2018 LSBC 26
Decision issued: September 24, 2018
Citation issued: April 2, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

GARY RUSSELL VLUG

APPLICANT

DECISION OF THE BENCHERS ON REVIEW

Review dates:	April 10 and 11, 2018
Benchers:	Sarah Westwood, Chair Jasmin Ahmad Jeff Campbell, QC Barbara Cromarty Lisa J. Hamilton, QC Steven McKoen Mark Rushton
Discipline Counsel:	Henry C. Wood, QC
Appearing on his own behalf:	Gary R. Vlug

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INTRODUCTION

[1] This is a Review pursuant to s. 47 of the *Legal Profession Act* (the "Act") of the decision of the hearing panel on Facts and Determination issued February 26, 2014 (2014 LSBC 09) and the decision of the hearing panel on Disciplinary Action issued September 5, 2014 (2014 LSBC 40) regarding three complaints totalling ten allegations (originally 11 allegations) of professional misconduct against the Applicant, Gary Russell Vlug.

[2] The Applicant also applies for an order that the decision of the hearing panel on Facts and Determination in relation to allegations 2 through 6 be set aside on the basis that the panel erred in not considering the overall effect of delay.

PROCEDURAL BACKGROUND

[3] On April 2, 2012, the Discipline Committee of the Law Society of British Columbia (the "LSBC") authorized a citation containing 11 allegations of professional misconduct arising from complaints made against the Applicant in relation to three different family law matters which we, as the hearing panel did, will refer to as the ES Matter, the PS Matter and the MW Matter.

[4] The citation alleged that the Applicant engaged in professional misconduct, which we summarize as follows:

The ES matter

1. The Applicant represented to the BC Supreme Court ("BCSC") on May 12, 2009 and to the LSBC on August 4, 2009 that opposing counsel had told him over the telephone that he would forward the Applicant's client, ES's, materials to Dr. E for the preparation of a Views of the Child Report, when the Applicant knew or ought to have known that this was untrue.

2. On or about May 24, 2009, while representing ES, the Applicant prepared and commissioned an affidavit of ES for use in the BCSC that stated that there was an active attempt by the opposing party to deprive Dr. E of ES's materials when:

   (a) the Applicant knew or ought to have known the representation was untrue; or

   (b) the affidavit was not properly drafted in that it was based on information and belief and the source of such information was not identified.

3. On or about June 11, 2009, the Applicant prepared and commissioned an affidavit of ES filed in the BC Court of Appeal ("BCCA") that stated that there was an active attempt by the opposing party to deprive Dr. E of ES's materials when:

   (a) the Applicant knew or ought to have known the representation was untrue; or

   (b) the affidavit was not properly drafted in that it was based on information and belief and the source of such information was not identified.

4. On or about June 22, 2009, the Applicant represented to the BCCA that he had not received a letter from opposing counsel that advised the Applicant to send

ES's materials to Dr. E, when the Applicant knew or ought to have known the representation was untrue.

5. Between June 2009 and December 2010, during an LSBC investigation, the Applicant made discourteous and unfounded statements about opposing counsel that:

   (a) opposing counsel "duped" him;

   (b) opposing counsel's conduct was aimed to take an advantage; and

   (c) opposing counsel's letter was created with the intent of causing a slip such that only the opposing party's materials were sent to Dr. E.

6. In or about 2009 and 2010, during an LSBC investigation, the Applicant represented that, in the BCCA hearing, the Court had an "off the record" discussion with opposing counsel regarding opposing counsel's conduct in not writing directly to the Applicant about the process of providing materials to Dr. E, when the Applicant knew or ought to have known that the representation was untrue.

The PS matter

7. On or about February 5, 2010, the Applicant, while acting for client PS (also known as SY) in a New Westminster divorce proceeding, signed and filed a second divorce proceeding in Vancouver using the name SY, for the purpose of improperly avoiding the procedure to amend the New Westminster pleadings.

8. In or about February, 2010, the Applicant, while acting for client PS (also known as SY) in a New Westminster divorce proceeding (in which a certificate of marriage had been filed), filed a Vancouver divorce proceeding that stated there had been no prior proceedings when the Applicant knew or ought to have known that the statement was untrue.

9. In or about February 2010, the Applicant, while acting for client PS (also known as SY), filed a statement of claim in a Vancouver divorce proceeding that stated that it was impossible to obtain a certificate of marriage because there was an urgent need to file a Certificate of Pending Litigation or otherwise protect assets and that a copy of the marriage certificate would be provided shortly when the Applicant knew or ought to have known that the statement was untrue.

The MW matter

10. On or about February 23, 2011, the Applicant, while acting for client MW, prepared and commissioned an affidavit sworn by MW (and subsequently filed in the BCSC) that implied his 2009 Notice of Assessment was attached to his form 89 financial statement sworn March 19, 2010, when the Applicant knew or ought to have known that the statement was not true.

11. On or about October 4, 2011, the Applicant, while acting for client MW, prepared and commissioned an affidavit sworn by MW (and subsequently filed in the BCSC) that stated that opposing counsel had complained to the LSBC that the Applicant had included "too much financial disclosure" when the Applicant knew or ought to have known that the statement was untrue.

[5] The LSBC invited the hearing panel to find that the Applicant had committed professional misconduct in relation to all 11 allegations.

[6] In the alternative, if misconduct was not found, the LSBC invited the hearing panel to find that the Applicant was incompetent in relation to allegations 2 through 5 and 7 through 11.

[7] The Applicant urged the hearing panel to dismiss all 11 allegations on the merits. The Applicant also requested that allegations 1 through 6 be dismissed on the basis of delay.

[8] The hearing took place June 3 through June 5, 2013.

[9] On February 26, 2014, the hearing panel found professional misconduct was made out in relation to all 11 allegations.

[10] As discipline for the 11 findings of professional misconduct, the hearing panel suspended the Applicant from the practice of law for a period of six months. The hearing panel also ordered the Applicant to pay $20,000 in costs.

[11] On September 10, 2014, the Applicant applied for a review of the hearing panel's decision on Facts and Determination and on Disciplinary Action pursuant to s. 47 of the Act. The review was heard on May 1 and June 10, 2015 with a decision issued December 31, 2015 (2015 LSBC 58).

[12] The review panel consisted of seven Benchers but was reduced to six due to illness of one of the Benchers. On December 31, 2015, the remaining six Benchers upheld the hearing panel's finding of professional misconduct in relation to allegations 2 through 6, as well as allegations 10 and 11, but reversed the hearing panel's

decision on allegations 7, 8 and 9 on the grounds that there was insufficient evidence of either professional misconduct or incompetence in relation to those allegations.

[13] The review panel split evenly 3:3 on allegation 1 and as a result, no review decision was reached in relation to allegation 1.

[14] As such, allegations 2 through 6, 10 and 11 were before the review panel for its decision on disciplinary action. The review panel reduced the suspension from six months to seven weeks and reduced the amount of costs.

[15] On January 4, 2016, the Applicant filed a Notice to Appeal and on January 19, 2016, the LSBC cross-appealed to the BCCA on the issue of standard of review. The Appeal was heard on February 15 and 16, 2017. The BCCA remitted the matter to a review board for a fresh review on the basis that the original review panel had misinterpreted the applicable standard of review. To summarize, the BCCA allowed the appeal, set aside the review panel's decision and ordered a fresh review with respect to allegations 2 through 11 (*Vlug v. LSBC*, 2017 BCCA 172).

[16] At the hearing of this Review, the Applicant renewed his application to dismiss allegations 2 through 6 on the basis of delay. The Applicant relied on his written submissions in respect of the delay argument, but did not expand on them, although invited to do so.

THE ISSUES

[17] The Applicant's Notice of Review sets out numerous grounds for review, namely that the hearing panel:

(a) erred in allowing the Law Society to present evidence, and the panel considered evidence that the Applicant had no knowledge of (Affidavit of Chrysta Gejdos sworn June 12, 2013);

(b) erred in allowing the Law Society to make submissions, and the panel considered those submissions which the Applicant had no knowledge of (submissions of June 13, 2013);

(c) did not allow for any opportunity to address the evidence and submissions aforesaid;

(d) did not require the Law Society to bear the burden of proof and prove its case pursuant to the case law outlined in *Law Society of BC v. Seifert*, 2009 LSBC 17;

(e) erred in not applying the case law set out in *Law Society of BC v. Martin*, 2005 LSBC 16;

(f) erred in engaging in the comparison test rejected by the BC Court of Appeal in *Hamilton v. Law Society of BC*, 2006 BCCA 367;

(g) erred in substituting its own beliefs for the burden of proof on the Law Society, a practice rejected by the BC Court of Appeal in *Sheddy v. Law Society of BC*, 2007 BCCA 96;

(h) erred in finding that the Applicant was blameworthy because he attempted to defend himself;

(i) erred in not considering the overall effect of the delay outside of an application to dismiss;

(j) as a result of not requiring the proper burden of proof, made many mistakes of fact.

[18] The Applicant further submitted that the Disciplinary Action imposed by the hearing panel of a six-month suspension was inappropriate.

[19] At the outset of this Review, the Applicant made an application to adduce fresh evidence. The fresh evidence consisted of the Applicant's Response to Notice to Admit dated May 8, 2013. After hearing submissions from the Applicant and the LSBC, we reserved judgment on the application. We dismissed the Applicant's application to adduce fresh evidence in reasons set out in a separate decision issued concurrently with this decision.

[20] Thus, the remaining issues for this Review Panel to address can be summarized as follows:

(a) Did the hearing panel err with respect to the onus and standard of proof?

(b) Did the hearing panel err in its findings of fact?

(c) Did the hearing panel err in its application of the test for professional misconduct to the allegations against the Applicant?

(d) Did the hearing panel err in its analysis and conclusion with respect to the Applicant's delay arguments?

(e) Depending on the determination of the above issues, was the hearing panel's disciplinary action appropriate?

GENERAL STANDARD OF REVIEW

[21] This Review is governed by s. 47 of the Act. Pursuant to s. 47(5) of the Act, we may either confirm the decision of the hearing panel or substitute a decision the hearing panel could have made under the Act regarding each of the remaining ten allegations of professional misconduct and the disciplinary action.

[22] The BCCA, in contemporaneous decisions in *Harding v. Law Society of BC*, 2017 BCCA 171 and *Vlug*, confirmed that the standard of review we must apply on a s. 47 review is one of correctness, except where the hearing panel has heard *viva voce* evidence and had the opportunity to assess witnesses' credibility, in which case we should show deference to the hearing panel's findings of fact.

[23] The BCCA decisions in *Vlug* and *Harding* have since been considered on a s. 47 review in *Law Society of BC v. Strother*, 2017 LSBC 23.

[24] In the *Strother* decision, the review panel discussed the standard of review and how it applies to situations where the hearing panel has had the advantage of hearing *viva voce* evidence at paras. 34 through 37:

> The question of the appropriate standard of review to be applied by a review board in a s. 47 proceeding has been the subject of much discussion in recent Law Society decisions. Recently, the BC Court of Appeal released two decisions that have clarified the internal standard of review to be applied by a review board in a s. 47 proceeding: *Vlug* and *Harding*.
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> In *Harding*, the Court of Appeal concluded that it was reasonable for s. 47 review boards to use that same standard of review articulated in *Law Society of BC v. Hordal*, 2004 LSBC 36 and *Law Society of BC v. Berge*, 2007 LSBC 7 ("*Hordal/Berge*"):
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> [6] … These decisions establish that the standard is correctness, except where the hearing panel has heard *viva voce* testimony and had the opportunity to assess witnesses' credibility, in which case the

review board should show deference to the hearing panel's findings of fact.

[7] In *Hordal*, the review board described the standard of review as follows:

> [9] In *Hops*, while considering the appropriate scope of review for "findings of proper standards of professional and ethical conduct", the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971), 10 DLR (3d) 446, at 452:
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> > The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interests of the public or of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men [and women] who enjoy the full confidence and trust of the members of the legal professional of this Province.
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> [10] It follows from that observation that the Benchers must determine whether the decision of the Hearing Panel was "correct", and if it finds that it was not, then the Benchers must substitute their own judgment for that of the Hearing Panel as is provided in Section 47(5) of the *Legal Profession Act*.
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> [11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the *viva voce* testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. In those cases the Benchers ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute.

[8] In *Berge*, the review board described the standard of review in this way:

> [19] The standard of review to be applied by the Benchers on this Review is one of correctness. See *Law Society of BC v. Dobbin*, [2000] LSDD No. 12.
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> [20] This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:
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> (i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer; and/or
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> (ii) whether the penalty imposed was appropriate.
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> [21] The standard of review described above is subject to one qualification, namely, that where issues of credibility are concerned, the Benchers should only interfere if the Hearing Panel made a clear and palpable error. See *Law Society of BC v. Hops*, 1999 LSBC 29 and *Law Society of BC v. Dobbin* (*supra*).

In *Vlug*, the Court of Appeal stated at para. 2 that:

> … the standard of review articulated in the *Hordal/Berge* line of cases is the internal standard developed by review boards for s. 47 reviews and is reasonable. The *Hordal/Berge* review board decisions establish that *the internal standard is correctness, except where the hearing panel has heard viva voce evidence and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact.*
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> [emphasis added]

In deciding this matter, we have followed the approach in the *Hordal/Berge* line of cases and have, when reviewing the decision of the hearing panel in this matter as a whole, considered whether the decision is correct. Where the hearing panel had the benefit of hearing *viva voce* testimony, we have shown deference to the hearing panel subject to making a determination as to whether a clear and palpable error was made.

[25] The review panel in *Law Society of BC v. Perrick*, 2018 LSBC 07 also addressed how the standard of review applies to a hearing panel's findings based on oral testimony at paras. 88 through 91, stating at para. 91:

> The hearing panel is to be afforded deference in its decision to the extent that the panel heard *viva voce* evidence and thus was in a better position to assess evidence, save any clear and palpable error: *Hordal*, at paragraph 11.

[26] In the case at hand, the hearing spanned three days. The evidence at the hearing included an Agreed Statement of Facts as well as oral evidence.

[27] In relation to allegations 1 through 6, the hearing panel had the benefit of oral testimony of the Applicant, Mr. Storey and the Applicant's client, ES. In relation to allegations 7 through 9, the hearing panel heard oral evidence from the Applicant, the Applicant's paralegal, MT, and a well-respected family law lawyer, Dinyar Marzban, QC, who was called as an expert by the LSBC. In relation to allegations 10 and 11, the hearing panel heard oral testimony from the Applicant. The hearing panel had the benefit of observing the evidence in chief and the cross-examination of each of these witnesses.

[28] The hearing panel had an advantage over this Review Panel in hearing the *viva voce* evidence. As such, we may only interfere with the hearing panel's findings of fact and credibility where there has been clear and palpable error on the part of the hearing panel. Absent clear and palpable error, the hearing panel's findings of fact based on controverted evidence must be upheld. See *Strother*, which adopts the approach taken in *Dobbin*.

ANALYSIS

a. Did the hearing panel err in its application of the onus and standard of proof?

[29] The hearing panel was aware of and specifically set out that the onus of proof in respect of all of the allegations was on the Law Society (para. 10 of the hearing panel's Facts and Determination Decision).

[30] The Applicant submits that the hearing panel erred in relation to the standard of proof required. He submits that the standard of proof for allegations of professional misconduct is "just below beyond a reasonable doubt," relying on *Law Society of BC v. Lyons*, 2008 LSBC 9. However, the Applicant's position is not

consistent with the Benchers' later decisions in *Siefert* and *Schauble*, which confirm the standard of proof is based on the balance of probabilities.

[31] At paras. 11 and 12 of the Facts and Determination Decision, the hearing panel correctly stated:

> The standard of proof was articulated by the Supreme Court of Canada in *FH v. McDougall*, 2008 SCC 53, 297 DLR (4th) 193, and adopted by Law Society hearing panels such as *Law Society of BC v. Shauble*, 2009 LSBC 11, and *Law Society of BC v. Seifert*, 2009 LSBC 17.
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> In *Seifert*, the panel stated:
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> > ... 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.

[32] The hearing panel correctly placed the onus on the LSBC to prove each of the allegations made against the Applicant in its Facts and Determination Decision and used the correct standard.

[33] The hearing panel did not err in its application of onus or standard of proof.

b. Did the hearing panel err in its findings of fact?

The ES matter

[34] In 2009 and 2010, the Applicant represented ES in a Hague Convention matter involving custody of a child. ES had provided his undertaking to the Court in Ireland to return the child to Ireland after a month-long vacation in Canada. After the vacation, in breach of his promise to the Irish Court, ES kept the child in Canada, taking the position that the child did not wish to return to Ireland. The child's mother, through her counsel, William Storey, applied for the return of the child to Ireland.

[35] On March 31, 2009, Madam Justice Martinson ordered a "Views of the Child" report be prepared to ascertain the child's wishes. Counsel agreed that Dr. E would prepare the report. By court order, Madam Justice Martinson directed that all the court materials be provided to Dr. E for background, but she did not specify who was to provide the materials to Dr. E.

[36] On April 1, 2009, Mr. Storey faxed a letter to Dr. E. The letter was copied by fax to the Applicant, asking whether Dr. E was willing and able to prepare the report. In response, Dr. E faxed a letter to Mr. Storey, copied by fax to the Applicant, asking Mr. Storey to arrange delivery of the necessary documents so that he could prepare the report.

[37] On April 1, 2009, the Applicant himself faxed a letter to Dr. E, which was copied by fax to Mr. Storey, setting out some additional facts that were not contained in Mr. Storey's letter to Dr. E.

[38] On April 2, 2009, Mr. Storey faxed a second letter to Dr. E, which was copied again by fax to the Applicant, containing Mr. Storey's proposal to ensure Dr. E received the relevant pleadings and affidavit material (the "Second Letter"). The Applicant admitted to receiving the Second Letter, which stated:

> … by copy of this letter I will advise Mr. Vlug that my office will make copies of and deliver to you the Petitioner's Pleadings and Affidavits *and I suggest that he do the same with the Applicant's Pleadings and Affidavits*. In addition I will provide you with a copy of the draft of the order that was pronounced by the Hon. Madam Justice Martinson on March 31, 2009. I will also ask my client to contact your office to arrange an appointment.
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> [emphasis added]

[39] Mr. Storey couriered another letter to Dr. E on April 2, 2009, with the cover letter copied by fax to the Applicant. This letter to Dr. E listed in detail what documents were sent to Dr. E, all of which were Mr. Storey's client's materials, not ES's materials (the "Third Letter"). The Applicant also received the Third Letter.

[40] The Applicant did not forward copies of ES's court documents despite receiving the Second Letter containing the proposal that he do so and the Third Letter showing what documents Mr. Storey had sent to Dr. E.

[41] In BCSC on May 12, 2009, the Applicant told Madam Justice Martinson that Dr. E had not received any of ES's materials due to Mr. Storey not providing them to Dr. E. The Applicant told Her Ladyship that Mr. Storey was responsible for forwarding both clients' relevant court documents to Dr. E based on a telephone conversation on or about April 2, 2009. Mr. Storey denied any such agreement or telephone call.

[42] The Applicant's client, ES, also testified that he recalled Mr. Storey offering to provide the materials to Dr. E in BCSC. ES testified that he was at the Applicant's

office on April 2, 2009 and recalled the Applicant and Mr. Storey having a telephone call that day in which Mr. Storey had confirmed he would send ES's materials to Dr. E (although ES only heard the Applicant's side of the call and took no notes).

[43] The official court transcript for March 31, 2009 did not contain any reference to Mr. Storey offering or agreeing to provide ES's materials to the expert. Neither the Applicant nor ES made notes of this.

[44] Mr. Storey testified that he did not agree to provide ES's materials to Dr. E in court or on the telephone. He also did not recall any communications between him and the Applicant regarding sending Dr. E materials, except for the Second Letter and the Third Letter faxed on April 2, 2009.

[45] For each of the BCSC and BCCA proceedings, ES swore an affidavit prepared and commissioned by the Applicant that stated 'there was an active attempt by the Petitioner to deprive [Dr. E] of [ES's] materials'.

[46] During an appearance in the BCCA on June 22, 2009, the Applicant engaged in the following exchange with the Court:

> Court: Well did you not get correspondence from Mr. Storey saying, I propose to send my documents and you send yours?
>
> Mr. Vlug: No, I did not.

[47] The Applicant further made submissions to the BCCA to the effect that Mr. Storey had "duped" him.

[48] Subsequently, Mr. Storey reported the Applicant's conduct to the LSBC. During the course of the LSBC's investigation, the Applicant maintained the position he took at the BCCA including:

(a) in a letter dated December 2, 2009 to the LSBC stating that Mr. Storey's conduct was aimed at obtaining an advantage of some sort; and

(b) a letter dated December 13, 2009 to the LSBC stating words to the effect that Mr. Storey's Second Letter was created with the intent of causing a slip that would further the advantage of providing only the other party's pleadings and affidavits.

[49] During the LSBC's investigation, the Applicant made assertions, including in his letter to the LSBC dated September 9, 2011, that a BCCA judge had chastised Mr. Storey during an "off the record" (i.e., not recorded in the official transcript) discussion at the June 22, 2009 proceedings for only sending his own client's documents to Dr. E and for merely copying the Applicant on the Second Letter rather than directly writing to him.

[50] Mr. Storey testified before the hearing panel that there was no such "off the record" discussion on June 22, 2009. He did not recall being chastised by a BCCA judge for his conduct in the ES Matter, nor could he recall any "off the record" discussions ever occurring in his years of appearing before the BCCA.

[51] The hearing panel acknowledged that one of its crucial tasks was to make findings of credibility at para. 33:

> There was conflicting evidence between the testimony of Mr. Storey and the testimony of Mr. Vlug with respect to the alleged telephone call. The Panel accepts the principles in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA), that "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." These principles have been accepted by other hearing panels, including in *Law Society of BC v. Shauble*, 2009 LSBC 1.

[52] The hearing panel then addressed the conflicting evidence relating to the Applicant's testimony versus Mr. Storey's testimony in detail in relation to whether or not the April 2, 2009 call took place at paras. 35 through 42:

> Mr. Storey testified that he had no record or recollection of a telephone call with Mr. Vlug regarding the logistics of forwarding documentation to Dr. E, although there may have been one with respect to a logistical matter concerning access to the child during the proceedings. Mr. Storey testified that he rarely communicated with Mr. Vlug by telephone and usually did so in writing, and that there were no notes to the file substantiating the alleged telephone call in his records, nor timesheet entries substantiating such call.
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> Mr. Vlug also testified that he had no notes to the file or timesheet entries that could have substantiated the existence of the telephone call.

> As for the delivery of the documents to Dr. E, it was clear from Mr. Storey's letters that he would only be responsible for sending his client's materials to Dr. E and that Mr. Vlug would be responsible for sending his client's materials to Dr. E. When asked why Mr. Storey would not have forwarded Mr. Vlug's client's documents, Mr. Storey indicated that there was no need, as the letter was clear that Mr. Storey was only sending his client's documentation, that he was not responsible for acquiring, photocopying and then sending opposing counsel's material to Dr. E. Put another way, the legal representation of ES was Mr. Vlug's job, not Mr. Storey's.
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> …
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> Mr. Storey had little or no interest in the outcome of the discipline proceedings against the Respondent, whereas Mr. Vlug had a substantial interest in the outcome of the discipline proceedings in terms of his reputation, and in terms of a finding of professional misconduct against him. Whether a witness has an interest in the outcome of the proceedings is a factor in assessing witness credibility enunciated within *Faryna v. Chorny*, (*supra*). That principle was adopted by the hearing panel in *Law Society of BC v. Shauble*, (*supra*).
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> *… the Panel accepts the evidence of Mr. Storey. His evidence was clear, convincing and cogent. It was unreasonable to expect that a telephone conversation was necessary or reasonable in the circumstances, as it would not make sense for Mr. Storey to have to assure Mr. Vlug, by telephone, that only Mr. Storey's client's materials were sent to Dr. E. He had already confirmed this in writing in two separate letters. Accordingly, the Panel does not believe that a telephone conversation occurred …*
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> …
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> *… Mr. Storey's evidence is to be preferred to that of Mr. Vlug, and that, consequently, there was no telephone conversation between him and Mr. Story* [sic] *on this matter and that his representation to the Supreme Court to that effect was not true.*
>
> [emphasis added]

[53] In relation to the Applicant's position that Mr. Storey had attempted to deprive Dr. E of ES's materials, the hearing panel found at paras. 46 through 48:

> Mr. Storey's letters of April 1 and 2, 2009, discussed at length above, are clear. Mr. Storey was sending his client's materials to Dr. E so that Dr. E could prepare his report, and Mr. Vlug should have been sending his client's materials to Dr. E. That being so, the Panel believes that Mr. Vlug knew or ought to have known that the statement in the affidavit that there was "an active attempt by the Petitioner to deprive Dr. E of Mr. Vlug's materials" was not true. Indeed, how could there be an active attempt to deprive Dr. E of the respondent's materials when Mr. Vlug received Mr. Storey's April 2 letter, which indicated what documents Mr. Storey was sending to Dr. E.
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> Affidavits that are based on information and belief must identify that they are being made on information and belief and the source of such information must be identified. Mr. Vlug's client, ES, testified on behalf of Mr. Vlug that he believed Mr. Vlug with respect to Mr. Vlug's assertion that Mr. Storey was trying to deprive Dr. E of the materials. Accordingly, the affidavit ought to have so disclosed.
>
> *Based on the totality of the evidence, we find that the Respondent knew that there was not an active attempt by Mr. Storey to deprive Dr. E of Mr. Vlug's client's materials. … Mr. Vlug received the April 2 letters from Mr. Storey, and any suggestion that Mr. Storey was attempting to deprive Dr. E of the materials is not worthy of belief.*
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> [emphasis added]

[54] The hearing panel also addressed in detail the Applicant's representation to the BCCA that, despite receiving the Second Letter, he had not received any correspondence from Mr. Storey telling him to send ES's materials to Dr. E at paras. 51 through 57:

> The transcript of the Court of Appeal proceeding was admitted as evidence, and on page 48, the following exchange occurs between the court and Mr. Vlug:
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> Court: Well did you not get correspondence from Mr. Storey saying, I propose to send my documents and you send yours?
>
> Mr. Vlug: No, I did not.
>
> Court: You did not.

In evidence, Mr. Vlug admitted that he had received Mr. Storey's letter of April 2.

However, he took the position that he did not mislead the court because he did not receive a letter specifically directed to him as "addressee" and thus he did not receive correspondence from Mr. Storey with respect to the logistics of delivering the documents to Dr. E. He also took issue with the wording, "I propose to send my documents and you send yours," suggesting that the wording chosen by Mr. Storey in his April 2 correspondence was not the same as the question asked by the Court of Appeal.

The Panel finds that Mr. Vlug intentionally made this statement to the Court of Appeal when he knew or ought to have known that the statement was untrue. He admitted receiving by fax the April 2 letter in which Mr. Storey indicated very clearly in his own words that he was going to send his client's documents to Dr. E and suggesting that Mr. Vlug do the same with his client's pleadings and affidavits. Indeed, Mr. Vlug admitted receiving another letter on April 2 with which Mr. Storey forwarded his client's documentation to Dr. E.

The Canons of Legal Ethics, section 2(3) applicable at the time, states "A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law." We find the Respondent misstated facts that he knew or ought to have known were untrue.

The transcript from the Court of Appeal is clear. A direct question was asked of Mr. Vlug: did he or did he not receive a letter from Mr. Storey to the effect that "you send your materials … I'll send mine." We find that he lied to a Judge of the Court of Appeal.

A lawyer cannot play semantics with the court by alleging that a faxed copy of correspondence from a lawyer as a "cc" was not correspondence received from that lawyer, nor can a lawyer play semantics with the wording of the letter when answering a specific question posed to him or her by a judge. …

[emphasis added]

[55] With respect to the Applicant's repeated assertions during the LSBC investigation that Mr. Storey had "duped" and tried to take improper advantage of him, the

hearing panel also addressed in detail the conflicting evidence in its Facts and Determination Decision as follows at paras. 59 through 62:

> Specifically, Mr. Vlug is alleged to have made discourteous and unfounded statements about Mr. Storey to the Court of Appeal when he said that Mr. Storey had "duped" him: Mr. Vlug's letter of December 2, 2009 to the Law Society in which he suggested that Mr. Storey's conduct was aimed at obtaining an advantage of some sort; and Mr. Vlug's December 13, 2009 letter to the Law Society in which he alleged that Mr. Storey's correspondence was created with the intention of causing a slip that would further the advantage of providing only the other party's pleadings and affidavits.
>
> *Mr. Storey's correspondence of April 2 was straightforward and clear. It is also clear that these letters were forwarded to and received by Mr. Vlug.*
>
> *We find that the Respondent's position before the Court of Appeal and in correspondence to the Law Society that Mr. Storey had done something improper or was seeking to obtain an unfair advantage or was seeking to create a "slip" is disingenuous and untrue.*
>
> *We find that statements respecting Mr. Storey that Mr. Vlug made to the Law Society and in the pleadings to the court were discourteous and were unfounded. Mr. Vlug accused Mr. Storey of trying to dupe him, and accused him of lying. To accuse someone of "duping you" and being a "liar" is an accusation of deception. Indeed, the evidence clearly indicates that Mr. Vlug was the one who was lying; to the Court of Appeal, the Law Society, and to the Hearing Panel.*
>
> [emphasis added]

[56] In relation to the Applicant's evidence that the BCCA had chastised Mr. Storey "off record", the hearing panel stated at paras. 70 through 76:

> *Mr. Storey testified that no off the record discussion took place before the Court of Appeal. His evidence was that, in his experience before the Court of Appeal, he had not known the Court of Appeal to make off the record comments to counsel.*
>
> *Mr. Storey also testified that he had no recollection of having been "lectured to" or "chastised" by the Court of Appeal with respect to this*

matter. If he had been the subject of criticism from the Court of Appeal, he testified it would have been exceptional and he would have remembered it.

Mr. Vlug testified that he recollected that the "off record" discussion occurred at a particular point in the Court of Appeal transcript. However, the Court of Appeal transcript does not reflect that the Court went "off record", nor does it reflect that the proceedings were adjourned briefly or the court reporting system was shut off.

Mr. Vlug gave evidence that he did not take notes of the hearing at the Court of Appeal.

The Panel prefers the evidence of Mr. Storey over the evidence of Mr. Vlug with respect to the alleged off record discussion. The point of transcripts is to show what was said to the court and what was said by the court in particular proceedings. The Court of Appeal transcript contains numerous entries where there was an adjournment for morning recess (19 min.); once for the noon recess (1 hour 29 min.); and once for the afternoon recess (5 min.) but no notation of an "off record" conversation and no record of a chastisement of Mr. Storey.

The Panel believes that, if there was any chastisement of Mr. Storey by the Court of Appeal, it would have been captured by the court reporter and reflected in the transcripts. If there had been an off record discussion, especially one in which a lawyer was criticized, there would have been an indication of an off record discussion. There is not, and Mr. Storey, ostensibly the victim of this apparent off record chastisement, has no recollection of it.

The Panel finds that alleging an "off record" discussion between the Court of Appeal and Mr. Storey in which the court chastised Mr. Storey for withholding documents from Dr. E was a statement that the Respondent knew or ought to have known was false. There is no evidence in the Court of Appeal transcript supporting the existence of an "off record" discussion criticizing Mr. Storey, and Mr. Storey has no recollection of being criticized by the Court of Appeal; something that a lawyer would recall. ...

[emphasis added]

[57] Allegation 1 is not before us. However, the findings of fact and credibility of the hearing panel relating to the alleged telephone call remain relevant to other of the allegations as the hearing panel properly considered the totality of the evidence.

[58] The hearing panel weighed evidence at the hearing, assessed the credibility of Mr. Storey and the Respondent in accordance with the principles outlined in *Faryna*, and found, on a balance of probabilities, that no telephone conversation occurred between the Applicant and Mr. Storey on or about April 2, 2009 in which Mr. Storey committed to sending both sets of client documents to Dr. E.

[59] The hearing panel clearly found Mr. Storey to be credible and found the Applicant's credibility to be lacking. The hearing panel emphasized that both the timing and the content of the Second Letter supports Mr. Storey's version of events.

[60] The Applicant forcefully submits that the hearing panel erred in not attributing weight to the testimony of ES.

[61] The Applicant takes issue with the fact that, in the Facts and Determination Decision, the hearing panel did not specifically address ES's testimony that he overheard the April 2009 telephone conversation between Mr. Storey and the Applicant while sitting in the Applicant's office. However, even on ES's own evidence, ES heard only the Applicant's end of the conversation. Furthermore, neither ES nor the Applicant took any notes of the alleged telephone conversation. The Applicant also had no time entry for the conversation. As well, the content of the Second Letter, which the Applicant received on April 2, 2009, is wholly inconsistent with the Applicant's insistence that Mr. Storey agreed to send ES's materials.

[62] The Applicant also points out that the hearing panel did not comment in its Facts and Determination Decision on ES's testimony that ES recalled Mr. Storey assuring Madam Justice Martinson in Court on March 31, 2009 that Mr. Storey would send all the documents to the author of the Views of the Child Report. However, ES's evidence on this point is not consistent with the clear and straightforward Second Letter. Furthermore, the official court transcript for March 31, 2009 has no record of this alleged interaction between Mr. Storey and Madam Justice Martinson. We will address the Applicant's submissions relating to transcripts below.

[63] The Applicant also takes issue with the fact that the hearing panel did not comment on Mr. Storey's inability to remember the content of the other file-related telephone discussions with the Applicant in April 2009.

[64] However, the hearing panel need not provide commentary on each piece of evidence. Reasons do not have to provide a minutely detailed explanation of the adjudicator's reasoning. The reasons need only, when read in full context of the evidence and the arguments, show why the hearing panel decided as it did. As set out in *R. v. R.E.M.*, 2008 SCC 51, at para. 17:

> The object is not to show *how* the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show *why* the judge made that decision.
>
> [emphasis in original]

[65] In *R.E.M.*, at paras. 48-51, the Chief Justice dealt specifically with findings of credibility by a trier of fact, commenting that credibility findings are often difficult to articulate and reasons need only show the trier of fact has seized the substance of the issue:

> The sufficiency of reasons on finding of credibility – the issue in this case – merits specific comment. The Court tackled this issue in *R. v. Gagnon*, [2006] 1 SCR 621, 2006 SCC 17, setting aside an appellate decision that had ruled that the trial judge's reasons on credibility were deficient. Bastarache and Abella JJ., at para. 20, observed that "[a]ssessing credibility is not a science." They went on to state that it may be difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events", and warned against appellate courts ignoring the trial judge's unique position to see and hear the witnesses and instead substituting their own assessment of credibility for the trial judge's.
>
> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

> What constitutes sufficient reasons on issues of credibility may be deduced from *R. v. Dinardo*, [2008] 1 SCR 788, 2008 SCC 24, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility … the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.
>
> The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

[66] The Applicant takes issue with the hearing panel putting any weight on the certified transcripts of the BCSC appearance and the BCCA appearance. He emphasizes that he did not concede in the Agreed Statement of Facts, or otherwise, that the certified transcripts were complete. However, s. 26 of the *Evidence Act*, RSBC 1996, c. 124, provides that evidence of a court proceeding may be given by way of certified transcript. A transcriber certifies on the document itself that the transcript is accurate and complete. Finally, and perhaps most importantly, the hearing panel considered the transcript evidence as merely a piece of the entire body of evidence, which included the hearing panel's assessments on credibility and the other documentary evidence.

[67] Overall, despite the lack of analysis regarding ES's testimony and Mr. Storey's inability to recollect other file-related telephone discussions from four years prior, we find no error on the part of the hearing panel in relation to the findings of fact supporting allegations 2 through 6.

[68] The hearing panel clearly preferred Mr. Storey's testimony, which was in harmony with the documentary evidence, including the Second Letter. On the Applicant's side, there was a lack of documentary evidence to support his self-serving testimony and ES's recollections.

[69] Following from the Applicant's admission that he received the Second Letter, the subsequent letter and the hearing panel's finding that no April 2, 2009 telephone

conversation occurred as alleged by the Applicant, the hearing panel naturally and logically concluded that the Applicant knew or ought to have known that Mr. Storey did not actively seek to deprive Dr. E of ES's materials.

[70] Allegation 4 concerns the Applicant's answer to the BCCA's June 22, 2009 question regarding the Second Letter:

> Court: Well did you not get correspondence from Mr. Storey saying, I propose to send my documents and you send yours?
>
> Mr. Vlug: No, I did not.

[71] The hearing panel found that the Applicant's answer to the BCCA was false. Clearly the Applicant should have told the BCCA that he had received the Second Letter. Yet, to this day, the Applicant steadfastly maintains that the BCCA was asking him whether he received a "direct" letter as opposed to a copy of a letter that was directed to Dr. E. We agree with counsel for the LSBC that this would be a strained, illogical interpretation of the question from the Court and that the Applicant either knew or ought to have known that his representation to the Court was false.

[72] Allegation 6 arose from the Applicant's representation to the LSBC that the BCCA had an "off the record" discussion with Mr. Storey regarding his failure to deliver ES's materials to Dr. E in early April 2009.

[73] The hearing panel clearly preferred Mr. Storey's testimony to that of the Applicant's on this issue. Furthermore, Mr. Storey's version of events was corroborated by the fact that there was no evidence of an "off the record" discussion in the official court transcript. While it may seem not surprising that an "off the record" discussion was not in the transcript, the purpose of the transcript is to record all of what goes on in the court proceedings. We do not find it credible that a judge would admonish counsel in a proceeding on an "off the record" basis. The fact that the admonishment did not appear on the transcript is consistent with Mr. Storey's testimony that it did not occur. As such, we find that the hearing panel did not err in finding that the Applicant's representation that a BCCA judge chastised Mr. Storey in an "off the record" discussion was untrue.

The PS matter

[74] Allegations 7, 8 and 9 arose from a family law matter in which the Applicant represented PS in two divorce actions. In regard to allegation 7, the LSBC alleged

that, on or about February 5, 2010, the Applicant committed professional misconduct by filing a second writ and statement of claim in the Vancouver Registry of the Supreme Court (the "Vancouver Filing") under a different name for the plaintiff, PS, for the purpose of improperly avoiding the procedure to amend the statement of claim previously filed for the same parties' divorce in October 2008 in the New Westminster Registry of the Supreme Court (the "New Westminster Filing").

[75] In regard to allegation 8, the LSBC alleged that, in the Vancouver Filing, the Applicant stated:

> There has been no other proceeding between or any agreement between the parties with respect to a separation between the parties or to the support or maintenance of a party or of a party [sic] or a child of a party, or with respect to the division of property of the parties …

when he knew or ought to have known this statement was untrue.

[76] In relation to allegation 9, the LSBC alleged that, in the Vancouver Filing, the Applicant stated:

> It is impossible to obtain a certificate of the marriage or a certificate of the registration of the marriage because there is an emergency need to for [sic] a Certificate of Pending Litigation to stop the transfer of matrimonial assets in China OR sale and liquidation of matrimonial assets and then transfer, outside of the jurisdiction of the court. A copy of the Marriage Certificate will be provided shortly …

when he knew or ought to have known that this statement was untrue.

[77] The Vancouver Filing was commenced in PS's Chinese name and claimed relief broader than in the New Westminster Filing, including division of the family assets and a restraining order on family assets.

[78] On or about February 5, 2010, the Applicant's staff filed a Requisition requesting the divorce order in the New Westminster Filing. The Applicant testified that he was unaware at that point that his staff filed the Requisition.

[79] The Applicant testified that, on the day prior to starting the Vancouver Filing, he recalled the outstanding New Westminster Filing and questioned his paralegal assistant, MT, about its status. MT subsequently informed him that "the Requisition had been filed." The Applicant testified to believing that MT had "put a stop" to the New Westminster Filing.

[80] As a witness for the LSBC, MT testified that the Applicant only inquired about the New Westminster Filing after the Vancouver Filing was made on February 5, 2010. She testified that, after she informed him that "the Requisition had been filed," the Applicant instructed her to do nothing more. She further testified that it was not until March 22, 2010, after the divorce order was granted on March 19 within the New Westminster Filing, that the Applicant instructed her to discontinue the New Westminster Filing.

[81] The LSBC called Dinyar Marzban, QC to give expert testimony concerning family law process and procedure in British Columbia. Mr. Marzban testified that any lawyer who is competent to practise family law in British Columbia would know that he or she cannot properly pursue a new divorce proceeding for the same client against the same spouse without first discontinuing any prior divorce proceeding.

[82] The Applicant characterized the duplicate divorce filings as an honest mistake where nothing stood to be gained from the two active filings for the same parties because the Vancouver Filing would ultimately be denied under the circumstances. He explained that the mistake arose from miscommunication between him and his staff.

[83] In relation to allegation 7, the Vancouver Filing used PS's Chinese name. The Applicant argues that PS used both names and that there are legitimate reasons to file a family law action using one's Canadian name and/or Chinese name. To obtain a divorce, the parties' names must match the marriage certificate. On the other hand, to claim a certificate of pending litigation, the parties' name(s) must match the name(s) of the registered owners on title. We agree that many people, including PS, have different names or variations of their names. Family law pleadings may also contain more than one name for a party (using "also known as").

[84] The hearing panel did not address allegations 7, 8 or 9 in as much detail as allegations 2 through 6. A review is a review on the record. We have reviewed the record of proceedings before the hearing panel. We are unable to find cogent, clear or, in fact, any evidence that the Applicant used PS's Chinese name in the proceedings in order to avoid amending the first action. We therefore find that the hearing panel erred. Having found no evidence of this improper purpose, we find that this is a clear and palpable error. We therefore dismiss allegation 7 as there is no evidence to support a finding of either misconduct or incompetence.

[85] With respect to allegation 8, the LSBC alleged that, in the Vancouver action, the Applicant denied the pre-existence of the active New Westminster action when he knew or ought to have known that the statement was not true. Mr. Marzban

provided an expert report and testified as an expert before the hearing panel. The hearing panel referred to Mr. Marzban's evidence at paras. 89 and 90 of the Reasons on Facts and Determination.

[86] Mr. Marzban's evidence included that, to commence a divorce action, it is mandatory to disclose the existence of any previous action that seeks a divorce, unless the previous action has been discontinued.

[87] Mr. Marzban also gave evidence that any family law lawyer practising in BC would know that he or she should not issue a second divorce proceeding for the same client without discontinuing the first one.

[88] In addition, the LSBC relied on an affidavit of Michelle McMillan, program manager for the Central Registry of Divorce Proceedings, which exists to detect multiple divorce proceedings between the same parties. Her evidence is summarized at para. 91 of the hearing panel's Decision on Facts and Determination.

[89] The Applicant submits that he made a simple mistake in filing the Vancouver action without disclosing in that action that his office had filed a previous divorce action.

[90] The specific wording used by the Applicant in the Vancouver Filing is as follows:

> There has been no other proceeding between or any agreement between the parties with respect to a separation between the parties or to the support or maintenance of a party or of a party [sic] or a child of a party, or with respect to the division of property of the parties.

[91] The Applicant testified that he thought his paralegal, MT, had discontinued the New Westminster Filing. He claimed that he told his paralegal to stop the New Westminster Filing when he was filing the Vancouver Filing and that he thought she had done so by filing a Requisition in the New Westminster Filing.

[92] The Applicant's paralegal's testimony did not support his evidence. The hearing panel preferred the Applicant's paralegal's evidence that she was not told to stop the New Westminster Filing until March 22, 2010.

[93] The Applicant's own evidence on this point does not make sense in that the Applicant would have had to sign a Notice of Discontinuance of the New Westminster Filing (not a Requisition) to discontinue it.

[94] If the Applicant was not sure if the New Westminster Filing was discontinued, he could have either checked with his paralegal or noted in the Notice of Family Claim in the Vancouver Filing that an action had previously been commenced and that he was unaware whether it had been discontinued. This would have notified the Court, the Central Divorce Registry, the opposing party in the action and her own lawyer that another proceeding existed and that jurisdiction may be an issue. Furthermore, pursuant to s. 3(2) of the *Divorce Act* (Canada), the second action seeking divorce is deemed void. The Applicant's failure to mention the yet unserved first action potentially masked this issue as well.

[95] This is not a case where another lawyer outside of the Applicant's firm had started the New Westminster Filing unbeknownst to the Applicant. This is also not a case where the previous action was started years prior and forgotten. We agree with the hearing panel that the Applicant made a false statement in the Vancouver action that he knew or ought to have known was untrue.

[96] In relation to allegation 9, the Applicant submits that, in completing the Vancouver Filing, he was in a rush and ticked the wrong box relating to the availability of the marriage certificate. The Applicant could have ordered another original of the marriage certificate; however, that process would have taken some time and time was of the essence to obtain the certificate of pending litigation to prevent disposition of the family property at issue in the proceeding.

[97] The hearing panel also did not address allegation 9 in detail in its Facts and Determination Decision.

[98] The hearing panel did not mention or acknowledge in its Facts and Determination Decision that, while the Applicant stated that the marriage certificate was "impossible" to obtain, the Applicant also stated that there was an urgent need to file a certificate of pending litigation to protect property and that he would file a marriage certificate "shortly".

[99] The fact that the Applicant stated that he would provide the marriage certificate "shortly" corroborates the Applicant's evidence that he had checked the wrong box. It also qualifies the statement that the marriage certificate was "impossible" to obtain by making it clear that the marriage certificate was only temporarily unavailable.

[100] The hearing panel assumed that a copy of the marriage certificate could have been filed with the Vancouver Notice of Family Claim. As stated by the Applicant in his evidence, an original marriage certificate is required, and a photocopy is insufficient. It is not easy to retrieve a marriage certificate that has been filed in

another proceeding. We find that the hearing panel erred in finding that the Applicant committed misconduct with respect to allegation 9 in relation to proving either professional misconduct or incompetence. We therefore dismiss allegation 9.

The MW matter

[101] Allegation 10 relates to a statement made in a February 23, 2011 affidavit of MW. The LSBC alleges that the February 23, 2011 affidavit implied that MW's 2009 CRA Notice of Assessment was attached to MW's financial statement at the time that MW swore the statement on March 19, 2010. The Applicant admits that the 2009 Notice of Assessment was not attached to the March 19, 2010 financial statement at the time MW swore it. In fact, the document was not available until several months later. The 2009 Notice of Assessment was not attached to the financial statement until the Applicant filed it in court in 2011.

[102] After receiving MW's March 19, 2010 financial statement, MW's ex-wife swore an affidavit on May 5, 2010, which stated at para. 6:

> [MW] has not provided any evidence of his 2009 income …
>
> Agreed Statement of Facts, para. 82

[103] MW swore an affidavit in response on February 23, 2011, which stated:

> In response to paragraph 6, my Notice of Assessment is attached to my financial statement.
>
> Agreed Statement of Facts, para. 87

[104] The evidence is that, by the time that the February 23, 2011 affidavit was sworn, the 2009 Notice of Assessment was attached to the previously sworn financial statement. Unfortunately, the hearing panel appears to have wrongly assumed that the rules that apply generally to affixing exhibits to affidavits also apply to a sworn financial statement (paras. 120 through 126 of the Facts and Determination Decision).

[105] We find that the hearing panel fell into error in this regard. Sworn financial statements are unique and are governed by a separate Rule in the BCSC Rules. In 2009/2010, Rule 60D of the Supreme Court Rules applied (now replaced by Rule 5-1 of the BCSC Family Rules). Rule 60D (20), (21) and (22) provide a mechanism for providing additional documents to be attached to previously sworn financial statements.

[106] We agree with the Applicant that the attachments to a sworn financial statement are not stamped as "attached" like exhibits are to a normal affidavit and the Rules permit attachments to be added later to financial statements.

[107] The Rules state that, when a document is added to the financial statement, the party must provide notice to the opposing party. It appears that the Applicant did not specifically notify the opposing counsel that documents were added. However, the Applicant is not cited for failing to provide an explanation or notice. The Applicant was alleged to have prepared and commissioned a false affidavit. However, as it turns out, the affidavit was actually correct at the time it was sworn.

[108] The Applicant's conduct in having his client swear to the statement contained in the February 23, 2011 affidavit was certainly not reflective of best practices. The statement is not truly responsive, and was confusing and potentially misleading. Affidavits should be drafted in a manner that is not in any way, even potentially, misleading. However, on the balance of probabilities, we do not find that the LSBC has proven allegation 10, either on the basis of professional misconduct or, in the alternative, incompetence. Allegation 10 is thus dismissed.

[109] In relation to allegation 11, the Applicant prepared and commissioned an affidavit sworn by MW on October 4, 2011 and filed in BCSC on October 5, 2011, which stated at para. 18:

> Counsel for the [ex-wife] complained to the Law Society that my lawyer had included too much financial disclosure to my financial statement.
>
> Agreed Statement of Facts, para. 103

[110] Under cross-examination by counsel for the LSBC, the Applicant admitted that opposing counsel had never complained to the LSBC that MW had provided "too much disclosure."

[111] During his submissions on this Review, the Applicant took the position that, despite his concession during cross-examination, the statement in the affidavit that opposing counsel had complained about there being "too much disclosure" was "true in the general sense." We disagree with the Applicant.

[112] At no time did counsel for the ex-wife complain that there had been too much disclosure. It is clear on the evidence, and ought to have been abundantly clear to the Applicant, that MW's ex-wife and her counsel were concerned about the lack of full disclosure, particularly regarding MW's 2009 income. The opposing party had, in fact, raised MW's lack of disclosure as an issue in the proceedings. The

opposing party's complaint to the LSBC was that the Applicant had added documents to the financial statement after it was sworn, and that the February 23, 2011 affidavit was misleading.

[113] In preparing and commissioning the October 4, 2011 affidavit of MW, he ought to have known that it was false. The hearing panel made no error in its finding.

c. Did the hearing panel err in applying the test for professional misconduct to each of the remaining allegations 2 – 6, 8and 11 made against the Applicant?

[114] The test for whether conduct amounts to professional misconduct is whether it constitutes a marked departure from the conduct the LSBC expects of lawyers: *Martin*. It is also well understood that conduct that is in breach of the LSBC Rules or the Act is not necessarily professional misconduct.

[115] The determination of whether certain conduct, rule breach or not, constitutes professional misconduct is based on a number of factors. The factors that may be appropriate to consider, depending on the particular case, 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 misconduct: *Lyons*.

[116] The test for professional misconduct is set out by the hearing panel at paras. 13 - 15 of its decision. The hearing panel considered *Martin* and the hearing panel and review decisions in *Re: Lawyer 12* (2011 LSBC 11 and 2011 LSBC 35, respectively). On review, *Lawyer 12* considered in detail the decision in *Re: Lawyer 10*, 2010 LSBC 02, also a review decision. Each of *Lawyer 12* (Review) and *Lawyer 10* canvass the culpability requirement that arises from *Martin* at length.

[117] The Applicant agrees that the "marked departure" test set out in *Martin* applies to the determination of whether particular conduct amounts to professional misconduct, but submits that the hearing panel erred in ignoring the element of culpability.

[118] In his submissions, the Applicant maintains that the presence of *mala fides* is necessary for a finding of professional misconduct. He relies on the test at para. 35 of *Lyons*:

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including 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.

[119] We disagree with the Applicant's argument that the presence of *mala fides* is a required element in professional misconduct. The leading case of *Martin* itself was based upon a determination of misconduct based on negligence (in that case, gross negligence) without any presence of dishonesty, deceit or significant personal or professional conduct issues.

[120] The intention behind the multi-factorial approach that involves a listing of potential elements (as in *Lyons*, at para. 35) was addressed in the review decision of *Law Society of BC v. Boles*, 2016 LSBC 48, at paras. 54-57. In *Boles*, the all-Bencher panel emphasized a case by case approach and confirmed that no single factor is necessarily determinative to the determination of what constitutes a marked departure in any given case.

[121] At para. 57 of its decision in *Boles*, the review panel quoted with approval the hearing panel in *Law Society of BC v. Harding*, 2014 LSBC 52 at paras. 76 to 79:

> In our view, given all the cases and the guiding principles from *Stevens* [*v. Law Society (Upper Canada)*, (1979), 55 OR (2d) 405 (Div. Ct.),] and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words "marked departure" are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.
>
> As *Stevens* and *Re: Lawyer 12* (both the single-bencher and the review decision) make clear the panel must look at all of the circumstances. In *Lyons*, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:
>
> (a) the gravity of the misconduct;
>
> (b) the duration of the misconduct;
>
> (c) the number of breaches;
>
> (d) the presence or absence of *mala fides*; and
>
> (e) the harm caused.

> The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.
>
> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

The ES matter

[122] Allegations 2 and 3 arose from the representation made in the ES Affidavits to the BCSC and later to the BCCA that there was an active attempt to deprive Dr. E of the Applicant's materials. The LSBC argued that the Applicant's statements were improper on the basis that: a) he knew or ought to have known that the representations were not true; or b) the ES Affidavits contained statements that were not identified as being made on information and belief, and the source of such information was not identified.

[123] Allegation 4 arose from the Applicant's denial to the BCCA that he had received the Second Letter. Even if the Applicant misinterpreted the Court's question as referring to direct and private correspondence between him and Mr. Storey, his answer was misleading at the very least. He was aware that he had received a letter regarding the subject matter that was the focus of the Court's inquiry. The Applicant provided an egregiously misleading response to a simple question from the Court and knew or ought to have known that he was misstating facts to the Court.

[124] Allegation 5 arose from representations that the Applicant made to the LSBC that Mr. Storey intended to deceive him. These representations were discourteous and unfounded.

[125] Allegation 6 arose from the Applicant's representation to the LSBC that the BCCA had an "off the record" discussion with Mr. Storey regarding his failure to deliver ES's materials to Dr. E in early April, 2009. The hearing panel found, and we agree, that the Applicant's representation was not true.

[126] We find no error in the hearing panel's findings in relation to each of allegations 2 through 6 that the Applicant's conduct represented a marked departure from the conduct the LSBC expects of lawyers.

[127] It is wholly unacceptable to misrepresent facts either to the LSBC or to any court. A lawyer is an officer of the court. Honesty and candour are at the core of the duties and responsibilities of a lawyer. We find no error with the hearing panel's finding of professional misconduct for each of allegations 2, 3, 4, 5 and 6.

[128] Subsequent to our hearing the LSBC's and the Applicant's submissions on this Review, the Supreme Court of Canada released its decision in *Groia v. Law Society of Upper Canada*, 2018 SCC 27.

[129] *Groia* involved disciplinary proceedings against a lawyer where the lawyer's in-court behaviour led to findings of professional misconduct. Mr. Groia's behaviour during the trial included personal attacks, sarcastic outbursts and allegations of professional impropriety against the opposing counsel who were Ontario Securities Commission prosecutors. In that case, the prosecutors and Mr. Groia disagreed over the scope of the commission's disclosure requirements, the format of such disclosure and the admissibility of documents.

[130] The majority of the Supreme Court in *Groia* agreed with the appeal panel's context-specific, multi-factorial approach in assessing whether or not a lawyer's in-court behaviour amounted to professional misconduct. However, they allowed Mr. Groia's appeal and reversed the findings of professional misconduct because Mr. Groia had:

(a) made the allegations of prosecutorial misconduct in good faith;

(b) had honestly-held but erroneous legal beliefs relating to disclosure requirements and admissibility of documents and the evolving law relating to abuse of process;

(c) did not deliberately misrepresent the law; and

(d) had a reasonable basis for his mistaken legal beliefs, in that there was a sufficient factual basis for him to have believed what he believed.

[131] In the Applicant's case, it cannot be said that the Applicant's allegations against opposing counsel were made in good faith. The Applicant repeatedly accused opposing counsel of underhanded and deceptive conduct. These were serious allegations of impropriety. The Applicant made these allegations in affidavit material filed in Court and in responding to an LSBC investigation.

[132] Caution should be exercised in making allegations of impropriety against other counsel. We accept that, in some circumstances it may be necessary to take issue with the conduct of other counsel. In the Applicant's case, however, there was no legitimate or reasonable basis for doing so. Based on the evidentiary record, he either knew that the allegations were unfounded or he demonstrated a wilful or reckless disregard for the facts. There was no reasonable factual foundation for the Applicant's allegations. The allegations were improper and constituted professional misconduct.

The PS matter

[133] Allegation 8 relates to the Applicant's client, PS. Mr. Marzban's expert testimony was that any family law lawyer in BC would know not to file a second proceeding seeking divorce without discontinuing the first proceeding. The hearing panel found that the Applicant ought to have known that his filings and subsequent statements were improper and misleading. By stating there had been no other proceeding, the Applicant misled the Registry, the opposing party and her lawyer, thereby improperly avoiding a potential jurisdictional issue and hiding the fact that the second action for divorce may be void. We agree with the hearing panel that this conduct represents a marked departure from what is expected of a lawyer.

[134] We confirm the hearing panel's findings of professional misconduct with respect to allegation 8.

The MW matter

[135] In relation to allegation 11, the Applicant admitted to having prepared and commissioned the MW Affidavit with a false assertion. It is wholly unacceptable for a lawyer to have a client swear an affidavit that the lawyer knows or ought to know is false. False affidavits not only mislead the Court but also unnecessarily prolong proceedings and create a risk of judicial outcomes that are not based on true and accurate information.

[136] We find that the hearing panel made no error in finding that the Applicant's action was a marked departure that constituted professional misconduct. We confirm the finding of professional misconduct in relation to allegation 11.

d. Did the hearing panel err in its consideration of the Applicant's arguments regarding delay and in its conclusion that there was no delay resulting in unfairness to him?

[137] The Applicant states that the hearing panel's findings with respect to the ES matter should be set aside due to the hearing panel's failure to consider the overall effect of delay outside of an application to dismiss. The majority of his submissions, however, focus on the hearing panel's acceptance and consideration of an affidavit (the "Gejdos Affidavit") containing evidence and materials of which the Applicant states he was unaware. The Applicant argues that this acceptance of the Gejdos Affidavit amounted to the LSBC presenting new evidence and that the hearing panel's admission of this "new evidence" ran contrary to principles of fundamental justice and fairness in that the Applicant was not offered a chance to review, respond or otherwise challenge the evidence contained within the Gejdos Affidavit.

[138] The Applicant did not raise the issue of delay before the hearing panel until the last three paragraphs (as transcribed) of his closing submissions, at which time he stated:

> … *Lawrence E. Pierce* (Pierce v, Law Society of BC, 2000 BCSC 887 (CanLII) says it's a serious matter because lack of reconstructional accuracy. *Lawrence E. Pierce* involves a delay of about four years and so does the [ES] complaint. … If there are things that concern you in evidence in the [ES] complaint then I want you to remember *Lawrence E. Pierce*, procedural unfairness and reconstructional accuracy, and those are my submissions.
>
> Transcript of June 5, 2013 proceedings
> Tab 4, Record, pages 552– 553

[139] In response to the Applicant's submissions on delay, counsel for the LSBC stated:

> ... If this is a concern for the panel the Law Society would like an opportunity to address this issue, and if you tell me that this is a concern for you I would like to prepare a response to this issue because I believe the evidence will demonstrate that there were various times in the investigation, particularly in the investigation of the [ES] complaint, where there was delay on the part of the Respondent in providing

> materials to the Law Society. So if he's raising an issue of delay the Law Society says if there is a delay at all at least part of it is on the shoulders of the Respondent. So if that's a concern for you I would ask that you provide notice and the opportunity to provide submissions on it.
>
> Transcript of June 5, 2013 proceedings
> Tab 4, Record, page 557

[140] The Applicant further responded to questioning from the hearing panel by stating that the delay argument is not an "afterthought", and pointing to the Agreed Statement of Facts stating "I had always thought that delay was an issue, and you can address it by looking at the Agreed Statement of Facts … for me it's not a major issue." Transcript of June 5, 2013 proceedings, Tab 4, Record, pages 559 and 561

[141] Counsel for the LSBC responded, commenting that formulating a reply to the Applicant's submission is difficult in the absence of particulars as to the source of the delay, to which the Applicant responded "I can say that delay has to do with the Storey complaint. I wouldn't eliminate anything from that. I wouldn't say that it was just the investigative part of it or that it was just the litigation part of it. … So if you would like me to go forward and identify those areas where I think there was delay, identify the issue more properly then she can have her reply." Transcript of June 5, 2013, proceedings Tab 4, Record, pages 562 and 563.

[142] The hearing panel, the Applicant and counsel for the LSBC then discussed the timeline for delivering written submissions on this point to the hearing panel. The Applicant's written submissions dated June 7, 2013 were provided to the hearing panel. The LSBC's reply submissions dated June 13, 2013, including the Gejdos Affidavit, were provided to the hearing panel but were inadvertently not provided to the Applicant until the time of the hearing on disciplinary action.

[143] The Applicant did not seek to introduce further evidence, nor did he ask for a right of reply to the LSBC submissions on this point. In her discussion on the issue of delay, counsel for the LSBC alluded to the fact that it was anticipated any LSBC submissions would relate to delay by the Applicant, and that the evidence "will demonstrate" that there was delay on the part of the Applicant.

[144] In its 2013 submissions to the hearing panel on the issue of delay, the LSBC stated that the Gejdos Affidavit "contains evidence that was disclosed to the [Respondent] in accordance with the LSBC's disclosure obligation, but not tendered at the hearing." The Applicant took no issue with that assertion, nor did he take any steps to dispute the chronology of proceedings set out in the Gejdos Affidavit.

Submissions of the Law Society dated June 13, 2013, at para. 28 Tab 19, Record, at page 1944

[145] The Facts and Determination Decision was issued on February 26, 2014. At para. 146 of the Facts and Determination Decision, the hearing panel summarized the Gejdos Affidavit. The hearing panel's decision on Disciplinary Action was issued on September 25, 2014, seven months after the issuing of the Facts and Determination Decision.

[146] The Applicant took no steps, and did not communicate any concern to the LSBC, regarding the content of the Facts and Determination Decision, including the Gejdos Affidavit.

[147] The contents of the Gejdos Affidavit and the Facts and Determination Decision were therefore not new to the Applicant as of the date of the hearing on disciplinary action, and it is to be presumed that he was aware of the procedural history described in the Gejdos Affidavit.

[148] At paras. 148-150 of the Facts and Determination Decision, the hearing panel dismissed the Applicant's request to have the ES matter dismissed for reasons of delay, finding that any delay was not inordinate or unacceptable at either the investigative or post-citation stages, that there was no evidence of prejudice to the Applicant by way of witnesses' memories being weakened by the passage of time, and that the alleged delay did not amount to an abuse of process by the LSBC.

[149] The hearing panel quoted *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, as the leading administrative law case dealing with an application for a stay of proceedings due to delay, finding that the Applicant failed to demonstrate that the delay was inordinate and unacceptable and provided no proof of prejudice of such magnitude that the fairness of the hearing was impacted by the unacceptable delay.

[150] The hearing panel outlined its reasons for dismissing the Applicant's request to dismiss the ES matter due to delay at paras. 148-150 of the Facts and Determination Decision:

> We do not find the delay is inordinate or unacceptable, either in the investigation stage or in the post citation stage, especially in light of the delays in responding by the [Respondent], and the procedural applications and steps taken by the [Respondent], which had the effect of delaying the date of the hearing.

> We find that there is no evidence of prejudice to the [Respondent] as a result of the witnesses' memories being significantly weakened by the passage of time on material facts in respect to the [ES] matter.
>
> We find that the alleged delay did not amount to an abuse of process by the Law Society The [Respondent] made his delay arguments at the end of the proceedings as an afterthought. If the [Respondent] were prejudiced by delay, one would expect he would have raised it at the outset of the proceedings.

[151] The Applicant led no *viva voce* evidence relating to the issue of delay or related matters before the hearing panel. The analysis with respect to delay involves a question of law. Accordingly, following *Vlug* and *Harding*, the standard of review to be applied in relation to the consideration of the Applicant's arguments on delay is one of correctness.

[152] The hearing panel applied the Supreme Court of Canada's reasons in *Blencoe* in assessing the impact of delay on the Applicant's case. As outlined in *Blencoe*, it is not merely length of time that determines whether or not a delay is unacceptable, but rather a consideration of contextual matters, including the nature and complexity of the case, the purpose and nature of the proceedings, and whether the Applicant contributed to or waived the delay.

[153] The Applicant provided no specific evidence, in submissions or otherwise, regarding significant prejudice suffered consequent upon the LSBC's allegedly unacceptable delay. In the absence of such evidence, we find the hearing panel made no error in concluding that there was no abuse of process by the LSBC warranting a stay of proceedings or a dismissal of the citation.

[154] The Applicant presented no evidence, other than repeated declarations, of the deterioration of his or anyone else's memory in relation to the ES matter allegations since the spring of 2009. The Applicant alleged in the LSBC's investigation and prosecutorial processes that he argued represented unreasonable delay, but presented no evidence as to how the LSBC contributed to periods of delay, or explanation as to how he bore no responsibility for the delay. In contrast, the LSBC presented several instances where the Applicant contributed to the overall delay in proceedings.

[155] The Applicant only raised the issue of delay at the end of his closing argument at the proceedings before the Hearing Panel. The Applicant was offered the opportunity to provide written submissions, and similarly the LSBC was offered the chance to address the Applicant's submissions by way of reply submissions.

We find that no significant unfairness resulted to the Applicant due to his lack of opportunity to reply to the LSBC's written submissions on delay, including the Gejdos Affidavit. The Applicant took no apparent steps to respond to the materials alluded to in the Facts and Determination Decision, nor to raise the issue of procedural unfairness before the hearing on Disciplinary Action. He did not seek any remedy before the hearing panel or request an opportunity to make further submissions or provide further evidence regarding this material.

[156] We find that the hearing panel committed no error in dismissing the application to have the ES allegations dismissed on the basis of delay, or in finding no evidence of prejudice to the Applicant as a result of delay.

[157] The application to set aside the reasons of the Hearing Panel on the issue of delay is dismissed.

e. Did the hearing panel impose an appropriate disciplinary action?

Positions of the Applicant and the LSBC

[158] The hearing panel found misconduct with respect to 11 allegations and determined that a global penalty of a six-month suspension was appropriate. Allegation 1 is not part of this review. We have upheld the hearing panel's findings of professional misconduct on seven of the ten allegations before us, namely in respect of allegations 2 through 6, 8 and 11.

[159] As set out in *Hordal*, it is inappropriate for a review board to "tinker" with the discipline determination of a hearing panel. In this case, we must, however, review the hearing panel's discipline determination in light of the fact that only seven of the ten allegations of professional misconduct before the hearing panel remain.

[160] The Applicant submitted to the hearing panel and on review before us that a one-month suspension in addition to a fine would be appropriate. The Applicant submits that any longer suspension would ruin his practice as a sole practitioner and, in essence, would be equivalent to disbarment. He says that he has employees who count on him, and if he is suspended for a lengthy time, he will not be able to retain his employees on salary.

[161] The Applicant also emphasizes that he has not been cited in the five-year period since the original hearing on Facts and Determination. He says that he has learned a better way to deal with lawyers and has skills that he did not have at the time these allegations arose.

[162] The LSBC submits that a relatively lengthy suspension in the range of six months imposed by the hearing panel remains appropriate despite one or more of the allegations being dismissed.

ANALYSIS

[163] The primary focus of disciplinary proceedings is the LSBC's mandate set out in s. 3 of the Act to uphold and protect the public interest in the administration of justice.

[164] As set out by G. Mackenzie in *Lawyers and Ethics: Professional Responsibility and Discipline*, (Toronto: Thomson Carswell, 2006) at page 26-1:

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession. In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes.

[165] In British Columbia, the leading cases concerning the principles to be considered when assessing sanction include: *Law Society of BC v. Ogilvie*, 1999 LSBC 17, *Law Society of BC v. Lessing*, 2013 LSBC 29 and *Martin.*

[166] At para. 55 of *Lessing*, the Review panel refers to *Ogilvie*:

> The above objects and duties set out in section 3 of the Act are reflected in the factors set out in the *Law Society of BC v. Ogilvie*, at paras. 9 and 10 of the penalty stage:
>
> > Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows the sentencing process to most ensure that the public is protected from acts of professional misconduct. Section 38 of the Act sets forth the range of penalties, from reprimand to disbarment from which a panel must choose and following a finding of misconduct. *In determining an appropriate penalty, the panel must consider what steps might be taken to ensure the public is protected, while also taking into account the risk of allowing the Respondent to continue to practice.*
> >
> > The criminal sentencing process provides some helpful guidelines, such as: the need for a specific deterrence of the Respondent, the need for general deterrence, the need for rehabilitation and the

need for punishment or denunciation. In the context of a self-regulatory body one must also consider the need to maintain the public's confidence in the ability of the disciplinary process to regulate the conduct of its member. While no list of appropriate factors to be taken into account can be considered exhaustive or appropriate in all cases, the following might be said to be worthy of general consideration and disciplinary dispositions:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the Respondent;

(c) the previous character of the Respondent, including details of prior discipline;

(d) the impact on the victim;

(e) the advantage gained, or to be gained, by the Respondent;

(f) the number of times the offending conduct occurred;

(g) whether the Respondent has acknowledged the misconduct and taken steps to disclose and redress the wrongs in the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the Respondent;

(i) the impact on the Respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the Respondent;

(k) the need for specific and general deterrence;

(l) *the need to ensure the public's confidence and the integrity of the profession*; and

(m) the range of penalties imposed in similar cases.

[emphasis added in *Lessing*]

[167] Not all of the *Ogilvie* factors come into play in all cases. As well, the weight given to the factors varies depending on the case. Some factors may play a more

important role in one case and the same factors may play little or no role in another case.

[168] In this case, we consider the following *Ogilvie* factors to be relevant to the determination of penalty:

Nature and Gravity of Conduct

[169] Allegations 2 through 6 involve particularly serious conduct. The Applicant misled the Court as well as the LSBC. Honesty and candour go to the core of a lawyer's duties.

[170] The nature and gravity of the conduct is a significant aggravating factor. The courts and the LSBC cannot discharge their duties to the public without being able to trust that the counsel they are interacting with are honest. The Applicant's decision to mislead both bodies is an aggravating factor.

Age and experience of the lawyer

[171] The Applicant is a senior, experienced lawyer called to the Bar in 1992.

[172] The Applicant's age and experience are aggravating factors.

The previous character of the lawyer including details of prior discipline

[173] Rule 4-44(5) provides that the panel may consider the lawyer's professional conduct record in determining the appropriate discipline.

[174] At para. 72 of *Lessing*, the review panel indicated that the weight given to a lawyer's professional conduct record varies based on the following factors:

(a) the dates of the matters contained in the conduct record;

(b) the seriousness of the matters;

(c) the similarity of the matters before the panel;

(d) any remedial actions taken by the Respondent.

[175] The Applicant's prior discipline record includes four conduct reviews and one prior citation. The Applicant's discipline record demonstrates instances of poor communication skills and personal behaviour, which have been referred to as "arrogant, belittling, demeaning, overly aggressive, threatening and unnecessary".

[176] We find that the Applicant's prior discipline record is a significant aggravating factor.

Whether the lawyer has acknowledged the misconduct and taken steps to disclose and redress the wrongs in the presence or absence of other mitigating circumstances

[177] The Applicant expressed some remorse before the hearing panel at the discipline hearing. However, it is particularly difficult to reconcile the Applicant's expression of remorse with his steadfastly held position that he did not mislead the Court or the LSBC in relation to allegations 2 through 6.

[178] As such, this is a neutral factor that does not weigh in the review panel's decision.

The possibility of remediating or rehabilitating the lawyer

[179] The Applicant states he has not been in trouble with the LSBC since the original Facts and Determination hearing in 2013. He submits that he has learned new ways to deal with counsel.

[180] At the same time however, as indicated, the Applicant steadfastly maintains that he did not mislead the Court or the LSBC in relation to allegations 2 through 6.

[181] The Applicant also remains steadfast in his view that the affidavits that he had his client sign in relation to allegation 11 were not misleading to anyone. The Applicant's lack of insight into his conduct is concerning.

The need for specific or general deterrence

[182] Both specific and general deterrence are factors for the Review Panel to consider.

[183] Given that the Applicant continues to maintain that he did not mislead anyone in relation to allegations 2 through 6, 8 and 11, we are of the view that specific deterrence is a significant factor. We clearly need to provide the Applicant with a strong message that his behaviour is inappropriate.

[184] General deterrence is also an important consideration in this case. The profession needs to know that misleading the Court or the LSBC will not be tolerated. Our justice system relies on the honesty and civility of lawyers. Lawyers are officers of the court in a position of trust. Lawyers must not in any way mislead the Court. The LSBC, as the self-regulatory body for lawyers, also relies on the honesty and

candour of its members. A lack of honesty and candour in one's responses to the LSBC can cause serious prejudice to investigations.

[185] We must communicate to the profession that deliberately misleading behaviour by a lawyer is unacceptable.

The need to ensure the public's confidence in the integrity of the profession

[186] The public needs to have confidence in lawyers. The Applicant's conduct in relation to each allegation, but particularly allegations 2 through 6, undermines the public's confidence in the integrity of the profession.

The range of penalties imposed in similar cases and the impact of the proposed penalty on the lawyer

[187] Misleading behaviour will usually warrant a suspension. The review panel in *Law Society of BC v. Chiang*, 2014 LSBC 55, at paras. 42-43 held that the usual discipline for misrepresentation is a suspension of one to three months in the absence of aggravating factors. We find that in the case at hand, there are aggravating factors that warrant a longer suspension.

[188] In this case, we are dealing with multiple incidents of misleading conduct. The misleading conduct involved both the Court and the LSBC. The Applicant also has a discipline history. A suspension will pose a serious hardship for the Applicant as a sole practitioner. However, the Applicant's misconduct was also very serious.

DECISION ON DISCIPLINARY ACTION

[189] After considering all of the relevant factors in this case, we are of the view that a suspension for a period of four months is warranted, with the suspension to begin on December 1, 2018 or on another date agreed between the Applicant and counsel for the LSBC, but in no event later than March 1, 2019.

COSTS

[190] Each of the LSBC and the Applicant have liberty to make written submissions to the Review Panel regarding costs within 60 days if necessary.

SUMMARY

(a) Allegations 7, 9 and 10 are dismissed;

(b) Professional misconduct findings relating to allegations 2 through 6, 8, and 11 are confirmed and upheld;

(c) Allegation 1 was not before this Review Panel;

(d) Global Disciplinary Action for allegations 2 through 6, 8 and 11: four month suspension to commence December 1, 2018 or on a date agreed by counsel for the LSBC and the Applicant, but in no event later than March 1, 2019; and

(e) Costs: the parties may apply in writing within 60 days if necessary.