

2017 LSBC 09
Decision issued: April 5, 2017
Oral reasons: February 3, 2017
Citation issued: November 8, 2016

**CORRECTED DECISION: PARAGRAPHS [24] AND [45] OF THIS DECISION
WERE AMENDED ON JUNE 15, 2017**

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

HEATHER CATHERINE CUNNINGHAM

RESPONDENT

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

Hearing date: February 3, 2017

Panel: Jamie Maclaren
Single Bencher Panel

Discipline Counsel: Carolyn Gulabsingh
Appearing on her own behalf: Heather C. Cunningham

INTRODUCTION

- [1] The Law Society issued a citation against the Respondent on November 8, 2016 for failing to provide a substantive response to its communications concerning its investigation of a complaint made against her (the “Citation”), contrary to Rule 7.1-1 of the *Code of Professional Conduct for British Columbia*.
- [2] The Citation alleged that the Respondent failed to respond substantively to some or all of:

- (a) letters dated August 4, September 15 and October 24, 2016;
 - (b) voice mail messages left on September 30 and October 13, 2016; and
 - (c) an email message dated October 4, 2016.
- [3] The Citation further alleged that the Respondent's failure to respond to the Law Society's communications constituted professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.
- [4] The hearing of the Citation proceeded in Vancouver on February 3, 2017 as a summary hearing under Rule 4-33 of the Law Society Rules. It was an unusually snowy day in southwestern British Columbia, and poor travel conditions prevented the Respondent and one of three panel members from attending the hearing in person. The hearing nonetheless proceeded in the late morning before a single Benchers panel (the "Panel"), pursuant to Rule 5-2(2)(c), with the Respondent appearing by telephone.
- [5] The hearing concluded in the early afternoon, at which point the Panel issued an oral decision and orders on determination, disciplinary action and costs. In short, the Panel found that the Respondent had committed professional misconduct, and ordered her to pay a \$5,000 fine and \$1,556.74 in costs to the Law Society. The written reasons follow.

BACKGROUND

- [6] On May 25, 2015, a retired Surrey woman (the "Complainant") retained the Respondent to probate a will. The Complainant and the Respondent met on September 11, 2015 to sign probate documents. There was no further communication between the parties until May 18, 2016, when the Complainant left the Respondent a telephone message requesting a progress report on her file. The Respondent did not respond to the message, and the Complainant made several more attempts to contact her by telephone, email and registered letter. Finally, on June 27, 2016, the Complainant sent a registered letter to the Respondent terminating her retainer and requesting the return of her file.
- [7] On July 6, 2016, the Complainant complained to the Law Society about the absence of any direct or indirect communication from the Respondent since September 11, 2015 (the "Complaint"). Among other things, the Complainant sought the return of her file and the remainder of her retainer fees.

- [8] On August 4, 2016, Carolyn Anderson, a lawyer from the Law Society's Professional Conduct Department, contacted the Respondent by telephone and informed her of the Complaint. Immediately after their telephone conversation, Ms. Anderson couriered a letter to the Respondent requesting her response to the Complaint by September 12, 2016. The Respondent did not respond by then.
- [9] On September 15, 2016, Gurprit Copland, the Law Society's Manager of Intake and Early Resolution, sent another letter to the Respondent seeking her response to the Complaint by September 29, 2016. Ms. Copland's letter included a caution that the Respondent's further failure to respond could be referred to the Law Society's Discipline Committee with a recommendation for a citation under the summary hearing process. The Respondent did not respond by the September 29 deadline.
- [10] Requiring a substantive response from the Respondent to proceed with its investigation of the Complaint, the Law Society made further failed attempts to elicit a response from her, as follow:
- (a) On September 30, 2016, Bev Gallagher, another lawyer from the Law Society's Professional Conduct Department, left the Respondent a telephone message asking that she return her call;
 - (b) On October 4, 2016, Ms. Gallagher emailed the Respondent to inform her that further failure to respond to the Law Society would result in a referral to its Discipline Committee;
 - (c) On October 13, 2016, Dave McCartney, an investigator employed by the Law Society, left the Respondent a telephone message asking her to contact him to set up a meeting;
 - (d) On October 24, 2016, Ms. Anderson sent a letter and an email to the Respondent setting out the Law Society's previous attempts to contact her, and advising her that the matter of her non-communication with the Law Society would be referred to its Discipline Committee if she failed to respond to the Law Society by October 29, 2016.
- [11] The Respondent did not respond to the Law Society by October 29, 2016. The Law Society consequently cited the Respondent on November 8, 2016 for failing to provide any response to its communications between August 4 and October 24, 2016. The Respondent did not contact the Law Society until the morning of her hearing when she telephoned the Hearing Administrator to report being held up in snowy road conditions.

ISSUES

[12] This Panel must determine:

- (a) Whether the Respondent's failure to provide any substantive response to the Law Society's communications outlined in the Citation constitutes professional misconduct pursuant to section 38(4) of the *Legal Profession Act*;
- (b) If (a) is affirmed, what disciplinary action to impose on the Respondent; and
- (c) If (a) is affirmed, what amount of costs to award to the Law Society.

LAW

Onus and standard of proof

[13] The onus is on the Law Society to prove, on a balance of probabilities, that the Respondent's failure to provide any substantive response to the Law Society's communications meets the test for professional misconduct.

[14] The Supreme Court of Canada set the civil evidentiary standard of a balance of probabilities in *FH v. McDougall*, 2008 SCC 53. Law Society hearing panels have since adopted and applied the balance of probabilities standard in professional misconduct decisions, including *Law Society of BC v. Schauble*, 2009 LSBC 11; *Law Society of BC v. Seifert*, 2009 LSBC 17; *Law Society of BC v. Pyper*, 2016 LSBC 1; and *Law Society of BC v. Samuels*, 2017 LSBC 1.

[15] In *Schauble*, the hearing panel summarized the onus and standard of proof at paragraph 43:

The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: "... evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But ... there is no objective standard to measure sufficiency." (*FH v. McDougall*).

Failure to respond

[16] Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* requires lawyers to:

- (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] Law Society Rule 3-5(7) states:

- (7) 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.

Test for professional misconduct

[18] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules or the *Code of Professional Conduct for British Columbia*. The Benchers instead assess a lawyer's conduct in specific circumstances to determine if there is "a marked departure from that conduct the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16 at paragraph 171. In *Martin*, the hearing panel observed at paragraph 154:

... 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.

[19] In *Re: Lawyer 12*, 2011 LSBC 11 at paragraph 14, the hearing panel summarized previous applications of the *Martin* test as follows:

In my view, the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the

circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

This articulation of the *Martin* test was accepted by the review panel in *Re: Lawyer 12*, 2011 LSBC 35 at paragraph 8.

- [20] Not every breach of the Law Society Rules or the *Code of Professional Conduct for British Columbia* will amount to professional misconduct. But repeated failure to respond to communications from the Law Society raises the presumption of professional misconduct. In *Law Society of BC v. Dobbin*, 1999 LSBC 27, at paragraph 25, a majority of the review panel held:

... [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. ...

This followed from the majority reasons at paragraph 20:

... If the Law Society can not 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. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

- [21] The majority reasons in *Dobbin* have been followed in many subsequent cases concerning the failure to respond to Law Society communications, including *Law Society of BC v. Cunningham*, 2007 LSBC 17; *Law Society of BC v. Marcotte*, 2010 LSBC 18; and *Law Society of BC v. Buchan*, 2013 LSBC 8.

- [22] In *Cunningham*, the hearing panel stated, at paragraph 22:

... If members of the public were to come to think that the LSBC pursues its investigations casually, by not requiring those under investigation to respond promptly and comprehensively, it might be thought that someone other than lawyers should govern the legal profession. If self-governance were lost, lawyer independence, of which self-governance is an essential

element, would be lost as well, and that loss would be contrary to the public interest.

[23] In *Cunningham*, the respondent gave evidence that she knew she was required to respond to the Law Society, but could not bring herself to respond because she “felt immobilized.” The hearing panel held that, to avoid a finding of professional misconduct, the respondent would need to lead evidence that she was afflicted with an illness sufficiently incapacitating to prevent her from communicating with the Law Society. The respondent did not provide enough evidence to support such incapacity.

EVIDENCE

[24] The Law Society provided affidavit evidence supporting each of several and varied attempts by Law Society staff to elicit communications from the Respondent between August 4 and October 4, 2016. The affidavit evidence also affirmed that the Respondent failed to provide any response — substantive or otherwise — to the Complaint.

[25] In her brief oral testimony, the Respondent admitted to having been properly served with the Citation, as well as all documents connected to her hearing. She did not challenge any of the Law Society’s evidence. Nor did she raise a defence to the allegation of professional misconduct. She instead apologized to the Law Society for bringing on disciplinary proceedings, and admitted to being “embarrassed and frozen” in the face of repeated Law Society correspondence concerning the Complaint. As vague explanation for her procrastination, she described suffering from anxiety after a physical injury from a fall in December 2015. In very candid terms, the Respondent expressed being “sorry” for having simply “missed” her duty to respond to the Law Society.

DETERMINATION

[26] On the facts established by the Law Society’s affidavit evidence, and broadly admitted by the Respondent, this Panel found that the Citation was properly served on the Respondent, that she received each of the six Law Society communications alleged in the Citation, and that she nonetheless failed to respond to any of them.

[27] The Respondent admitted to ignoring the Law Society communications while in a self-described state of anxious immobilization. She did not, however, present her mental state as a defence to the Citation. Nor did she provide any evidence that her

mental state rendered her incapable of communicating with the Law Society. She thus failed to rebut the presumption of professional misconduct set out in *Dobbin*.

- [28] This Panel found that the Respondent's failure to respond to the Law Society represented a marked departure from the standard expected of lawyers in British Columbia. It displayed gross culpable neglect of her duties as a lawyer, and it therefore constituted professional misconduct.

DISCIPLINARY ACTION

- [29] The Law Society's disciplinary proceedings are designed to fulfill its mandate to uphold and protect the public interest in the administration of justice as set out in section 3 of the *Legal Profession Act*.
- [30] For many years, Law Society panels have considered the long non-exhaustive list of penalty factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. In *Law Society of BC v. Lessing*, 2013 LSBC 29, at paragraphs 57-60, the review panel identified the two most important penalty factors from *Ogilvie* as: (i) the need to ensure the public's confidence in the integrity of the profession; and (ii) the possibility of remediating or rehabilitating the respondent. The *Lessing* review panel also observed that, where there is conflict between these two factors, protection of the public should take priority over rehabilitation of the respondent.
- [31] More recently, in *Law Society of BC v. Dent*, 2016 LSBC 05, the hearing panel affirmed the prioritization of penalty factors in *Lessing*, and, at paragraphs 19-25, consolidated the wider list of *Ogilvie* factors into four general factors for determining appropriate disciplinary action: (i) the nature, gravity and consequences of the misconduct; (ii) the character and professional conduct record of the respondent; (iii) acknowledgement of the misconduct and remedial action; and (iv) public confidence in the legal profession including public confidence in the disciplinary process.
- [32] This Panel considered each of the four general factors from *Dent* in assessing appropriate disciplinary action for the Respondent, with protection of the public foremost in mind.

Nature, gravity and consequences of the misconduct

- [33] It is common behaviour to cope with a negative situation by way of denial and avoidance. We have all been guilty of procrastinating in the face of an unpleasant task. But where an unpleasant task rises to the level of a duty upholding the integrity of a profession, avoidance and procrastination are unacceptable options.

Public confidence in the integrity of professional self-regulation is compromised whenever the Law Society is perceived to be doing less than everything reasonably possible to hold its members accountable for breaching rules. Continued failure to respond to Law Society communications is a serious matter, particularly when the communications are required to investigate a complaint made by a member of the public.

- [34] As of the date of her hearing, the Respondent had not provided any response to the Law Society communications outlined in the Citation. The scope and duration of a failure to respond to Law Society communications are important penalty factors previously considered in *Marcotte; Law Society of BC v. Malcolm*, 2012 LSBC 04; *Law Society of BC v. Decore*, 2012 LSBC 17; and *Buchan*.

Character and professional conduct record of the respondent

- [35] Roughly ten years ago, the hearing panel in the previous *Cunningham* decision found the Respondent guilty of professional misconduct for failing to respond to the Law Society and to the Legal Services Society regarding a complaint made by a legal aid client. The facts in that case were very similar to the facts here, and the Respondent offered the same explanation of feeling immobilized upon receiving Law Society communications. In its decision on penalty in *Law Society of BC v. Cunningham*, 2007 LSBC 47, the hearing panel fined the Respondent \$2,000 for her professional misconduct. The hearing panel mentioned her previously clean professional conduct record, her 2001 call to the bar “later in her life,” and her very modest annual income as mitigating factors in assessing discipline.
- [36] The Respondent’s professional conduct record was clean between the citation in *Cunningham* and the Citation here. If the Respondent’s previous fine served as a specific deterrent to further procrastination and avoidance in that period, it ceased to have sufficient effect by August 2016 when the Law Society sought her response to the Complaint.

Acknowledgement of the misconduct and remedial action

- [37] The Respondent did not make any effort to acknowledge or remedy her misconduct prior to her hearing on February 3, 2017. At the hearing, she accepted full responsibility for ignoring communications from the Complainant and the Law Society alike. She acknowledged the negative impact that her misconduct had on the Complainant. She noted that she did not gain any advantage from her misconduct, and she offered apologies to counsel for the Law Society, to this Panel and to the Complainant (not then present). She did not suggest how she would

ensure prompt responses to clients and the Law Society in the future, apart from asserting that her procrastination is “not a pattern.”

Public confidence in the legal profession including public confidence in the disciplinary process

- [38] To maintain public confidence in the self-regulation of the legal profession, any failure to respond to Law Society communications regarding a complaint must meet with specific deterrence to the respondent and general deterrence to other members. Such deterrence should increase as progressive discipline for repeated cases of failure to respond, with some consideration for the length of time between cases.
- [39] Law Society decisions on penalty for repeated failure to respond to the Law Society impose sanctions ranging from a \$4,000 fine for a second finding of professional misconduct within 15 years in *Law Society of BC v. Payne*, 2010 LSBC 28, to a four-month suspension for three proximate findings of professional misconduct in *Law Society of BC v. Ben-Oliel*, 2016 LSBC 42.
- [40] In *Law Society of BC v. Niemela*, 2012 LSBC 09, the hearing panel ordered a \$5,000 fine for a second citation for failure to respond to the Law Society within four years of the first citation. When the respondent was cited a third time within a year for failure to respond, the hearing panel in *Law Society of BC v. Niemela*, 2013 LSBC 15 contemplated ordering a suspension, but instead ordered a fine of \$15,000 and practice supervision with the reasoning that such a penalty would serve as more effective specific deterrent than a suspension.
- [41] Here, the Law Society sought a \$5,000 fine as discipline for the Respondent’s professional misconduct. The Respondent sought a \$4,000 fine on the argument that her professional misconduct was a somewhat isolated incident, and that she had not gained any advantage by failing to respond to the Law Society. She did not provide any evidence regarding her financial situation.
- [42] In the hope that it will serve as sufficient specific deterrence to the Respondent and general deterrence to other lawyers who may consider avoiding their duty to respond to the Law Society, this Panel ordered a \$5,000 fine as discipline for the Respondent’s second finding of professional misconduct. The Respondent must pay a first fine instalment of no less than \$2,500 to the Law Society by April 30, 2017, and any and all remainder by October 30, 2017.

[43] This Panel also encouraged the Respondent to seek free treatment from a Law Society-funded counselling program for her recurrent problems of procrastination and avoidance.

COSTS

[44] Though delayed by the snowy weather, the Respondent's hearing took about a half-day to be heard. Consequently, this Panel awarded \$1,556.74 in costs to the Law Society, to be paid by the Respondent no later than October 30, 2017. This amount is composed of \$1,000 for a half-day hearing, pursuant to tariff, and \$556.74 in disbursements.

OTHER ORDERS

[45] This Panel ordered that the Respondent provide a substantive written response to the Complaint, as requested by the Law Society in its repeated communications between August 4 and October 4, 2016, no later than February 17, 2017.

[46] This Panel also ordered, pursuant to Rule 5-8(2), that the Citation, all affidavits entered into evidence, and the hearing transcript be anonymized to protect solicitor-client information, and to conceal the identities of the Complainant and any other clients of the Respondent, before being released to a third party.