2018 LSBC 03
Decision issued: January 24, 2018
Citation issued: December 22, 2010

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

PAMELA SUZANNE BOLES

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing dates:	July 6, 2017, August 31, 2017, October 12, 2017 and November 2, 2017
Panel:	Bruce LeRose, QC, Chair Ralston Alexander, QC, Lawyer
Discipline Counsel:	Mark D. Andrews, QC and Gavin Cameron
Counsel for the Respondent:	Richard C. Gibbs, QC

BACKGROUND

[1] This matter has a long history. The citation was issued on December 22, 2010. Two different decisions on Facts and Determination were issued, with the most recent being released on January 14, 2016, (2016 LSBC 02) (the "2016 Decision"). The 2016 Decision includes a description of most significant events to the date of its release.

[2] Following the release of the 2016 Decision, Clayton Schultz, FCA, the third member of this Hearing Panel, retired from the Law Society Tribunal for reasons of ill health. Pursuant to Law Society Rule 5-3 (1), the President of the Law Society ordered that this Panel continue with its two remaining members.

[3] Following the release of the 2016 Decision, the Law Society sought a review on the record of the 2016 Decision pursuant to s. 47 of the *Legal Profession Act*, SBC 1998, c. 9. That review was heard on September 23, 2016 and the decision of the review panel was released on December 28, 2016. The 2016 Decision was confirmed by the review panel, on different grounds.

[4] The hearings on disciplinary action were held on three different days, interrupted following the first day by an application from the Law Society to call as witnesses in the hearing, respective counsel for the parties at the time of the initial hearing (April 11, 2012). After several adjournments, that application was presented in a telephone conference on August 31, 2017, and the motion to call the additional witnesses was denied with reasons to be provided in this decision.

[5] The purpose of this hearing was to determine an appropriate disciplinary action for the finding of a breach of Law Society Rules as found in the 2016 Decision.

POSITION OF THE LAW SOCIETY

[6] The Law Society referenced the *Ogilvie* factors, (*Law Society of BC v. Ogilvie*, 1999 LSBC 17) and suggested condensing the same into four combined categories, as follows:

(a) Nature and gravity and consequences of the conduct;

(b) Character and professional conduct record of the Respondent;

(c) Acknowledgement of misconduct and any remedial action; and

(d) Public confidence in the legal profession including public confidence in the discipline process.

[7] As to nature and gravity, it was acknowledged that this case was in respect of a breach of the Rules and was not about professional misconduct. Slightly aggravating factors were that there were four rule-breaches in this case and the failure to report these certificates prevented the Law Society from initiating any of its regulatory processes to protect the public.

[8] It argued that the prior discipline history of the Respondent as evidenced by the professional conduct record before the Panel and the principle of progressive discipline were important considerations in this case.

[9] The Law Society placed considerable emphasis on the Professional Conduct Record ("PCR") of the Respondent. It noted that the PCR included four citations

(including this citation) and, in particular, a prior citation for a breach of the same rule. The PCR also includes three conduct reviews, one of which dealt with several different complaints over a time period from 2008 to 2010. The Respondent was also the subject of a Practice Standards referral from 1998 to 2003.

[10] The Law Society argued that the considerable disarray of the Respondent's financial affairs over a significant and relevant period of time, including her failure to file several income tax returns when due, (indeed not filed until some years later), is an aggravating factor and should have provided the Respondent with an increased awareness and vigilance about compliance with Law Society Rules as they relate to financial accountability.

[11] The Respondent's acknowledgement of the wrongdoing was conceded by the Law Society, though counsel for the Respondent took considerable exception to the suggestion that the acknowledgement was not provided until after the hearing began. We have more to say on this subject.

[12] It was noted that the large number of letters of recommendation provided by the Respondent should be accorded less weight as very few of the letters acknowledged an awareness of the prior discipline history of the Respondent or the fact of the prior citation for a previous breach of the same rule. In addition, and following the reasoning in *Law Society of BC v. Dent*, 2016 LSBC 5, the letters of recommendation seeking to establish good character can be overcome by a significant PCR. The Respondent's PCR is at least as "significant" as that of Mr. Dent.

[13] The Law Society argued for a fine of $7,500. The Law Society suggested that level of fine was at the low end of the range of acceptable penalties in the circumstances, having regard to similar cases of failure to report judgments. Several cases were cited in support of that proposition.

POSITION OF THE RESPONDENT

[14] The Respondent argued that the extreme anguish suffered by the Respondent as a result of the release of the first decision on Facts and Determination (see the 2016 Decision for a full explanation) was sufficient punishment and the protracted proceedings that the Respondent suffered through should be recognized by the Panel and therefore a simple reprimand was the appropriate disciplinary action in the circumstances.

[15] It is the position of the Respondent that the Law Society is responsible for the pain and suffering of the Respondent by reason of a breach of an agreement concluded

between respective counsel for the parties on the eve of the second day of the first hearing in 2012. It was determined in the 2016 Decision that, as a result of the alleged agreement among counsel, the Respondent did not testify in that first hearing. The 2016 Decision includes a description of the agreement, the consequences that followed its non-disclosure to the Panel, and the resulting unintended consequences.

[16] The suggestion of improper behaviour by prior Law Society counsel was the reason the Law Society sought permission to call both counsel involved in the 2012 hearing so that the nature of the agreement and any possible breach of the same could be canvassed by this Panel. We have more to say on this subject later in this decision.

[17] The Respondent presented a significant array of letters of reference and a binder of court decisions (48) in which the Respondent had participated as counsel and provided (presumably) quality services to her clients. The Panel did not review the decisions provided except to the extent they were referenced by counsel and finds that there is little or no probative value to that component of the Respondent's submission on disciplinary action.

[18] The fundamental argument of the Respondent as to the proper sanction to be imposed is that the Respondent has suffered greatly as a result of these protracted proceedings and that only a reprimand is required or justified in all of the circumstances.

DISCUSSION

[19] When reduced to its simplest terms, the determination required of this Panel is straightforward. We have an acknowledged breach of the Rules by a Respondent with an extensive PCR. We have considered the *Ogilvie* factors and the submissions of counsel for both parties. We have applied the principle of progressive discipline because we believe that the PCR of the Respondent requires it. We have considered and placed very little weight upon the letters of recommendation provided by the Respondent for the reasons articulated in the *Dent* decision. We have found that the court decisions submitted by the Respondent have little or no probative value.

[20] Counsel for the Respondent has argued forcefully that this entire process was not necessary, given the acknowledgement of the Respondent, from time to time, that she had breached the Rules.

[21] We are not of the view that that acknowledgement is determinative of whether this proceeding was necessary, in particular because the Law Society was seeking a finding of professional misconduct. It is clear that at no time did the Respondent acknowledge professional misconduct as an appropriate outcome. A hearing was accordingly required and conducted.

[22] The Respondent argues that the absence of a finding of professional misconduct is a profoundly significant characteristic of these proceedings, and claims that with the finding in the decision of the review panel of simple rule-breaches, her defence was "thoroughly vindicated".

[23] The main thrust of the Respondent's argument is that the Law Society is entirely responsible for the original outcome, which has caused the Respondent great harm, and therefore any discipline imposed by this Panel should be mitigated.

[24] The Panel does not accept this proposition and has determined (as will be discussed below) that both parties are equally responsible for the 2012 outcome on Facts and Determination that led to these protracted proceedings.

[25] We have determined that the appropriate penalty, in all of the circumstances, is a fine in the amount of $7,500. In establishing a fine at this level we have considered and are mindful of the argument of the Respondent that she has suffered enough. We will now address that issue and our determination on the circumstances related to the paragraph 41 outcome.

PARAGRAPH 41

[26] To provide context for what follows, readers are directed to the 2016 Decision. In the absence of the facts provided in that decision, nothing that follows will be understandable.

[27] We begin with a description of the agreement concluded by counsel on the eve of the second day of the 2012 Hearing. The agreement was the result of an email exchange obviously confirming a prior discussion. Law Society counsel advised Respondent's counsel as follows:

> As discussed, I now understand we are in agreement on 3-44 breach for
>
> - 1(e) the July 2004 Judgment for $48,005.06
> - 1(g) the Feb 2004 judgment for $9,371.91
> - 1(h) the Sept 2005 judgment for $6,528.46

> 1(c) the April 2005 $150,000 judgment, is to be determined on the basis that the essential elements are made out but they are subject to your *de minimus* defence and the ITA defence etc. – AND if your defences do not prevail there will be a Rule 3-44 finding (in other words, the essential elements are made out, but there is no 3-44 breach specifically acknowledged to preserve your ability to raise specific defences). Is that more or less what you are saying??
>
> All of this on the understanding that we may argue a finding of "professional misconduct" should be made in respect of the 3 or 4 breaches made out.

[28] Counsel for the Respondent replied (in part):

> That reflects my understanding. …
>
> As for the anticipated evidence you expect to call from Howie Caldwell, I am not restricted in raising objections if I feel that is appropriate. More significantly, however, I understand that the thrust will be that opportunities for access to some evidence and\or remedies (such as spot audits, if they had been deemed appropriate at the time) were lost as a result of the delay in reporting. However, you are not anticipating that to be attributed to any deliberation or intended obstruction on Pam's part, but rather to consequences flowing from the simple passage of time. Please correct me if I have misunderstood that. If it is intended to go into suggestions of deliberate or intentional interference with LS functioning, then we would feel compelled to explore the issues more fully, and/or call rebuttal evidence.

[29] The Panel was not advised of this "agreement" and the evidence of Mr. Caldwell was uneventfully admitted and none of the prohibited subject matters were canvassed. The parties presented their respective closing arguments.

[30] As foreshadowed in the email exchange, the Law Society argued for a finding of professional misconduct. The primary precedential foundation for the argument was the decision in the case of *Law Society of BC v. Lyons*, 2008 LSBC 09. The *Lyons* decision describes considerations that assist panels to determine when a breach of the rules reaches the level of professional misconduct.

[31] Those considerations include the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides* and the harm caused by the respondent's conduct. Law Society counsel recited the first four of these

considerations, excluded a reference to harm, and added as a further consideration, without wording from *Lyons* as a basis for doing so, "wilful blindness".

[32] The emphasis of the Law Society argument was on the presence or absence of *mala fides*. This was tied to what was described as the "Respondent's mental state and intent." The submission continued in these terms:

> It is inconceivable, I submit, that during the period of March to October, in those years, that the Respondent did not know, that the certificates were judgments. Such certificates having been registered as judgments in the LTO from as early as 2002. And that was clearly to her knowledge.

[33] The Law Society argued that the *Lyons* harm that followed the failure to report the judgment is the prevention of an opportunity for the Law Society, in the public interest, to initiate an investigation into the financial circumstances of the judgment debtor and to determine if those financial circumstances pose any danger to the public.

[34] The Law Society submission concluded as follows:

> But for the reasons set out above, including the duration, gravity, and harm resulting and the presence of *mala fides*, or alternatively, wilful blindness, the Law Society respectfully submits that the conduct be characterized as professional misconduct in respect of all or some of the conventions. [sic]

[35] Counsel for the Respondent replied. The first argument that was developed suggested the importance of the knowledge in the Respondent of the change in the Law Society Rules that clarified that certificates issued under the *Income Tax Act* were to be treated as judgments that engaged the reporting obligation. Equally, the question of whether the Respondent was actually aware of the existence of the Certificates and that she therefore should have reported them. He argued that, if she was not aware of the certificates, it should be difficult to censure her for a failure to report them.

[36] The argument addressed the difference between imputed knowledge of the change/clarification of the rule, which in argument at least the Respondent accepted she should have within a year or 15 months of the date of the change. Counsel cautioned that the imputed knowledge accepted in respect of the rule-change should not be taken as evidence of actual knowledge. The argument then identified some factual considerations revealed in the Respondent's letter of February 29, 2012 to her counsel in response to Law Society inquiries about outstanding certificates.

The Respondent plainly states in that letter that she did not think of the certificates as judgments.

[37] A technical argument was advanced as to the effectiveness of one of the certificates, which issue has no bearing on the issues under consideration in this analysis.

[38] The next thrust of the Respondent's argument addressed the extent to which the established behaviour reached the threshold of professional misconduct. Counsel first noted that, although payment of the certificates was not a defence to the failure to report, payment should significantly mitigate the seriousness of the duration factor.

[39] The Respondent next discussed the harm factor and considered the notion that the primary harm advanced was the impairment of the ability of the Law Society to respond to the concerns raised by an unsatisfied judgment, thereby protecting the public from the consequences of a member in financial stress. Counsel noted that, even when the multiple judgment information was discovered by the independent inquiry of the Law Society, no intervention was seen. The Law Society did send inquiring letters to the Respondent, but there was certainly no rush to spot audit or take other protective intervention. It is also the case that the Law Society had other damaging information from the Respondent, provided over several years in the course of her annual reporting obligations, about numerous general account cheques being dishonoured when presented for payment. Counsel noted that these reports did not appear to raise significant alarm at the Law Society and again no supervisory or preventive intervention occurred.

[40] Based upon this analysis, counsel for the Respondent suggested the harm factor of *Lyons* was overstated by the Law Society.

[41] Respondent's counsel acknowledged the references to *mala fides* and wilful blindness. He argued that the concepts should be restricted to circumstances where there is some element of deliberation or a knowing series of contraventions. He suggested that there is no knowledge in the Respondent of this rule or the events that suggest its contravention. He said "and we certainly are not working, in this case, with evidence of knowledge."

[42] Counsel then addressed the "strong" assertions of the Law Society regarding it being "inconceivable" that the Respondent was unaware that the certificates were judgments. He noted that the assertion ignored the foundational position of the Respondent that she was not aware of the rule and not aware of the certificates. He also noted that the prior breach of the same rule is not helpful in analyzing these

facts because there is no similarity between the first judgment of the Supreme Court and these certificates from the tax department.

WHAT WENT WRONG?

[43] We are now obliged to consider the circumstances of the agreement concluded between counsel on the night of the first day of the 2012 hearing. The reason for this analysis is that counsel for the Respondent argues that the Law Society breached the agreement and that, therefore, many of the negative consequences that followed the release of the 2012 decision are the responsibility of the Law Society and that this burden must be addressed in the penalty imposed in this Disciplinary Action phase of the 2016 hearing.

[44] It is manifest in the events that followed the release of the 2012 Decision that neither party expected the decision that was rendered. We know that of the Law Society because it immediately, through counsel, took the position that it would not rely on the language of paragraph 41 in the disciplinary action phase of the hearing. The position of the Respondent is clear, as evidenced by the variety of corrective measures launched immediately following the release of the decision.

[45] We believe that neither party, nor their respective counsel, anticipated this possible outcome following their agreement concluded on the eve of the second day of the 2012 hearing. This outcome (paragraph 41) was the quintessential unintended consequence.

[46] In settling the terms of the agreement, Law Society counsel reserved the right to argue for a finding of professional misconduct. Counsel for the Respondent apparently agreed that that intended argument could be advanced as long as the Law Society was not alleging that the non-reporting of the judgment was an intentional interference with Law Society functioning. It was specifically provided that the Respondent would need to consider calling rebuttal evidence if there was a suggestion that the non-reporting was with an intention to mislead.

[47] Counsel had determined to keep their agreement from the Panel. In doing so, the Panel did not have the benefit of the Respondent's testimony as to her knowledge or lack thereof of the import of these certificates. Clearly, the best evidence of what was in the mind of the Respondent on these seminal questions would come from the mouth of the Respondent. That reality was validated in the second hearing.

[48] The *Lyons*' factors include *mala fides*. Much discussion in the disciplinary action phase of this hearing was devoted to an understanding of what constitutes *mala*

fides. Multiple dictionary sources were cited. In the view of the Panel, most of that information was not helpful. We know that *mala fides* is the opposite of *bona fides*. Bad faith vs. good faith. There can be no inadvertent *mala fides*.

[49] It follows then, if it is agreed that *mala fides* may be developed as a consideration before the Panel, that the state of mind of the Respondent would be in issue. For the Law Society to succeed in its quest for a finding of professional misconduct, it would need to argue that the Respondent was acting with bad intentions (*mala fides*). There is no other route to that outcome. However, the parties had just agreed that the intention of the Respondent to interfere with the Law Society regulatory function (the only meaningful interference in the context of this hearing) was an off limits subject matter. It is accordingly our finding, that the agreement of counsel, particularly when considered in light of its secrecy from the Panel, was flawed from the start.

[50] There could be no *mala fides* (a necessary *Lyons* factor) advanced as a consideration without at the same time engaging, at the least, an inquiry of the state of mind of the Respondent. The state of mind of the Respondent was alluded to in passing by the counsel for the Law Society, and his argument was likely enhanced by the addition to the *mala fides* factor the notion of wilful blindness. To be clear, *Lyons* does not speak to wilful blindness, but we note also that, by definition, wilful blindness requires advertence.

[51] Counsel for the Respondent relied upon the written record to establish the state of mind of the Respondent on the significant issues of knowledge of the rule and knowledge of the certificates. The written record is clear on that position but it is, of course, self-serving and not subject to the rigours of cross-examination. The second hearing provided to the parties a suggestion of why the Respondent may have eschewed the opportunity to testify given the aggressive and relentless cross-examination to which her testimony at the second hearing was subjected.

[52] The reason why we denied the application of the Law Society to call these two counsel as witnesses in this hearing follows from the foregoing analysis. It was clear to the Panel that neither party asked for or anticipated the outcome that resulted. There could be no useful evidence provided that would clarify their intentions or anticipations. Both were clear to the Panel. Equally clear was the fact that this did not turn out as either had hoped, and that outcome required no further clarification.

[53] This Panel finds that responsibility for the unfortunate and unintended outcome is shared equally. As noted above, the agreement was ill-conceived and, at the very least, should have been disclosed to the Panel. The decision to leave the Panel

uninformed of the agreement had consequences for which both parties must share responsibility.

[54] The final consideration for this Panel is the question of whether the Panel should give mitigating credit for the adverse publicity and embarrassment of the Respondent following the publication of the 2012 decision on Facts and Determination. Both parties argued the application of a component of the *Faminoff* decision, *Law Society of BC v. Faminoff*, 2017 LSBC 04, to urge different outcomes. Counsel for the Respondent correctly noted that *Faminoff* speaks to the opportunity to consider the adverse publicity as a mitigating factor, while at the same time the decision notes that the mitigation for that factor should generally not attract much weight.

[55] The specific reference in *Faminoff* is as follows at para. 104:

> It is our view that the impact of the proceedings in terms of stress and embarrassment should generally not attract much weight as a mitigating factor. Publication of disciplinary proceedings is an important aspect of the Law Society's statutory duties with respect to the public interest. Further, disciplinary proceedings will invariably lead to stress and embarrassment for the lawyer. This can be expected where the lawyer's professional reputation and in some cases the ability to practise may be at risk.

[56] We adopt this language and the minimal impact suggested as a mitigating factor. In this regard our determination of a shared responsibility for the outcome and its negative consequences is relevant.

ORDER

[57] The Respondent is ordered to pay a fine of $7,500. She will have until May 1, 2018 to pay.

[58] If the parties, both represented by extremely able and senior counsel, are not able to agree on the issue of costs, that issue may be returned to the Panel for determination within 30 days of the issuance of this decision.