2023 LSBC 44
Hearing File No.: HE20190068 and HE20190069
Decision Issued: November 14, 2023
Citation Issued: November 5, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

TROY JOHN DUNGATE
AND
TREVOR SCOTT DUNGATE

RESPONDENTS

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	May 17 to 19, 2023
Written submissions:	August 25, 2023
Panel:	Lindsay R. LeBlanc, Chair Cindy Cheuk, Lawyer Paul Barnett, Public representative
Discipline Counsel:	Michael D. Shirreff Jessie I. Meikle-Kähs
Appearing on their own behalf:	Troy John Dungate and Trevor Scott Dungate
Written reasons of the Panel by:	Lindsay R. LeBlanc

CITATION

[1] On November 5, 2019, a citation was issued against the Respondents pursuant to the *Legal Profession Act*, SBC, 1998, c.9, and the Law Society Rules (the "Citation"). The Citation reads as follows:

> 1. On or around February 2, 2016, one or both of Troy Dungate and Trevor Dungate breached an undertaking given to another lawyer, RG, as set out in a letter dated November 27, 2015, by failing to inform RG that an investigation had concluded, contrary to one or more of rules 2.1-4(b), 5.1-6 and 7.2-11 of the *Code of Professional Conduct for British Columbia*.
>
> This conduct constitutes professional misconduct or conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*.
>
> 2. In or around May 2016, June 2016, and December 2018, one or both of Troy Dungate and Trevor Dungate made representations to another lawyer, RG, in relation to their undertaking set out in Allegation 1, that they knew or ought to have known were false or misleading, contrary to one or both of rules 2.1-4(a) and 2.2-1 of the *Code of Professional Conduct for British Columbia*, in one or more email communications sent: May 27, 2016, June 1, 2016, June 28, 2016, and December 12, 2018.
>
> This conduct constitutes professional misconduct or conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*.

PROCEDURAL FACTS

[2] The Citation was authorized on October 24, 2019, issued on November 5, 2019, and the Respondents admit the Citation was duly served.

[3] At the hearing the Respondents initially raised objections to the documents sought to be relied on by the Law Society; however, as the hearing progressed, the Respondents put into evidence the contested documents and the objection was withdrawn.

[4] In some instances, documents relating to the Citation, have been signed, or sent by email, by one of the Respondents. The Respondents asked the Panel to accept that where a document was signed by one, it had been endorsed by the other and that all communications were joint communications of the Respondents. The Panel has proceeded on this basis.

[5] The Law Society called lawyer, RG and Gurprit Bains, Deputy Chief Legal Officer of the Law Society, as witnesses. Both were cross-examined by the Respondents.

[6] The Respondents testified and were cross-examined by the Law Society.

FACTS

[7] On or about December 16, 2013, the Law Society advised Troy Dungate that it has opened an investigation file regarding possible breaches of the Law Society Rules. Law Society investigation files are subsequently opened for Trevor Dungate and John Dungate, regarding possible breaches of the same Law Society Rules.

[8] In March 2014, the Respondents (and their now deceased father, John) retain RG to act for them with respect to the Law Society investigation files.

[9] On June 18, 2015, the Respondents terminate their engagement of RG after expressing displeasure with the account rendered by RG.

[10] On November 26, 2015, the Respondents write to RG expressing concern with the Registrar's appointment to review RG's legal accounts. The relevant contents of that letter are reproduced here:

> We anticipate that the majority of the material that you will be presenting to the Master will be subject to our client solicitor privilege. We point out that presenting this material while the investigations are ongoing will harm us and we give you notice that we do not waive our client solicitor privilege on any material in your possession at this time.
>
> We require that you delay the hearing date for your appointment until the Law Society's investigation has been completed and the matters with which we consulted you on are resolved with the Law Society.

[11] On November 27, 2015, RG responds indicating that he had previously suggested obtaining an anonymized appointment, but did not receive a reply to that suggestion so he went ahead and applied for a review of his accounts. RG expresses his concern with the request to simply adjourn the appointment hearing and puts forward a proposal for the Respondents consideration which reads, in part, as follows:

> …Your suggestion that I simply put off my day in court until your Law Society proceedings conclude is not appetizing to me. …

> I will not agree to simply adjourn. …
>
> I suggest that, as a term of the adjournment you wish, but, I say, are not entitled to, that you pay, without prejudice to the outcome of the taxation, 50% of the amount I have billed you inclusive of fees, taxes and disbursements. *I suggest a term that you undertake to advise me forthwith when the Law Society's investigation of you has been concluded such that the prejudice you claim would no longer be a factor.* In exchange, I would agree to adjourn the review of my accounts sine die and to not set the review until a date established in consultation with you after you notify me that the LSBC investigation is concluded. If, at review, I recover less than what you will have paid under this proposal I will, of course, promptly refund what I would then owe you, but I decline to be stalled indefinitely and to bear the whole cost of having taken on the brief you asked me to take on.

The emphasis (in italics) above has been added to identify the undertaking subsequently accepted by the Respondents (the "Undertaking"). During the hearing the Respondents raised an issue with respect to whether the Undertaking was truncated. For the purposes of the Panel's decision, the Panel accepts the Respondents' position that the Undertaking is not to be truncated and includes the words "such that the prejudice you claim would no longer be a factor."

[12] On November 27, 2015, the Respondents accept the proposal by returning RG's November 27, 2015, letter with the Undertaking paragraph highlighted and signed by Troy Dungate. Although signed only by Troy Dungate, Trevor Dungate's evidence was that his brother was accepting the Undertaking on behalf of both of them and that he was equally bound to the Undertaking. At this time, the Respondents also enclose a bank draft for $21,688.49.

[13] On February 2, 2016, the Law Society writes to the Respondents advising that the assessment of the Trust Assurance Department's referral to Professional Conduct is complete. The relevant contents of that communication are reproduced here:

> I have now completed my assessment of the Trust Assurance Department's referral to Professional Conduct. The purpose of an assessment is to determine, based on the evidence, whether professional misconduct has occurred requiring disciplinary or remedial action.

Upon review of the evidence, I have concluded that, although the Trust Assurance Department's referral raised valid concerns, it does not disclose conduct serious enough to warrant further action. As a result, no further action will be taken in accordance with Rule 3-8(1)(b) of the Law Society Rules 2015 which states:

> 3-8 (1) After investigating a complaint, the Executive Director must take no further action if the Executive Director is satisfied that the complaint:
>
> > (b) does not disclose conduct serious enough to warrant further action.

…

Conclusion

You have taken steps to ensure that, going forward, your orders to pay and your statements of account provide sufficient detail and accurately reflect how you are disbursing your clients' funds. Moreover, your new practices ensure that you are properly remitting taxes. I trust that you have implemented practices to ensure that residual trust balances are identified and properly dealt with early. In all of the circumstances, I am satisfied that the evidence in this case does not give rise to conduct serious enough to warrant further action.

I will be forwarding a summary of your legal argument to the Policy Department. It is within their purview to review the *Act* and the rules to determine if they are deficient. If so, they may recommend amendments.

Having completed my assessment and canvassed those concerns with you, I am satisfied that the valid concerns raised in this complaint have been drawn to your attention. My decision not to recommend further action in this case should not be taken as an indication that any similar future complaint would reach the same conclusion. Future complaints of this nature could result in referrals to the Practice Standard Committee and/or the Discipline Committee.

…

[14] On February 19, 2016, the Law Society writes to the Respondents and invites them to fill out a survey on the investigation. The letter reads in part as follows:

> We write further to the Law Society's letter of February 2, 2016, and hope that you have had a chance to read and consider the Law Society's assessment following our investigation into your conduct.

[15] On May 27, 2016, RG writes to the Respondents asking whether the Law Society investigation has concluded. On May 27, 2016, the Respondents provide the following response by email:

> We have your email of May 27th 2016.
>
> The adjournment of your fee review was agreed to until the Law Society Investigation was completed and the matters with which we consulted you on were resolved. We agreed to advise you forthwith when that happened.
>
> We will advise you when it happens.

[16] On May 28, 2016, RG responds and disagrees with the position taken by the Respondents. A portion of RG's email is reproduced here:

> The concept that I wait until the matters you consulted me on "were resolved" was not part of my agreement to adjourn: the relevant concept is limited to the conclusion of the Law Society's investigation. I do not agree to expanding the hold-off period beyond the conclusion of the investigation. I wrote Friday to ask if the Law Society investigation had concluded and, as your prompt reply invoked the different concept of "matters resolved", I write again to inquire if the Law Society's investigation has been concluded such that I may now re-set my fee review?

[17] On June 1, 2016, the Respondents introduce a counterproposal and provide, *inter alia,* the following response by email to RG concerning the Law Society investigation:

> We confirm that the Law Society's investigation of us has not been concluded such that the prejudice we claim is no longer a factor.

[18] RG immediately responds by email to the Respondents on June 1, 2016, seeking the following clarification: "I'd appreciate clarification over whether, if I were to decline your offer, I'd now be free to re-set the hearing date." The Respondents then immediately respond by email on June 1, 2016. The Respondents email is reproduced here:

> To be clear

1) the matters with the Law Society (which we retained you on) have not been concluded and the prejudice continues to exist; and

2) if you decline our offer you would not be free to re-set the hearing date at this time.

[19] On June 27, 2016 RG follows up on the matter after not receiving a response to a June 7, 2016 proposal to settle the outstanding account. RG outlines his understanding of the investigation process and his doubts that, with the passage of time, the matter was still outstanding. The relevant portions of that email communication are reproduced here:

> I am very concerned to be specifically reassured that the Law Society is in the "investigation" stage with respect to its internally-generated complaints about how you charge for disbursements and I feel obliged to tell you frankly that I am very dubious that it could possibly still be in the investigation stage.
>
> …
>
> Following investigation, the complaint would be "assessed" by the staff lawyer, whom I assume to be Mr. Busanich (*sic*), but perhaps the matter has been handed off again since I departed the file. The assessment puts the Executive Director to a decision: if the investigation reveals the complaint is not valid or cannot be proved or does not disclose conduct serious enough to warrant further action, then the Executive Director must take no further action on the complaint. Rule 3-8(1). Rule 3-8(2) is the discretionary no further action provision if the ED is satisfied that the complaint has been resolved. If either of those stages have been reached, then I could plainly carry on with my fee review.
>
> If neither the mandatory or discretionary no further action provisions apply, then the ED must refer the complaint to either Discipline or Practice Standards, but those are "Actions after Investigation". Neither referral to committees constitutes a continuation of the investigation stage.
>
> I find it totally unfathomable that, after all this time, your complaints are in the "investigatory", "pre-assessment" stage.
>
> …
>
> I need you to specifically address whether your matters are still in the investigation stage – that is, unassessed.

[20] On June 28, 2016, the Respondents respond and restate the position outlined in their June 1, 2016, response.

[21] On June 28, 2016, RG responds by email and asks the Respondents to directly answer the following questions:

> 1. Has the Law Society's investigation concluded?
>
> 2. Has its complaint been assessed?

[22] On June 28, 2016, the Respondents provide their response which is reproduced in part here:

> The only question that you are entitled to ask and we are obligated to answer is:
>
> 1) Has the Law Society's investigation of you been concluded such that the prejudice you claim would no longer be a factor?
>
> The answer to the above question is still: **NO.**
>
> We will not be providing you with any further information as you and your staff cannot control the leakage of confidential information out of your office. …
>
> …
>
> Govern yourself accordingly.

[23] The next communication on this matter is a number of years later on November 28, 2018, when RG in follow up asks the Respondents if they are in compliance with the Undertaking and requests answers to the same questions sent on June 28, 2016. Emails are again exchanged, and the Respondents conclude by confirming that they are in compliance with the Undertaking and refer RG back to the email exchanges of 2016.

[24] On December 16, 2018, RG filed a complaint with the Law Society and an investigation was commenced.

POSITION OF THE LAW SOCIETY

[25] With respect to allegation 1 in the Citation, the Law Society summarized its position as follows:

(a) The Respondents undertook to advise RG when the Investigation had concluded. The Respondents' position about "prejudice" and arguments about how to interpret the Undertaking are disingenuous and lack common sense. If there is any need to consider "prejudice", that became a non-issue as soon as the investigation was closed.

(b) The investigation concluded in February 2016 and the Respondents were advised by the Law Society. Their evidence about what they believed is not credible.

(c) The Respondents breached the Undertaking by failing to advise RG that the investigation had concluded thereby breaching their duty to strictly and scrupulously fulfill every undertaking given pursuant to rules 2.1-4(b), 5.1-6, and 7.2-11 of the *Code of Professional Conduct for British Columbia* (the "*Code*").

(d) The Respondents' conduct was a marked departure from the standard expected of members of the profession.

[26] The Law Society submits that the Respondents' dealings with RG were self-serving and that they made representations that they knew or ought to have known were false or misleading.

[27] The language used by the Respondents, as submitted by the Law Society, was designed to mislead RG, demonstrating a lack of integrity and candour. The acts were intentional and calculated.

POSITION OF THE RESPONDENTS

[28] The Respondents submit that the Citation truncates the language of the undertaking to which they agreed. The Panel, in the reasons above, has defined the terms of the Undertaking which includes the language sought to be included by the Respondents. The Respondents submit that when the full wording of the Undertaking is considered, they cannot be found to be in breach.

[29] The Respondents further submit that the Law Society has failed to provide evidence that the investigations had concluded and argue that reliance on the February 2, 2016 letter is insufficient. The Respondents, in support of their argument, took the Panel through a comprehensive review of their dealings with the Law Society following receipt of the February 2, 2016 letter.

[30] The Respondents submit that the Undertaking was subjective and that they remained and remain the subject of prejudice due to: (a) the fact that they were not released of a requirement to retain files; and (b) the Law Society oversight processes continued. They rely on the February 2, 2016 letter and the following statement, which they categorize as a "warning": "Future complaints of this nature could result in referrals to the Practice Standards Committee and/or the Discipline Committee."

ONUS, STANDARD OF PROOF & TEST FOR PROFESSIONAL MISCONDUCT

[31] The Law Society has the onus of proving the allegations in the Citation, and the standard of proof is on a balance of probabilities: *Foo v. Law Society of British Columbia*, 2017 BCCA 151, at para. 63 and *Law Society of BC v. Schauble*, 2009 LSBC 11, at para. 43.

[32] The test for what constitutes professional misconduct is "whether the facts as made out disclose 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.

ANALYSIS

Allegation 1

[33] The starting point in the analysis must be the specific terms of the undertaking. As the Undertaking was in writing, it is to be construed by reference to the intention of the parties to be deduced from the writing itself and the circumstances in which it was given (*Hammond v. Law Society of British Columbia,* 2004 BCCA 560).

[34] The arrangement giving rise to the Undertaking was not complicated. The prejudice was tied to the investigation and the Respondents agreed by way of the Undertaking to advise RG when the investigation had concluded.

[35] The Respondents' position conflates the role of the Law Society in regulating lawyers with that of an active investigation and the prejudice that may flow from that investigation.

[36] Lawyers are always subject to oversight by the Law Society. Lawyers have ongoing reporting responsibilities and are subject to audit by the Law Society to ensure that the public continues to be protected from unscrupulous acts.

[37] The Respondents point to the ongoing reporting and audit functions of the Law Society in their effort to argue that the prejudice was perpetual and ongoing. This ignores the context and intention of the Respondents and RG when the Undertaking was accepted. Such an interpretation also fails to give meaning to the first part of the Undertaking which required the Respondents to advise forthwith when the Law Society investigation was concluded. On review of the correspondence, the Panel finds that "investigation" in the Undertaking was clearly a reference to the investigation files referenced in the February 2, 2016 letter.

[38] The Panel finds that the Respondents were given notice that the "investigation" was concluded on receipt of the February 2, 2016 letter.

[39] The Respondents acknowledged receipt of February 2, 2016 letter and they were aware of its contents when responding to RG's communications requesting an update on the status.

[40] The Respondents failed to advise RG that the investigation had concluded and provided evasive answers.

[41] Rule 2.1-4(b) of the *Code* provides that a lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given.

[42] With respect to undertakings, the *Code* at rule 5.1-6 provides that a lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

[43] Rule 7.2-11 further provides as follows:

> 7.2-11 A lawyer must:
>
> (a) not give an undertaking that cannot be fulfilled;
>
> (b) fulfill every undertaking given; and
>
> (c) honour every trust condition once accepted.

[44] In *Law Society of British Columbia v. Heringa*, 2004 BCCA 97, at para. 6, the Court of Appeal stressed the importance of undertakings to the legal profession and quoted the decision of the hearing panel, in part, as follows:

> [37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one

> lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> [38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

[45] The Panel finds that the Respondents' argument that prejudice continued is an after-the-fact attempt to justify their conduct.

[46] There is no suggestion based on the evidence that the Respondents held a belief that the investigation was ongoing or sought clarity on its status. It was not until the issuance of the Citation that the Respondents started to make inquiries of the Law Society in an effort to build a case that "prejudice" existed.

[47] The Respondents breached the terms of the Undertaking and fell below the standard expected of lawyers to a degree that is a marked departure from the conduct expected of lawyers.

Allegation 2

[48] When lawyers provide misleading or false information it undermines the profession such that the public no longer has trust in the profession.

[49] The Panel finds that the Respondents conduct was serious in that it was calculated and self-serving. The Respondents, by hiding the fact that the investigation had concluded, sought to advance their position. Instead of providing clear answers to straightforward questions, they started a negotiation with RG for reduction of his account.

[50] The Respondents purposely evaded direct questions concerning the status of the investigation and acted with a lack of candour which falls far below the standard expected of lawyers. At no point did the Respondents advise RG that they had received the February 2, 2016 letter from the Law Society or otherwise discuss next steps with respect to the hearing RG sought to advance.

[51] The Respondents failed to discharge their responsibility honourably and with integrity and failed to treat a fellow member of the profession with courtesy and

good faith. The Respondents failed to discharge their duties as set out in rule 2.2-1 and 2.1-4 of the *Code.*

[52] The Panel finds that the Respondents' acts were intentional, calculated and deliberately sought to deceive a fellow member of the profession and were a marked departure from the conduct expected of a lawyer.

CONCLUSION

[53] The Panel finds the Respondents' proven conduct as described in allegation 1 and allegation 2 of the Citation was a marked departure from the conduct expected of a lawyer and the Respondents' actions constitute professional misconduct.