

2017 LSBC 37
Decision issued: October 23, 2017
Oral decision: June 16, 2017
Citation issued: April 4, 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: June 16, 2017

Panel: Thomas Fellhauer, Chair
David Layton, QC, Lawyer
Linda Michaluk, Public representative

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

INTRODUCTION

- [1] On April 4, 2017 the Law Society issued a citation alleging that the Respondent had committed professional misconduct by failing to comply with an order made by a hearing panel on February 3, 2017. The order had been delivered orally by the hearing panel on February 3, 2017 (the “Order”), followed by written reasons issued on April 5, 2017. For the written reasons, see 2017 LSBC 09.
- [2] The Order required the Respondent to provide by February 17, 2017 a complete and substantive response to the enquiries made in the Law Society’s letters dated

August 4, 2016, September 15, 2016, September 30, 2016, and the Law Society's email dated October 4, 2016.

- [3] These enquiries made by the Law Society related to an investigation into a complaint made by one of the Respondent's clients (the "Complaint"). The Complaint related to the failure by the Respondent to reply to her client on a probate matter.
- [4] The Respondent did not provide a response to the Law Society enquiries by February 17, 2017. The Law Society therefore issued the citation mentioned in para. 1 above.
- [5] The Law Society elected to proceed by way of a summary hearing under Rule 4-33 of the Law Society Rules.
- [6] Pursuant to Rule 4-33(2)(a), the Law Society provided evidence by way of affidavit at the facts and determination stage of the hearing. Counsel for the Law Society also made written and oral submissions. The Respondent led no evidence and made no submissions at this stage of the hearing. In particular, the Respondent did not contest the Law Society's contention that she had committed professional misconduct by failing to comply with the Order.
- [7] After considering the evidence and submissions, we provided brief oral reasons concluding that the Respondent had committed professional misconduct as alleged in the citation. We advised that written reasons would follow.
- [8] As permitted by Rule 4-33(3), we then received submissions from the Law Society and the Respondent on the issue of disciplinary action. We agreed with the position of the Law Society and ordered that the Respondent should be suspended for one month or until she provided a complete and substantive written response to the Law Society's requests for information, whichever was later. We also ordered that costs of \$2,542.70 be paid by the Respondent on or before January 31, 2018.
- [9] The following are our reasons for concluding that the Respondent committed professional misconduct as alleged in the citation. These reasons also set out our decision regarding the appropriate disciplinary action and costs.

PRELIMINARY MATTERS

- [10] Pursuant to Rule 4-21(2)(a), the Law Society applied to amend the citation to correct an erroneous date given regarding one of the Law Society's letters

requesting information from the Respondent. The date in question should have been October 24, 2016, not September 30, 2016.

[11] With the Respondent's consent, we granted the Law Society's application to amend the citation.

[12] We also found that the Respondent was properly served with the citation.

LEGAL PRINCIPLES RELEVANT TO FACTS AND DETERMINATION

[13] The onus is on the Law Society to establish professional misconduct and the standard of proof is a balance of probabilities. As noted in *Law Society of BC v. Seifert*, 2009 LSBC 17 at para. 13:

... the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities. ...

[14] Professional misconduct is proven where the facts as made out disclose conduct falling markedly below the standard the Law Society expects of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171.

[15] The hearing panel in *Martin* further stated at para. 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.

[16] This test was further confirmed by a Bencher review panel in *Re: Lawyer 12*, 2011 LSBC 35, which adopted the following statement of the single Bencher hearing panel in *Re: Lawyer 12*, 2011 LSBC 11 at para. 14:

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.

[17] Rule 7.1-1 of the *Code of Professional Conduct for British Columbia* (the "Code") requires lawyers, among other things, to comply with orders made under the *Legal Profession Act* or the Rules of the Law Society.

- [18] A breach of an order of a hearing panel does not automatically constitute a finding of professional misconduct. However, it is generally a serious matter because, unless lawyers comply with such orders, including as in this case orders to respond to the Law Society regarding the investigation of a complaint, the Law Society cannot carry out its duties in a timely and effective manner so as to promote public confidence in the regulation of the profession, the integrity of the bar and the administration of justice.
- [19] Counsel for the Law Society provided a number of decisions involving situations where a lawyer failed to comply with an order of a hearing panel or the Law Society which resulted in a finding of professional misconduct: *Law Society of BC v. Jessacher*, 2016 LSBC 11, *Law Society of BC v. McLean*, 2015 LSBC 06, *Law Society of BC v. Welder*, 2012 LSBC 18, *Law Society of BC v. Ben-Oliel*, 2016 LSBC 35 and *Law Society of BC v. Farion*, 2017 LSBC 05.

REVIEW OF EVIDENCE

- [20] The transcript of the February 3, 2017 hearing shows that the Respondent participated by telephone and understood that she had been ordered to respond to the Law Society's enquiries by February 17, 2017. Indeed, at the hearing, which took place on a Friday, the Respondent stated that she would comply with the Order by Monday morning.
- [21] Before us, the Respondent provided no explanation for her failure to comply with the Order, nor did she contest the Law Society's assertion that this failure constituted professional misconduct
- [22] Given these facts, we conclude that the failure of the Respondent to comply with the Order that she provide a complete and substantive response to the enquiries made in the Law Society's letters dated August 4, 2016, September 15, 2016, October 24, 2016 and email dated October 4, 2016 constitutes a marked departure from the standards expected of lawyers in this province and thus amounts to professional misconduct.

DISCIPLINARY ACTION

- [23] The Law Society is seeking a suspension from the practice of law for one month, or until the Respondent has complied with the order, whichever is last occurring.

[24] The primary purpose of disciplinary proceedings is the fulfillment of the Law Society's mandate as set out in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice.

[25] As stated in *Law Society of BC v. Hill*, 2011 LSBC 16 at para. 3:

It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

[26] A non-exhaustive list of factors to be considered in assessing the appropriate penalty are set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17.

[27] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the review panel stated that not all of the *Ogilvie* factors would come into play in all cases and the weight to be given to these factors would vary from case to case, and that, in most cases, two factors will play an important role: protection of the public (including public confidence in the disciplinary process and public confidence in the profession generally), and rehabilitation of the lawyer. The review panel stated in para. 60 that, if there is a conflict between these two factors, then protection of the public will prevail.

[28] More recently, in *Law Society of BC v. Dent*, 2016 LSBC 5 at paras. 15-16, the panel said that it is often unnecessary for a panel to review every one of the *Ogilvie* factors in explaining why it has reached a particular decision regarding penalty and that it may be helpful to reduce the *Ogilvie* factors into four consolidated *Ogilvie* factors:

- (a) Nature, gravity and consequences of the conduct;
- (b) Character and professional conduct record of the respondent;
- (c) Acknowledgement of the misconduct and remedial action; and
- (d) Public confidence in the profession including public confidence in the disciplinary process.

[29] We adopt a similar approach, and we will consider the four consolidated *Ogilvie* factors listed above plus the range of sanctions imposed in similar cases.

Nature, gravity and consequences of the conduct

- [30] In this case, the breach of the Order was a continuation of the failure of the Respondent to provide an answer to the Law Society regarding the investigation of a client complaint. As such, the Respondent's failure to comply with the Order has further prevented the Law Society from carrying out its investigatory duties in a timely and effective manner. The gravity of this misconduct is accentuated by the fact that, as of the date of the hearing in this matter, the Respondent had still not complied with the Order.
- [31] The substantial harm caused by a failure to respond to Law Society requests for information, including information needed to investigate a client complaint, is obvious when one considers the vital importance of prompt and complete responses to the effective regulation of the profession in the public interest (*Law Society of BC v. Ben-Oliel*, 2016 LSBC 40 at para. 47). As stated in *Dobbin*, at para. 20:
- ... 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. ...
- [32] The same point is made in numerous other panel decisions, many of which are referenced in *Ben-Oliel* at paras. 48 and 49.

Character of the Respondent and her Professional Conduct Record

- [33] The Respondent's professional conduct record discloses the following:
- (a) Two citations issued in 2006 that were adjudicated together in 2007. In 2005, the Legal Services Society of British Columbia ("LSS") wrote to the Respondent regarding a complaint it had received about her. The Respondent did not respond, and as a result, the LSS lodged a complaint with the Law Society. The Law Society attempted to get a response from the Respondent regarding the complaint during January to March of 2006. In April of 2006, the Discipline Committee of the Law Society directed the Respondent to attend a conduct review to discuss this matter and attempted to arrange the meeting. The Respondent did not answer the Law Society's communications. In June of 2006, the Respondent was cited for failure to communicate to arrange the conduct review. The Law Society continued to try to arrange a conduct review without success. In July the Law Society rescinded its earlier citation and issued a new citation for failure to

respond to the LSS. In 2007, a hearing panel found that the Respondent's behaviour constituted professional misconduct and fined her \$2,000 (2007 LSBC 47). The Law Society had requested a suspension of two months. The hearing panel declined, saying that a fine was more appropriate because this was a first and isolated event.

Although this conduct occurred 10 years ago, it is troubling because of the similarity to the current conduct. In that case, the Respondent also stated she was sorry but provided no explanation for her conduct.

- (b) Citation issued November 8, 2016. As set out in paras. 2 and 3 above, this citation relates to the Respondent's failure to respond to the Law Society's enquiries regarding a complaint made by a client in a probate matter. It resulted in the Order that is the subject matter of citation that is now before us. The disciplinary action imposed was a \$5,000 fine.

Acknowledgement of the misconduct and remedial action

- [34] The Respondent has not provided any explanation as to why she breached the Order and why she has not complied with the Law Society's repeated requests for a response to her client's complaint. Based on the information before us, we see no evidence that the Respondent has taken any remedial action in this regard.

Public confidence in the profession and the disciplinary process

- [35] The public's confidence in the legal profession and the disciplinary process is seriously threatened where a lawyer repeatedly ignores attempts by the Law Society to investigate a client complaint and fails to comply with an order by a hearing panel requiring that a response be provided to the Law Society.
- [36] Counsel for the Law Society rightly notes that imposing a similar sanction for repeated misconduct may lead reasonable members of the public to conclude that the Law Society is not effectively regulating the profession, thus compromising public confidence in the profession's disciplinary process.

Range of sanctions in similar cases

- [37] Although our role is to select a sanction that we believe is most appropriate considering the particular characteristics of the misconduct and the particular situation of the Respondent, we do take guidance from the range of sanctions in similar cases.

[38] Counsel for the Law Society has provided the following decisions that involve a breach of a previous order and we agree are sufficiently similar and are therefore relevant:

- (a) *Farion* (30-day suspension for failure to comply with an order made by a previous hearing panel requiring that the respondent provide by a certain date proof or evidence that she had attended at a medical specialist on a particular date);
- (b) *Ben-Oliel* (a suspension for two months or until the respondent provided a substantive response to the Law Society for failure to comply with an order of a previous hearing panel to provide a response to the Law Society);
- (c) *Jessacher* (suspension until the respondent provided a substantive response to the Law Society for failure to comply with an order of a previous hearing panel to provide a response to the Law Society);
- (d) *McLean* (a fine of \$4,000 for failure to comply with an order made by the Chair of the Discipline Committee to produce certain information, records and documents to the Law Society);
- (e) *Welder* (three-month suspension for failure to comply with an order of a review panel regarding two requirements to pay issued by the Canada Revenue Agency); and
- (f) *Law Society of BC v. Coutlee*, 2010 LSBC 27 (one-month suspension for breach of an order of a previous hearing panel that restricted the respondent's fields of practice).

[39] There are factors in each of the foregoing cases that can be considered to be different from those in the case before us. For example, the *McLean* decision is somewhat distinguishable as the lawyer did not have a previous citation as part of his record. The *Welder* decision is also somewhat distinguishable as the lawyer had an extensive discipline history.

[40] Nonetheless, we conclude that the range in similar cases is a suspension of one to two months or until the original order is complied with, whichever is later.

Conclusion regarding disciplinary action

[41] The factors considered above support a suspension rather than a fine. The Respondent was fined \$2,000 in 2007 for failing to respond to LSS and \$5,000 in

2017 for failing to respond to the Law Society. We must consider the protection of the public and maintaining public confidence in the legal profession and the disciplinary process. We must also consider what we believe will motivate the Respondent to comply with the Order so that the Law Society may continue its investigation of the Complaint by the client.

ORDER

[42] We order that:

- (a) commencing July 1, 2017, the Respondent is suspended from the practice of law for:
 - (i) a period of one month, or
 - (ii) until the Respondent has provided a complete and substantive response to the enquiries made in the Law Society's letters to her dated August 4, September 15 and October 24, 2016, and an email message dated October 4, 2016,

whichever is last occurring, pursuant to section 38(5)(d) of the *Legal Profession Act*; and
- (b) the Respondent pay costs.

COSTS

[43] The Law Society seeks costs of \$2,542.70. This amount is composed of \$2,000 for a full day hearing, pursuant to the tariff, and \$542.70 in disbursements. A draft bill of costs was presented to us and was sent to the Respondent.

[44] Rule 5-11 provides that costs under the tariff are to be awarded unless the panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that provided by the tariff.

[45] The tariff in Schedule 4 of the Rules is \$2,000 for each day of a summary hearing.

[46] The Respondent made no submission with respect to the proposed bill of costs.

[47] We see no reason for departing from the costs as calculated by counsel for the Law Society pursuant to the tariff. We award costs to the Law Society in the amount of \$2,542.70.

[48] After consideration of the Respondent's submissions regarding her finances, and the timing of her other expenses, and in particular her outstanding fine of \$5,000 referenced at para. 33(b) above, we order that the Respondent be required to pay costs of this hearing on or before January 31, 2018.

ORDER TO PROTECT CONFIDENTIAL INFORMATION

[49] Counsel for the Law Society has made a request for an order under Rule 5-8(2) that confidential information and third party information relating to the Respondent's client and any information that would be protected by solicitor-client privilege not be disclosed and that such information be redacted from this decision and the transcript of this hearing and any exhibits filed in these proceedings.

[50] This was requested on the basis of a concern that the particulars of the client should not be accessible to the public, based on solicitor-client privilege and client confidentiality.

[51] Openness and transparency are an important part of these disciplinary proceedings. Rule 5-8(1) provides that every hearing is open to the public. Rule 5-9(1) permits any person to obtain a transcript pertaining to any part of the hearing that he or she was entitled to attend. Rule 5-9(2) permits, subject to solicitor-client privilege, any person to obtain a copy of an exhibit entered in evidence when a hearing is open to the public.

[52] The Rules recognize that there may be legitimate reasons to restrict public access to a hearing or to exhibits filed at a public hearing or to a transcript of the hearing. Rule 5-8(2), permits a panel to make an order that specific information not be disclosed "to protect the interests of any person."

[53] It is important that clients not lose the protection of solicitor-client confidentiality simply because the Law Society has relied on documents containing confidential information for the legitimate purpose of bringing disciplinary proceedings against a lawyer. A panel can therefore utilize Rules 5-8(2) and 5-9(2) to prevent confidential information from being accessible to the public.

[54] For this reason we order that the transcript of the hearing and the exhibits filed at the hearing be redacted to remove any reference to the client or the client's personal information and any information that would be protected by solicitor-client privilege.