[66] The consideration of a prior record despite a pending review finds support in other legal contexts. In the context of criminal law, a majority of the Supreme Court of Canada held in *Hewson v. The Queen*, [1979] 2 SCR 82 at p. 102, that a prior conviction should be considered in subsequent proceedings notwithstanding that the prior conviction is under appeal. In the context of immigration law, the Federal Court of Canada held in *Nabiloo v. Canada (Citizenship and Immigration)*, 2008 FC 125, that the Immigration and Refugee Board may treat a person as convicted for the purposes of findings of inadmissibility to Canada, even though that conviction is under appeal. There is also precedent in Law Society jurisprudence for relying on a previous decision that is under review when deciding disciplinary action: see *Law Society of BC v. McLean*, 2016 LSBC 6 at paras. 3 and 20.

[67] In his submissions, the Applicant relied on *Law Society of Manitoba v. Histed*, 2006 MBLS 15. In that case, the Respondent lawyer sought an adjournment of disciplinary proceedings on the basis that he had outstanding appeals of Law Society disciplinary matters. He requested an adjournment on the basis that his conduct record, which included a suspension, would be considered in determining the penalty notwithstanding that the record was under appeal. The panel dismissed the adjournment application, noting that the Law Society was not seeking a suspension or anything greater than a suspension. This ruling, however, does not address the question of whether it is appropriate to consider a disciplinary record that is under review.

[68] It is our view that a prior conduct record should not be excluded from consideration on the basis that it is under review. That could prevent a hearing panel from considering evidence of critical importance to the calculation of penalty. It is our view that that would be inconsistent with the statutory duties of the Law Society. The Law Society is mandated to protect the public interest. A prior disciplinary record can be important to a decision on penalty, particularly if it reveals recent or similar misconduct.

[69] This can be seen in the prior disciplinary decision in this case. In *Law Society of BC v. Perrick*, 2014 LSBC 25, the panel stated at para. 26:

> ... the Panel felt that, ordinarily, a suspension of 90 days would be warranted. However, given the age of the Respondent, his 43 year Professional Conduct Record, which is remarkably clean, the fact that there have been no further complaints or issues involving the Respondent since this matter arose in 2006… we have concluded that a fine instead of a suspension should be imposed.

[70] This illustrates the importance of considering the lawyer's conduct history, whether positive or negative, in determining the appropriate penalty.

[71] We acknowledge that this determination allows for the possibility that a lawyer will be disciplined based on a conduct record that is subsequently set aside on review. In our view, this would be a very rare occurrence. This would only occur where a lawyer is subject to discipline proceedings within a short time after another discipline hearing and where the previous finding is subsequently overturned on review or appeal. If this were to occur, it may be possible to remedy the prejudice in a section 47 review or appeal. However, it is our view that the mere possibility of prejudice arising from the consideration of a previous conduct record that is under review should not result in a hearing panel disregarding the record. In our view, disregarding a relevant discipline history would be unacceptable given the statutory duties of the Law Society.

[72] The weight to be placed on a prior disciplinary record is within the discretion of the hearing panel. This depends on a number of factors, including the recency of the record, the seriousness of the record, and the similarity of the misconduct to the matters before the panel: see *Law Society of BC v. Lessing*, 2013 LSBC 29.

[73] In this case, the prior disciplinary history revealed a pattern of behaviour that was of significant concern, particularly given the duty of the Law Society to protect the public interest in the administration of justice. It was a recent record, and involved events that occurred during the same time frame as the events before the hearing

panel. It included dishonesty and similar acts of negligence to those that had occurred in these proceedings. If the hearing panel in these proceedings could not consider the prior record simply because the Applicant had filed for a review, then it would have distorted the reasoning process required to determine the appropriate penalty.

[74] In our view, the hearing panel was correct to consider the prior record of the Applicant.

THE 30-DAY SUSPENSION

[75] The standard of review for penalty decisions has been the subject of some debate. It has been described as correctness, or sometimes "correctness informed by reasonableness." In contrast, the British Columbia Court of Appeal has referred with approval to authority that the standard of review for questions of mixed fact and law and penalty should be reasonableness: see *Mohan v. Law Society of BC*, 2013 BCCA 489 at para. 31; *Kay v. Law Society of BC*, 2015 BCCA 303 at para. 40. Some Law Society decisions have interpreted these Court of Appeal decisions to change the standard of review for questions of mixed fact and law (which undoubtedly includes penalty) to a standard of reasonableness: see for example *Re: Applicant 8,* 2016 LSBC 12.

[76] Notwithstanding this uncertainty, the accepted and established approach in section 47 reviews of decisions on penalty is to consider whether the penalty is within a reasonable range of outcomes. Subject to the panel correctly applying legal principles, if the disciplinary action imposed by the hearing panel is within the reasonable range, it should not be disturbed on review: see *Law Society of BC v. Hordal* at paras. 9, 18-20; *Law Society of BC v. Goldberg* at paras. 8, 37; *Law Society of BC v. Chiang*, 2014 LSBC 55 at para. 28; *Law Society of BC v. Foo*, 2015 LSBC 34 at paras. 9-12; *Law Society of BC v. Vlug*, 2016 LSBC 58 at paras. 13-14; *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 32. This is the long-standing approach in Law Society decisions. It is the approach we will apply in this ground of review.

[77] The hearing panel suspended the Applicant for a period of 30 days. In addition to the Applicant's disciplinary history, the hearing panel considered that the circumstances of this case were not only a marked departure from the quality of service expected of competent counsel, but also a fundamental failure to provide any meaningful service.

[78] The panel noted that when the Applicant's legal account was reviewed in *Ron Perrick Law Corporation v. SM*, 2012 BCSC 859, the Registrar reduced the fees from $3,866.96 to $500. The panel also noted that his handling of the file resulted in a successful civil action against him for professional negligence. The panel considered this to be an aggravating factor.

[79] The panel considered that the conduct in this case took place over a lengthy period of time and included multiple examples of dereliction of his duty to his client and to opposing counsel.

[80] We agree with the hearing panel that, given the related prior discipline history and the numerous acts of misconduct in failing to provide quality of service or to respond to opposing counsel, a 30-day suspension was appropriate. Whether the standard of review is "correctness informed by reasonableness" or simply reasonableness, we would dismiss this ground of review. It is our view that the hearing panel's decision was not only reasonable, but was also the correct result.

[81] Accordingly, we dismiss the application for review and confirm the decision of the hearing panel. We order that the costs of this section 47 review be payable by the Applicant. If counsel are unable to agree on costs, we will accept submissions in writing on the issue of costs within 30 days of the issuance of this decision.

[82] The 30-day suspension ordered by the hearing panel was stayed until further order of this Review Board. At the review hearing, we ordered that the suspension is stayed until 30 days after the decision on this review, or until further order of the Review Board. We confirm that the suspension is to commence 30 days after the date of issuance of this decision.