

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 1, 2016

Panel: Martin Finch, QC, Chair
Ralston S. Alexander, QC, Lawyer
Linda Michaluk, Public representative

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

[1] At the conclusion of the hearing in this matter the Panel made the following order, and advised that written reasons would follow. These are the written reasons. The order (with complainant's names in the original) made on September 1, 2016 provided as follows:

1. The Respondent pay costs in the amount of \$1,296.91 to the Law Society on or before October 3, 2016;
2. The Respondent is suspended from the practice of law for a period of four months commencing on October 1, 2016 until and including January 31, 2017, pursuant to section 38(5)(d) of the *Legal Profession Act*;

3. Pursuant to s. 38(7) of the *Legal Profession Act*, by September 16, 2016 the Respondent must provide a complete and substantive response to the enquiries made in the Law Society's letters to her dated March 1 (C Complaint), March 15 (C Complaint), March 9 (S Complaint), March 30 (C Complaint), March 31 (S Complaint), April 5 (C Complaint), April 15 (S Complaint) and May 31, 2016 (S and C Complaints); and
4. This Order is to be delivered to the Respondent by email and courier by September 2, 2016.

BACKGROUND

- [2] Two citations were authorized against the Respondent on June 17, 2016 and issued on June 24, 2016. Both citations set out an allegation that the Respondent failed to respond to the Law Society and that the conduct constitutes professional misconduct or a breach of the Act or Rules.
- [3] The first citation alleges the Respondent did not respond substantively or at all to letters from the Law Society dated March 9 and 31, April 15 and May 31, 2016 regarding investigation into the complaint of AS (the "S Complaint").
- [4] The second citation alleges the Respondent did not respond substantively or at all to letters from the Law Society dated March 1, 15 and 30, April 5 and May 31, 2016 regarding investigation into the complaint of BC (the "C Complaint").
- [5] By order of the President's designate, Nancy Merrill, QC, both citations were determined at this one hearing.

NON-ATTENDANCE BY THE RESPONDENT

- [6] At the time set for the commencement of the hearing, the Respondent had not appeared. Counsel for the Law Society suggested that she had not heard from the Respondent and suggested that the Panel adjourn to allow the Respondent an opportunity to appear in case the Respondent had been held up in traffic or otherwise prevented from attending as required. The Panel adjourned the hearing briefly to allow the Respondent this additional time. She did not appear following the brief adjournment or at all.
- [7] The Panel then considered whether the hearing could proceed in the absence of the Respondent. Section 42(2) of the *Legal Profession Act* provides that a panel may proceed with a hearing in the absence of a respondent if the panel is satisfied that

the respondent has been served with the citation and the Notice of Hearing. The Panel reviewed an affidavit of service sworn by Chrysta Gejdos and satisfied itself that the Respondent had been served with both of the citations and the Notice of Hearing.

- [8] Having made a finding that the Respondent had been properly served with the citations and the Notice of Hearing, the Panel invited counsel to proceed despite the absence of the Respondent.
- [9] Law Society Rule 4-33 permits hearings to proceed on affidavit evidence (or an Agreed Statement of Facts or Admissions under Rule 4-18) if the citation concerns, among 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.
- [10] The Panel notes that the Law Society bears the burden of proof and that each of the allegations in the citations must be made out on a balance of probabilities.

FACTS

The S Complaint

- [11] The Law Society submitted an affidavit of Carolyn Anderson, a staff lawyer for the Law Society and a person familiar with the facts of this case. (Exhibit 4) The affidavit sets out a timeline and the various correspondence between the Respondent and the Law Society with respect to the S Complaint.
- [12] The timing of events is as follows:
- (a) On February 5, 2016, the Law Society received a complaint about the Respondent from AS, opposing counsel in a matter where the Respondent was the personal defendant. The Respondent had retained a law firm to provide legal services for her client. The law firm had not been paid for their services by the Respondent and it retained AS to pursue recovery of the debt. A settlement was reached, and the Respondent agreed to sign a consent judgment. The Respondent has failed to make any payments to the law firm or provide the signed consent judgment;
 - (b) On March 9, 2016, Ms. Anderson sent a letter by mail and email to the Respondent seeking a response on the S Complaint;

- (c) When no response was received by the March 30, 2016 due date, Ms. Anderson sent further letters by mail and email on March 31 and April 15, 2016 with the same result;
- (d) On April 27, 2016, Ms. Anderson was contacted by telephone by Robert Cooper, a lawyer, who advised he had been consulted by the Respondent;
- (e) Following a subsequent telephone conversation with Mr. Cooper on May 3, 2016, Ms. Anderson sent an email to Mr. Cooper requesting certain information from his client (the Respondent) “as soon as possible”;
- (f) On May 20, 2016, Ms. Anderson contacted Mr. Cooper by email requesting a timeline as soon as possible with regard to an expected response from the Respondent;
- (g) On May 30, 2016, Ms. Anderson received a telephone message from Mr. Cooper stating he had not received instructions from the Respondent; this was confirmed again on May 31, 2016;
- (h) On May 31, 2016, Ms. Anderson sent a letter by mail and email to the Respondent referencing the previous correspondence and stating that, if a response was not received by June 5, 2016, the matter would be referred to the Chair of the Discipline Committee pursuant to the summary hearing process with a recommendation for a citation;
- (i) No further reply has been received by the Law Society from the Respondent or Mr. Cooper.

The C Complaint

[13] The Law Society submitted a further affidavit of Carolyn Anderson, who was also familiar with the facts of the C Complaint. (Exhibit 5) The affidavit sets out a timeline and the various correspondence between the Respondent and the Law Society with respect to the complaint.

[14] The timing of events is as follows:

- (a) On February 22, 2016, the Law Society received a complaint about the Respondent from BC, who, on or about September 28, 2015, had retained the Respondent to assist him in making an application for a patent;

- (b) On March 1, 2016, Ms. Anderson sent a letter by mail and email to the Respondent seeking a response on the C Complaint;
- (c) When no response was received by the March 14, 2016 due date, Ms. Anderson sent further letters by mail and email on March 15 and 30 and April 5, 2016 with the same result;
- (d) On April 27, 2016, Ms. Anderson was contacted by telephone by Robert Cooper, who advised he had been consulted by the Respondent;
- (e) Following a subsequent telephone conversation with Mr. Cooper on May 3, 2016, Ms. Anderson sent an email to Mr. Cooper requesting certain information from his client (the Respondent) “as soon as possible”;
- (f) On May 20, 2016, Ms. Anderson contacted Mr. Cooper by email requesting a timeline as soon as possible with regard to a response from the Respondent;
- (g) On May 30, 2016, Ms. Anderson received a telephone message from Mr. Cooper stating he had not received instructions from the Respondent; this was confirmed again on May 31, 2016;
- (h) On May 31, 2016, Ms. Anderson sent a letter by mail and email to the Respondent referencing the previous correspondence and stating that, if a response was not received by June 5, 2016, the matter would be referred to the Chair of the Discipline Committee pursuant to the summary hearing process with a recommendation for a citation;
- (i) No further reply has been received by the Law Society from the Respondent or from Mr. Cooper.

LAW SOCIETY SUBMISSIONS

[15] The Law Society submits that the Respondent’s failure to respond to the Law Society regarding the two complaints is professional misconduct. The Panel was referred to *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.”

[16] 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.

[17] 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.

[18] 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.

[19] 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.

[20] 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 numerous cases including the following:

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.

DISCUSSION

[21] The Panel heard no evidence to contradict the clear and compelling affidavit evidence presented by the Law Society. It would be difficult to imagine a more clear series of events where a respondent completely disregards inquiries of the Law Society seeking to respond to a complaint.

[22] Equally troubling is the Respondent's indifferent response to the discipline process. The Law Society must have cooperation from lawyers in the pursuit of its statutory mandate to govern the profession in the public interest. The Respondent appears to have "checked out" from the profession while apparently continuing to practise. This cannot be permitted and must be responded to in the clearest possible terms. A message confirming the seriousness with which this misconduct is viewed must be communicated.

CONCLUSION

[23] The Respondent's behaviour in these circumstances is a manifest marked departure from the conduct expected of lawyers by the Law Society. In that result the Panel finds that the Respondent committed professional misconduct by her failure to respond to the Law Society in its investigation of the S Complaint the and C Complaint.

DISCIPLINARY ACTION

[24] The Law Society seeks the following:

- (a) a suspension from the practice of law of one to three months, to commence on the first day of the month immediately following the Hearing Panel's decision;
- (b) costs in the amount of \$2,533.16 (or \$1,272.93 if the total hearing time for both phases of the hearing is less than two and a half hours); and
- (c) an order pursuant to s. 38(7) of the *Legal Profession Act* 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 March 1, 15 and 30, April 5 and May 31, 2016 (C Complaint) and March 9 and 31, April 15 and May 31, 2016 (S Complaint).

[25] The Law Society submits that the Respondent's misconduct is serious, and that failure to respond to the Law Society goes to the heart of the ability of the Law Society to regulate lawyers in the public interest. It seeks a suspension as the Respondent has a previous conduct record of nearly identical circumstances and these matters are the second and third citations involving the Respondent's failure to respond that have proceeded to hearing in approximately four months.

- [26] The Law Society submits that there is a need for both specific and general deterrence with respect to a lawyer's failure to respond to the Law Society, particularly so when the misconduct has been repeated after recent disciplinary action has been taken. There is a small array of cases dealing with a second or third proven allegation of failing to respond to the Law Society. Generally speaking, suspensions have been ordered in cases where a second citation alleging failure to respond has been proven.
- [27] The Law Society referred the Panel to several cases where second citations for failures to respond resulted in suspensions: *Law Society of BC v. Tak*, 2010 LSBC 07 (F&D) and 2010 LSBC 13 (DA); *Law Society of BC v. Tak*, 2011 LSBC 01 (F&D) and 2011 LSBC 05 (DA); *Law Society of BC v. Ashton*, 2004 LSBC 11 (F&D) and 2004 LSBC 12 (DA).
- [28] The Law Society requests the application of progressive discipline and suggests that ordering a suspension will send a strong message of specific deterrence to the Respondent, which is appropriate in light of the recent previous citation. A suspension will also send an important message of general deterrence to the profession that the Law Society, in its regulation of the profession in the public interest, will not tolerate lawyers who repeatedly ignore their regulatory obligations, and that escalating sanctions will be ordered in circumstances of repeated misconduct.

DECISION

- [29] The Panel has determined that the sanction ordered should ensure that the public can have confidence in the integrity of the profession and its ability to self-regulate. As stated by the hearing panel in *Tak*, 2010 LSBC 13 at paragraph 13:

As stated in *Dobbin*, "There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute." This concern is amplified by the fact that the Respondent has been found guilty of professional misconduct for a second time for similar conduct in less than a year.

- [30] The Panel also agrees that this is an appropriate case for progressive discipline. For that reason, the Panel is not persuaded that the range of penalty suggested by the Law Society is adequate. We have accordingly increased the period of suspension beyond that requested as we find that a four-month suspension is more in keeping with the blatant and consecutive nature of the misconduct we have identified. The period of suspension will be October 1, 2016 to January 31, 2017 inclusive.

- [31] The Law Society provided details of the costs for this hearing consisting of the full and half-day tariff of \$1,000 plus the fees for the court reporter and other ancillary costs. The Panel finds that costs in accordance with the half-day tariff are appropriate and therefore orders costs of \$1,272.93 payable by April 30, 2017.
- [32] As noted at the beginning of these reasons, at the conclusion of the hearing the Panel issued the order reproduced there, and these are the reasons in support of that order.
- [33] At the conclusion of the hearing and at the further request of the Law Society the Panel ordered that, if any third party should request copies of the citations, transcripts or evidence before the Panel in this matter, all references to named complainants and other solicitor-client information be redacted before the documents are released.