2018 LSBC 28
Decision issued: September 25, 2018
Citation issued: February 11, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

GERHARDUS ALBERTUS PYPER

RESPONDENT

DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION

Hearing date:	July 31, 2018
Panel:	Joost Blom, QC, Chair Robert Smith, Public Representative
Discipline Counsel:	Kieron G. Grady
No-one appearing on behalf of the Respondent	

BACKGROUND

[1] This disciplinary proceeding concerns the services performed by Mr. Gerhard Pyper (the "Respondent") for his client, NM, in a personal injury matter in 2011-2014. The rather tangled procedural history is outlined below under the heading "Application to Dismiss or Stay on the Ground of Undue Delay." The citation was issued on February 11, 2015 and amended on August 11, 2015. The Respondent is alleged to have committed professional misconduct in providing an inadequate quality of service to his client, and in failing to recommend to the client that he obtain independent legal advice concerning the expiry of a Notice of Civil Claim that the Respondent filed on the client's behalf. The two allegations in the citation are set out in more detail below.

[2] The Respondent is a former member of the Law Society. He did not appear at the hearing on Facts and Determination, although he had appeared and represented himself at earlier hearings on preliminary motions in this matter.

PROCEEDING IN THE ABSENCE OF THE RESPONDENT

[3] The Law Society submitted that the hearing should proceed in the Respondent's absence, as authorized by section 42(2) of the *Legal Profession* Act and Law Society Rule 4-41. Counsel cited instances in which panels had so decided, including *Law Society of BC v. Tak*, 2014 LSBC 27, *Law Society of BC v. Gellert*, 2013 LSBC 22, *Law Society of BC v. Power*, 2009 LSBC 23, *Law Society of BC v. Basi*, 2005 LSBC 41, *Law Society of BC v. McLean*, 2015 LSBC 06, and *Law Society of BC v. Jessacher*, 2015 LSBC 43.

[4] The hearing panels in those cases considered a variety of factors. These included whether the respondent was provided with notice of the hearing date and was cautioned that the hearing might proceed in his or her absence; whether the panel adjourned in case attendance was prevented merely by delay; whether the respondent provided any explanation for non-attendance; whether the respondent had admitted the underlying misconduct; and whether the respondent was a former member of the Law Society.

[5] The Respondent in this case has not admitted the misconduct alleged, but all the other factors pointed towards a decision to proceed. The Respondent was shown to have been served with the Citation by courier to his last known address, pursuant to Rule 10-1. He was also served in the same manner with the Notice of Hearing. He was cautioned both in the Citation and in the Notice of Hearing that the hearing could proceed in his absence. The Respondent, in email correspondence with the Hearing Administrator, Michelle Robertson, had earlier confirmed his availability for the dates set for the hearing. He had provided no explanation for his non-attendance other than to advise, by email to the Hearing Administrator of June 28, 2018, that he could not fly back to Canada without financial assistance from the Law Society, which was denied.

[6] The Law Society also referred to factors relating to the public interest in bringing the proceeding to a conclusion. A significant time had elapsed since the events that gave rise to this proceeding, as well as since the proceeding was commenced. (The chronology of the proceeding is set out in the next section.)

[7] Another relevant question is, "If not now, when?" If there were a realistic chance that circumstances might change in the near future so as to allow the Respondent to attend the hearing, there might be a reason not to proceed in his absence. However, it is unclear when, or whether, such a change in circumstances may come about.

[8] The Panel concluded that, in light of all the factors, it was fair to give priority to the public interest in moving the proceeding forward. The decision was therefore to proceed with the hearing, despite the Respondent's absence.

APPLICATION TO DISMISS OR STAY ON THE GROUND OF UNDUE DELAY

[9] By email to the Hearing Administrator, the Respondent sent an application to be presented to the Hearing Panel in the event that the hearing proceeded in his absence. The application, dated July 29, 2018, sought an order that "[t]he charges to be heard on July 29, 2018 [the hearing was in fact set for July 31] be dismissed, alternatively stayed as a result of undue delay bring [*sic*] the charges to hearing."

[10] The Law Society opposed the application.

[11] The chronology of this proceeding against the Respondent is as follows.

[12] The total time elapsed since the issue of the citation is some three and a half years. The citation was issued on February 11, 2015.

[13] The hearing of the citation was scheduled for August 17-19, 2015. The Panel initially consisted of Nancy Merrill, QC, Jim Dorsey, QC, and Robert Smith. On August 17, 2015, the Respondent requested an adjournment of the hearing to enable him to retain counsel. The Law Society consented to the adjournment on the basis that any new date would be peremptory on the Respondent. The adjournment was ordered. In the end the Respondent did not retain counsel.

[14] The new, peremptory, hearing date was set for February 10-12, 2016. In December 2015, Mr. Dorsey was replaced on the Panel by Joost Blom, QC. On February 4, 2016, the Respondent advised that he intended to apply at the hearing on February 10, 2016 to have the citation dismissed on the basis of lack of jurisdiction or bias on the part of the Law Society.

[15] A week before the hearing, our Panel was advised that the Respondent had made essentially identical applications in two other disciplinary proceedings against him. The hearing panel in the first of the other proceedings had dismissed his application on January 11, 2016 (*Law Society of BC v. Pyper*, 2016 LSBC 01). The Respondent advised the panel in the second proceeding, at a hearing on January 25, 2016, that he intended to appeal the first panel's decision to the Court of Appeal. The second panel therefore postponed its decision on his application pending the outcome of that appeal. Written reasons on the decision to adjourn were issued on February 17, 2016 (*Law Society of BC v. Pyper*, 2016 LSBC 08). At a telephone conference on February 3, 2016 our Panel agreed with the Respondent and Law Society counsel that, at our hearing, we would hear submissions on

the Respondent's application to dismiss, including the question of the impact of the panels' decisions at the two other proceedings on the way we should deal with the application.

[16] At our hearing on February 10, 2016, after presentation of evidence by both sides on the application, we decided, essentially for the same reasons as the second panel, that it would not be appropriate to decide on the Respondent's application when the first panel's dismissal of a similar application was to be reviewed by the Court of Appeal. We therefore adjourned our hearing until the outcome of that appeal.

[17] The Respondent did appeal the first panel's decision to the Court of Appeal under s. 48 of the *Legal Profession Act*. The Court of Appeal issued its decision on March 3, 2017: *Law Society of British Columbia v. Pyper*, 2017 BCCA 113. The Court dismissed the appeal.

[18] We then considered the Respondent's application in the light of the reasons for the first hearing panel's decision and the Court of Appeal's reasons for upholding the decision. We concluded that the application made to us should likewise be dismissed (*Law Society of BC v. Pyper*, 2017 LSBC 27, issued July 31, 2017). Parenthetically, the second panel subsequently dismissed the application that the Respondent made before them: *Law Society of BC v. Pyper*, 2017 LSBC 41 (issued November 10, 2017).

[19] By email of October 25, 2017 the Hearing Administrator advised the present Panel that Nancy Merrill, QC was not able to complete the hearing and that the President of the Law Society had ordered, pursuant to Rule 5-3(1) and (2), that the Hearing Panel continue with the remaining members for the purposes of completing the hearing.

[20] The resumed hearing on the present citation was scheduled for February 22 to 24, 2018. Shortly before that hearing was due to begin, Ms. Gulabsingh, Law Society counsel in the proceeding, left the Law Society. The Law Society sought an adjournment of the hearing to allow time to obtain new counsel. The Respondent agreed to the adjournment. Mr. Grady was subsequently retained as Law Society counsel in the proceeding. A new hearing date was set for July 31 to August 2, 2018.

[21] At our hearing on July 31, 2018, before addressing the merits of the case, we considered the Respondent's motion to dismiss or stay on the ground of "undue delay." Mr. Grady referred us to *Christie v. Law Society of British Columbia*, 2010 BCCA 195, and *Law Society of Upper Canada v. Abbott*, 2017 ONCA 525. Both applied principles laid down in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44. These cases stand for the proposition that there are two circumstances where delay may warrant a stay of proceedings: (a) where the delay impairs a respondent's ability to make full answer and defence, thereby prejudicing the fairness of the hearing; and (b) where, even if the fairness of the hearing has not been compromised, the respondent has suffered prejudice in the

form of significant duress and stigma from an unacceptable delay such that to continue the proceeding amounts to an abuse of process.

[22] We conclude that neither (a) the procedural fairness ground nor (b) the abuse of process ground is made out in this case.

[23] As for (a), this case would have been heard nearly two years ago, in August 2015, had it not been for three adjournments. The first two of these, which accounted for the bulk of the delay, were at the instance, and for the benefit, of the Respondent. The first was to enable him to retain counsel (which in the end he did not do). That put the hearing back to February 2016. The second was to give the Respondent time to appeal to the Court of Appeal the first hearing panel's dismissal of his application, similar to the application he made to us. By the time the Court of Appeal decided on his appeal, and the present Panel then decided the application made to us, the hearing date for the merits of the proceeding had to be moved back to February 2018. Only the third adjournment, which put the hearing date back to July 2018, was at the instance of the Law Society. Under these circumstances we cannot find that the case has been protracted in a manner that unfairly prejudices the Respondent's ability to make full answer and defence.

[24] As for (b), the Respondent submitted no evidence that he had been prejudiced by the delay so as to make it an abuse of process to continue. Nor did any evidence of prejudice appear from the facts known to this Panel. In *Blencoe*, the Supreme Court of Canada emphasized that, to constitute an abuse of process, the delay must be one "that would, in the circumstances of the case, bring the human rights system [in this instance, the disciplinary system] into disrepute" (para. 115), and would make the proceedings "contrary to the interests of justice" (para. 120). We could not find that the delay in this case gave rise to an abuse of process within these authorities.

[25] We therefore dismissed the Respondent's application to dismiss or stay the proceedings on the ground of "undue delay."

ISSUES

[26] The two items of misconduct to be considered have to do with, first, the Respondent's failing to provide a competent level of service to the client and, second, failing to advise the client to obtain legal advice in respect of a possible breach of the Respondent's obligations in that regard. (The allegations in the citation are set out in detail below.

FACTS

[27] The facts as related here come from two sources. One is the Notice to Admit dated November 25, 2015, that the Law Society caused to be served on the Respondent. Under Law Society Rule 4-28, if the lawyer fails to respond to any or all the allegations in a Notice to Admit within 21 days, the lawyer is deemed to admit, for the purposes of the disciplinary hearing only, the truth of the facts and the authenticity of the documents listed in the notice. The Respondent filed no response to the Notice to Admit. The facts that it relates to are therefore to be taken as established for the purposes of the hearing, and the documents that it lists are to be taken as authentic for those purposes.

[28] The other source for the facts is the *viva voce* evidence given at the hearing by PL, a now retired lawyer whose involvement in the relevant events is described below.

[29] The Respondent was called to the Bar in South Africa in 1990 and in Namibia in 1993. He was admitted as a member of the Law Society of British Columbia on December 9, 2002. He practised with a small firm in Surrey for about six years. As of 2009 he practised as Gerhard Pyper Law Corporation, doing business as Pyper Law Group, until October 7, 2014.

[30] On August 23, 2011, NM consulted the Respondent about a potential claim for civil assault. NM said he had been assaulted by a man known to him (D) in the stands at a well-attended soccer game in Surrey. D was subsequently charged criminally with the assault.

[31] At the initial consultation NM decided to retain the Respondent to commence the civil action. He paid the Respondent a $28 lawyer referral fee at the time of the consultation and a $448 retainer a few days later. The Respondent had indicated he was not prepared to undertake the representation on a contingency fee basis, and so the retainer was for an hourly fee. NM signed a written retainer agreement prepared by the Respondent on or about September 2, 2011.

[32] The Respondent assisted NM on September 2, 2011 with preparing a victim impact statement that was subsequently forwarded to Surrey Crown Counsel.

[33] The Respondent wrote to NM's physician on October 12, 2011 enclosing an authorization for a release of clinical records.

[34] The Respondent drafted a Notice of Civil Claim ("NOCC") on NM's behalf and filed it with the registry on November 2, 2011. He retained Dye & Durham, a process-serving firm, to serve D personally with the NOCC. Dye & Durham were unsuccessful in serving the NOCC on D. On December 30, 2011 Dye & Durham sent an email to the

Respondent's assistant strongly suggesting that they provide an affidavit of attempted service that could be used in a subsequent application for substitutional service on D.

[35] Nothing further happened on the file until April 19, 2012, when the Respondent's assistant sent the Respondent a memo noting that Dye & Durham had not been able to serve D and asking for instructions as to whether to request an affidavit of attempted service. The assistant also asked the Respondent to discuss substitutional service with her as the file was "currently at a standstill." The Respondent hand-wrote instructions on the memo that NM, the client, might be approached and asked if he would like to retain a private investigator to effect service.

[36] The Respondent prepared a letter to NM, dated July 18, 2012, seeking NM's approval to hire a private investigator to effect service of the NOCC. The letter advised NM that this would require a further retainer of $1,500. This letter did not reach NM at the time.

[37] By July 23, 2012, in addition to the initial $28 lawyer referral fee and $448 retainer, NM had paid the Respondent further retainers totalling $3,000 ($1,000 on September 2, 2011, $1,000 on October 14, 2011, and $1,000 on December 5, 2011). The Respondent had sent NM statements of account totalling $2,655.75 ($603.12 on September 19, 2011, $1,223.85 on October 18, 2011, $161.94 on November 25, 2011, $377.22 for disbursements on February 2, 2012, and $289.97 on July 23, 2012). This left a balance in trust of $791.90.

[38] The NOCC expired on November 2, 2012 because the Respondent had taken no further steps to serve D with the NOCC after Dye & Durham advised in December 2011 that they had not been able to effect service. Nor had the Respondent applied to renew the NOCC before it expired.

[39] The Respondent wrote NM a letter dated February 22, 2013, noting that he had not heard from NM since he wrote on July 18, 2012 (NM had not received this letter) to ask whether NM wished to proceed and provide a retainer to appoint a private investigator to locate and serve D. He advised NM by the letter of February 22, 2013 that unless NM gave instructions to the contrary, the Respondent would close the file in 14 days

[40] After receiving the February 22, 2013 letter, NM met with the Respondent. At that time the Respondent provided NM with a copy of his July 18, 2012 letter. That letter referred to the NOCC as attached, but the copy the Respondent gave NM at the meeting did not have the NOCC attached. NM advised the Respondent that D's criminal trial was scheduled to take place at Surrey Provincial Court on July 17, 2013. NM further advised the Respondent that he wanted to pursue his civil claim against D.

[41] The Respondent did not prepare NM for his evidence at the criminal trial, nor did he himself attend the trial. He had, however, arranged for his clerical assistant, EP, to serve D

with the NOCC at the criminal trial on July 17, 2013. This was done, at a point in the trial before NM had been cross-examined on his evidence. Defence counsel were therefore able to cross-examine NM on the contents of the NOCC, which NM himself had never seen.

[42] When the NOCC was served on D at his criminal trial on July 17, 2013, not only had the time for serving the NOCC expired (on November 2, 2012) but the two-year limitation period for the civil claim had also expired, the original events having taken place on July 8, 2011.

[43] At the criminal trial, the prosecution called only two witnesses, NM and a friend of NM who, along with NM's son, had accompanied NM to the soccer game. For the defence, D's testimony was that he had a verbal altercation with NM but had not struck him. He had seen from NM's appearance that NM must have been struck in the eye but it was not he (D) that had done so. Three witnesses, who were with D at the game, also testified that they had not seen D strike NM. The Provincial Court judge therefore acquitted D for lack of proof that he had committed the assault on NM.

[44] The Respondent sent NM a statement of account dated July 22, 2013 for $181.55. This included the service of the NOCC on D at the Provincial Court. It also referred to NM having left three phone messages for the Respondent and the Respondent having attempted to return the calls.

[45] On July 31, 2013 DH, a lawyer, wrote to the Respondent advising that D had retained him, DH, with respect to the civil claim. DH advised that he was unaware of any order renewing the timing for service of the NOCC outside of the 12 months from the date of filing. If such an order had been granted, he requested that the Respondent provide him with a copy of it. If no such order had been granted, but the Respondent intended to seek a renewal of the NOCC by court order, DH requested that he be provided with notice of any such application.

[46] On August 13, 2013, the Respondent applied for, and on August 15, 2013 obtained, default judgment against D in the BC Supreme Court. He sent NM an account on August 19, 2013, in the amount of $746.80, most of which was for the obtaining of the judgment. This used the $389.88 still remaining in trust and left a balance owing of $356.92.

[47] DH, not having received a response to his letter of July31, sent a follow-up letter to the Respondent on August 16, 2013 requesting a response. The Respondent replied by letter of September 24, 2013. He advised that "an oversight occurred" and default judgment had been taken against DH's client, D. The Respondent said he would seek instructions from his own client as to the claim.

[48] On October 9, 2013 the Respondent wrote to DH enclosing an unfiled Notice of Application, returnable November 28, 2013. The Notice of Application was filed in the BC Supreme Court on October 11, 2013. It sought an order that the default judgment granted on August 15, 2013 be set aside by consent, and an order that the NOCC filed November 2, 2011 be renewed for 12 months. Among the facts stated in support of the application was that "[i]t is due to an oversight that the NOCC was not renewed within the 12 month period." The Respondent's assistant, BC, emailed the client, NM, to advise him of the upcoming application to renew the NOCC and set aside the default judgment. An unfiled copy of the Notice of Application was attached.

[49] On November 19, 2013 DH provided an Application Response, and two supporting affidavits, to the Respondent. The Respondent provided a copy of those materials to NM on November 22, 2013.

[50] On November 28, 2013 the Respondent appeared before Madam Justice Maisonville to speak to NM's application to renew the NOCC and set aside the default judgment. DH, on D's behalf, opposed the application to renew but consented to an order setting aside the default judgment. Madam Justice Maisonville declined to hear the application on the ground that it was inappropriate for the Respondent to speak to the application and other counsel on behalf of NM should speak to it.

[51] The Respondent wrote to NM on January 29, 2014 to "confirm that I have advised you that the Court had indicated that you retain independent counsel to renew the Notice of Claim, which was served late on the Defendant as a result of his continued actions to evade service." It added, "We confirm that you expressed your doubt whether you wish to proceed with the action." It asked for NM to think about that question and provide the Respondent with his reply within 14 days, failing which the Respondent would close the file.

[52] On February 6, 2014, NM met with new counsel, PL. He (PL) wrote to the Respondent. The letter referred to PL's understanding that a missed limitation period had extinguished NM's claim, and requested the Respondent's file concerning NM. No response was received and PL sent a follow-up request on February 17, 2014. This second letter referred to the Respondent's having appeared before the Supreme Court to renew the service period and the Court's having refused to hear the application. It added, "Clearly you need to report this matter immediately."

[53] The Respondent replied to PL by fax on February 19, 2014. The letter said that "we disagree with your notion that the limitation period was missed" and that "[t]he Rules have provided that the Notice of Claim is to be renewed after one year of filing if not served," and "[t]he time limit provided by the Rules can be extended even after a one year period." In support of this statement the letter referred to *Barlow v. Anastasia Holdings Ltd.*, (1983)

45 BCLR 300. The letter also invited PL to pick up the client's material at any time, which PL did the same day.

[54] PL testified that when he examined the file he noted that it included no proof of claim or witness statements. Although the injury to NM took place in the stands at a well-attended soccer match, the Respondent had not obtained statements from anyone to support NM's claim. There was nothing to indicate that the Respondent had contacted Crown Counsel about the criminal case. PL determined that there was a certain amount of information in the police file, including statements they had taken from NM and NM's friend, who testified for the prosecution at the criminal trial. There was also a photograph taken at the time showing NM's injury. It proved very difficult to obtain any new evidence now, more than two years after the events in question.

[55] On March 14, 2014, PL filed a Notice of Application returnable April 4, 2014 to set aside the default judgment, renew the NOCC and amend the style of proceeding to correct some errors in the parties' names in the original NOCC. An affidavit of NM was filed in support of the application. DH filed an application response consenting to the default judgment being set aside but opposing the application to renew the NOCC. The application was heard on April 4, 2014 by Master Keighley. He set aside the default judgment and renewed the NOCC for six months until October 3, 2014. He also amended the style of proceeding.

[56] D filed a Response to Civil Claim on July 21, 2014. NM filed an Amended NOCC on August 8, 2014, reflecting the order made on April 4, 2014.

[57] PL testified that he advised NM that the chances of success in the civil claim were 50-50 at best. The testimony given by three friends on D's behalf at the criminal trial was on the record and could easily be put forward by D at a civil trial. PL sent D (who by this point was no longer represented by DH) an offer of settlement and a notice of a two-day trial. D did not respond. NM in the end decided that he did not have the financial resources to pursue the matter further. The possibility of an action against the Respondent was also considered but NM, again, because he felt he could not risk liability for costs, did not pursue that option, either.

THE CITATION

[58] As mentioned above, the citation was issued on February 11, 2015, and the Respondent admitted he was served with the citation on the same day. The citation was amended on August 11, 2015.

[59] Allegation 1 of the amended citation reads as follows:

1. Between November 2, 2011 and February 7, 2014, in the course of representing your client, NM, in a civil claim filed November 2, 2011, you failed to serve your client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook* then in force and Rule 3.2-1 and Rule 3.2-2 of the *Code of Professional Conduct for British Columbia*. In particular, you failed to do some or all of the following:

    (a) ensure the Notice of Civil Claim was served on the defendant before it expired;

    (b) take steps between December 30, 2011 and February 22, 2013 to serve the Notice of Civil Claim or to advance the litigation;

    (c) obtain instructions from the client between April 19, 2012 and July 18, 2012 regarding service of the Notice of Civil Claim;

    (d) contact your client between July 18, 2012 and February 22, 2013;

    (e) between approximately November 2, 2012 and September 24, 2013, inform your client that the Notice of Civil Claim had expired and advise of the potential consequences of the expiration;

    (f) review or respond to a letter dated July 31, 2013 from opposing counsel; and

    (g) provide your client with a letter dated July 31, 2013 from opposing counsel or inform your client of the content of the letter and in particular, that the Notice of Civil Claim had expired.

    This conduct constitutes professional misconduct or incompetent performance of duties undertaken in the capacity of a lawyer, pursuant to section 38(4) of the *Legal Profession Act*.

[60] Allegation 2, as mentioned earlier, was not pursued by the Law Society.

[61] Allegation 3 reads as follows:

3. Between November 2, 2012 and December 17, 2013 you failed to recommend to your client, NM, that he obtain independent legal advice regarding the expiry of the Notice of Civil Claim you filed on his behalf, an error or omission which was or might have been damaging to your client and that could not be rectified readily, contrary to Rule 7.8-1 of the *Code of Professional Conduct for British Columbia*.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

ANALYSIS

[62] We address the issues in the following sequence.

1. Has the Law Society proved that, as alleged in allegation 1 of the citation, the Respondent "failed to serve [his] client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation"? (The Quality of Legal Representation Issue.)

2. Has the Law Society proved that, as alleged in allegation 3 of the citation, the Respondent "failed to recommend to [his] client … that he obtain legal advice regarding the expiry of the NOCC [he] filed on his behalf." (The Recommending Independent Legal Advice Issue.)

3. If the answer to either or both of questions 1 and 2 is yes, do the Respondent's acts and omissions constitute professional misconduct? (The Professional Misconduct Issue.)

The Quality of Legal Representation Issue

[63] We have no hesitation in finding that the Respondent failed to serve his client, NM, in a manner that would be expected of a competent lawyer.

[64] The Respondent was retained by NM to advise him on, and represent him in, a civil claim against D for assault and battery. On the evidence before us, NM realistically had a potential claim against D. However, as a result of the Respondent's actions, NM lost any chance of pursuing the claim successfully. NM also spent some $3,500 but ended up with nothing to show for it — indeed, less than nothing, since he had lost the prospect of a civil claim that he had previously had.

[65] We find that each of the allegations in paragraphs (a) to (g) of allegation 1 of the citation has been proved in this proceeding.

[66] Among the shortcomings in the Respondent's handling of the matter we refer particularly to the following.

[67] The Respondent, for no apparent reason, allowed the one-year period for serving the NOCC to expire on November 2, 2012. It was true that the process-servers had been

unable to serve D, but that could have been addressed, as the process-servers suggested to the Respondent, with an order for substitutional service. There was still plenty of time to obtain an order when they made that suggestion in December 2011. At the very least the Respondent could have applied, before expiry of the period, to extend the time for service. We were informed that an application to renew the NOCC after the year has expired is usually more difficult to obtain because it can more readily be opposed on the ground that the defendant has been prejudiced by the delay.

[68] The Respondent, for no apparent reason, delayed taking any steps to advance the action until the limitation period for the claim had expired on July 8, 2013.

[69] The Respondent did not secure evidence early, or at all, to prove NM's claim, including the gathering of information with respect to witnesses and liaising with Crown Counsel.

[70] The Respondent did not take steps to prepare his client with respect to the testimony he would have to give at D's criminal trial. Nor did the Respondent attend the trial. The only step he took was to have his administrative clerk serve the defendant, D, at the criminal trial with the already expired NOCC, which the client had never seen and which exposed the client to cross-examination on the allegations it contained.

[71] The Respondent improperly applied for and obtained default judgment against D, when the NOCC had expired for lack of service on D and when the limitation period for the claim against D had already expired. This error could only be rectified by an application to set the judgment aside.

[72] When he finally took steps to deal with the fact that the NOCC had expired, the Respondent did so by applying to the court himself in November 2013 to renew the NOCC. Since it was his responsibility that the NOCC had expired, he was in a conflict between his duty to the client to try to get the NOCC renewed, and his own interest in minimizing his responsibility for the NOCC not having been served on D within the year.

[73] The Respondent failed to communicate regularly with his client to keep the client informed about the status of his civil claim. Such communication as there was had manifest deficiencies. The inability to serve D personally was clear by December 2011. The Respondent took no steps to discuss this situation with the client until April 19, 2012 when the Respondent's assistant drew to his attention the need for some kind of action. The only step the Respondent took was to propose to the client that a private investigator be obtained, at substantial expense, to effect service. Substitutional service was apparently not considered. This proposal was made in a letter dated July 18, 2012, but that letter was apparently not received by the client until the Respondent met with the client in February 2013.

[74] When faced with the need to explain why things had gone wrong, his statements to his client and to other counsel attempted to evade his own responsibility for what happened. Two examples can be referred to.

[75] When he wrote to his client on February 22, 2013, the Respondent had done nothing on the file for more than a year (the last attempt at service of the NOCC was in December 2011). The Respondent's letter nevertheless implied that the responsibility was the client's for not responding to the Respondent's inquiry about retaining a private investigator. The client's lack of response, even if there had been a lack of response, was no excuse for doing nothing to advance the client's case. But the client had not failed to communicate with the Respondent. The Respondent made the inquiry about the private investor only in a letter to the client of July 18, 2012, which the client did not receive until some seven months later, at the meeting prompted by the Respondent's letter of February 22, 2013.

[76] When, on February 19, 2014, the Respondent faxed a response to PL's inquiry about a "missed limitation period," he denied that the limitation period was missed. The Respondent asserted that the Rules permitted the NOCC to be renewed after one year, and referred PL to *Barlow v Anastasia Holdings Ltd.* That case in fact makes it clear that renewal of the writ (as the initiating document was then known) is a matter of discretion and will be refused if the defendant is prejudiced by the delay in service. It also makes it clear that the lawyer whose fault it is that the defendant was not served should not appear on the application to renew. This was the rule that the Respondent failed to observe himself when he personally appeared before Madam Justice Maisonville.

[77] We have no doubt that, taken together, all the shortcomings proved before us reflect a quality of service that is not "conscientious, diligent and efficient" and do not measure up to what would be expected of a competent lawyer in a similar situation. These are the standards as set out in Chapter 3, Rules 3 and 5 of the former *Professional Conduct Handbook* (in force at the time of most of these events), and are carried forward, with minor variations in wording, in Rules 3.1-1 and 3.1-2 of the *Code of Professional Conduct of British Columbia*. (The *Code* replaced the *Handbook* as of January 1, 2013.)

The Recommending Independent Legal Advice Issue

[78] The Respondent should have been aware of the expiry of the NOCC when it happened, on November 2, 2012. He actually became aware of the expiry of the NOCC at the very latest when DH, on D's behalf, drew the expiry of the one-year period to his attention in his (DH's) letter of July 13, 2013. The issue is whether a duty arose to recommend to the client, NM, that he obtain independent legal advice about the expiry of the NOCC. He did not actually recommend independent legal advice in writing until his letter to NM of

January 29, 2014. According to PL's notes, NM told PL that the Respondent had advised him orally that he could not continue to act for him on or about December 7, 2013.

[79] A similar issue was discussed in *Law Society of BC v. Harding*, 2014 LSBC 52. In that case the hearing panel found that the lawyer had failed to advise his client, whose case was the subject of an application to dismiss for want of prosecution, to seek independent legal advice. The panel stated at paras. 99 and 100:

> This is an area of trepidation for lawyers. It is tempting but not appropriate for lawyers to decide that they can "fix" the error so there is no utility to recommending independent legal advice. The duty to recommend independent legal advice is based on an objective standard. It is part of a lawyer's fiduciary duty to his or her client, which includes scrupulous adherence to the obligation not to put the lawyer's own interests ahead of the client and to be candid, even where they have a plan to remedy the situation: *Law Society of Alberta v. Chick*, 2008 LSA 13.
>
> In the context of an application to dismiss for want of prosecution, the lawyer's conduct in the circumstances that give rise to the application are important but not determinative. If the want of prosecution is due to the lawyer, not the client or extraneous circumstances, the lawyer must give consideration to recommending independent legal advice. This is not to say that the lawyer's conduct must be intentional and the circumstances completely within the lawyer's control. …

[80] The panel in *Harding* concluded at para. 144 that, from the time the Want of Prosecution Application was launched until it was dismissed, the client's "interests were in peril due to the conduct of Mr. Harding. He should have referred her for independent legal advice."

[81] The same, we find, applies here. The obligation to recommend independent legal advice arises when the client's interests are at risk so as to call for legal advice and the lawyer, because of his or her own involvement in creating the risk, is in a conflict and so cannot provide that advice. As codified in the *British Columbia Code of Professional Conduct*, Rule 7.8-1, "the lawyer must recommend that the client obtain independent legal advice concerning the matter" if the lawyer discovers that, in a matter for which he or she is responsible, the lawyer has made "an error or omission that is or may be damaging to the client and that cannot be rectified readily."

[82] When the NOCC expired, the interests of the client, NM, were vulnerable. The client's claim would cease to exist if the NOCC was not renewed. In our view, the Respondent had a duty to recommend independent legal advice to his client as soon as the client's interests were at risk due to the Respondent's own failure to act, which was, at the latest, as

of the date of the expiry, November 2, 2012. On the evidence, the duty to recommend independent legal advice remained unfulfilled for more than a year.

The Professional Misconduct Issue

[83] Section 38(4) of the *Legal Profession Act* distinguishes between various findings that a disciplinary panel can make (though the panel can make more than one). The two wrongs that are alleged in allegation 1 of the citation, the quality of service allegation, are professional misconduct and incompetent performance of duties undertaken in the capacity of a lawyer. Allegation 3, the allegation of failure to recommend legal advice, alleges professional misconduct only. As far as allegation 1 is concerned, we find that the facts show that the Respondent did incompetently perform duties he had undertaken as a lawyer. What remains is to decide, in relation to both allegations, whether the Law Society has made out professional misconduct.

[84] The test most often cited, when the issue is to determine whether a lawyer's acts or omissions amount to professional misconduct, is whether the facts show "a marked departure from that conduct the Law Society expects of its members" (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171). The panel in that case, at para. 154, also said that a lawyer's conduct meets that standard if it "displays culpability which is grounded in a fundamental degree of fault, that is, whether it displays gross culpable neglect of [the lawyer's] duties as a lawyer."

[85] A case that applied the *Martin* standard to a failure to provide the required quality of service is *Law Society of BC v. Perrick*, 2014 LSBC 39. The panel in that case said at para. 44:

> Although that threshold [of "gross culpable neglect" of a lawyer's duties] may be passed in a single incident, it is more likely to happen in multiple occurrences in representing the client. In addition, the quality of service requirement may happen when each of the individual occurrences of themselves are not sufficient to raise concerns about quality of service. However, cumulatively, they may raise issues of quality of service.

Professional Misconduct — allegation 1

[86] The Law Society submitted in relation to allegation 1 that, in this case, although the Respondent's actions or inactions individually might not amount to professional misconduct, collectively they do. We agree. When the Respondent's acts and omissions are considered as a whole, they clearly meet the "marked departure" and "gross culpable neglect" standards put forward in *Martin* and applied in *Perrick*.

[87] *Harding*, also considered whether failure to provide an adequate quality of service amounted to professional misconduct. The panel was particularly concerned with allegations that involved delay or lack of activity. The panel said at para. 88 that the following factors should be considered: (a) the gravity of the misconduct, taking into account the length of the delay or lack of activity, and whether it was coupled with representations to the client about the case that were not true, or with failures to communicate with the client; (b) duration of the misconduct; (c) the number of breaches, that takes into account whether the citation is based on a single incident or a series of incidents that should be considered together; (d) the presence or absence of *mala fides* in the reasons for the delay or lack of activity; and (e) the harm caused to the client by the lawyer's not advancing the case.

[88] We agree with the Law Society's submission, again relating to allegation 1, that these factors apply in this case and point towards a conclusion of professional misconduct. The Respondent's failure to perform his duties was grave and imperiled the client's claim. No obvious reason was given for the Respondent's delay in dealing with the expired NOCC or attempting to serve an expired NOCC on a defendant and then taking default judgment in the face of earlier inquiries from opposing counsel about the validity of service. The misconduct involved a series of failures to act from late 2011 to late 2013, the better part of two years. There is nothing to suggest *mala fides* on the Respondent's part but the harm to the client's interests was incontestable and serious.

[89] In *Chick*, the Law Society of Alberta hearing panel found that, after the lawyer had inadvertently failed to serve a statement of claim within the time provided by the rules of court, the lawyer had a duty to inform the client and to advise the client to obtain legal advice. The panel noted at para. 67 that, in such a situation "it was not up to the Member to reach his own conclusion that his error would not harm his clients."

Professional Misconduct — allegation 3

[90] As for allegation 3, we find that the failure to advise his client to obtain independent legal advice was also professional misconduct. The Respondent had clearly made a professional error in letting the NOCC expire, and it was his duty at that point to draw this to the client's attention and advise the client to seek independent legal advice. The Respondent did not do so, and his failure continued for a year, during which he improperly appeared for his client on the application to renew the NOCC. We conclude that, in these circumstances, the Respondent's failure to advise the client to obtain independent legal advice was a marked departure from his obligations as a lawyer and amounted to gross culpable neglect of his duties to his client.

RESULT

[91] We therefore find that the Law Society, under allegation 1 of the citation, has met the onus of showing both professional misconduct and incompetent performance of duties undertaken in the capacity of a lawyer. Under allegation 3 of the citation, the Law Society has met the onus of showing professional misconduct.