2023 LSBC 16
Hearing File No.: HE20210058
Decision Issued: April 13, 2023
Citation Issued: November 8, 2021
Citation Amended: March 28, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

SCOTT THOMAS JOHNSTON

RESPONDENT

DECISION OF THE HEARING PANEL ON JOINT SUBMISSIONS

Written Submissions:	January 17, 2023
Panel:	Jennifer Chow, KC, Chair John Lane, Public representative Kate Saunders, Lawyer
Discipline Counsel:	Marsha Down
Respondent's Counsel:	Matthew Cooperwilliams
Written reasons of the Panel by:	Jennifer Chow, KC

OVERVIEW

[1] The parties have provided joint submissions to the Hearing Panel regarding allegations that the Respondent sexually harassed two employees at his firm in June 2020. Pursuant to Rule 5-6.5 of the Law Society Rules (the "Rules"), a hearing panel is prohibited from diverging from joint submissions on disciplinary action unless we find that the proposed penalty is contrary to the public interest in the administration of justice.

[2] In the joint submissions, the Respondent: (a) admits that he committed professional misconduct when he sexually harassed two employees of his law firm in June 2020; and (b) agrees to be suspended for six-weeks and to pay costs in the amount of $2,500.

[3] The Hearing Panel accepts the joint submissions and finds that the proposed disciplinary action is not contrary to the public interest in the administration of justice.

PROCEDURAL BACKGROUND

[4] On December 8, 2022, the Law Society and the Respondent made a joint request pursuant to LSBC Tribunal Practice Direction 5.1(2) that the hearing on the merits of this proceeding be heard in writing. That joint request was granted on December 9, 2022 by the motions adjudicator in *Law Society of BC v. Johnston,* 2022 LSBC 51.

[5] The allegations are set out in a citation authorized by the Discipline Committee on October 28, 2021 (issued on November 8, 2021 and amended on March 28, 2022) (together the "Citation"). The Citation contains allegations relating to an event held by the Respondent's law firm at a restaurant in Vancouver on June 20, 2020.

[6] The Law Society is proceeding only on allegations 1 and 2(a) of the Citation which are set out as follows:

> 1. On or about June 20, 2020, you sexually harassed A, an employee of your law firm, contrary to one or both of rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia*, when you did one or more of the following:
>
> a) made comments and gestures of a sexual nature;
>
> b) engaged in unwelcome sexual advances; and

c) touched her without her consent.

This conduct constitutes professional misconduct or conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*.

2. On or about June 20, 2020, you sexually harassed B, an employee of your law firm, contrary to one or both of rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia*, when you did one or both of the following:

a) made a comment and gesture of a sexual nature; and

This conduct constitutes professional misconduct or conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*.

[7] The service requirements under Rule 5-6.1 have been met as the Respondent admits he was properly served with the Citation in accordance with Rule 4-19 of the Law Society Rules.

THE JOINT SUBMISSION PROCESS

[8] When a matter proceeds under Rule 5-6.5 of the Rules, a hearing panel is prohibited from diverging from the joint submissions on disciplinary action unless it finds that the proposed penalty is contrary to the public interest in the administration of justice.

[9] This statutory limitation reflects the principles set out by the Supreme Court of Canada in *R. v. Anthony-Cook,* 2016 SCC 43, at para. 34, which recognized an "undeniably high threshold" before joint submissions can be rejected since rejection "denotes a submission so unhinged from the circumstances…that its acceptance would lead reasonable and informed persons…to believe that the proper functioning of the justice system had broken down." Further, the Court explained at para. 32 and 33 that joint submissions should be rejected only where they are "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the…system."

[10] In *Law Society of BC v. Lang*, 2022 LSBC 04 at paras. 27 to 28, the hearing panel noted that the principles in *R. v. Anthony-Cook* provide "certainty for the parties negating the negative aspects involved in requiring witnesses to testify; and creating efficiencies in the system."

[11] Recently, in *Law Society of BC v. Davison,* 2022 LSBC 23, the hearing panel explained the application of the *Anthony-Cook* test to the joint submissions process:

> … the express wording of Rule 5-6.5(3)(b) is instructive and notably similar to the public interest test in *R. v. Anthony-Cook*. Rule 5-6.5(3)(b) expressly prohibits the Panel from diverging from the joint submissions on disciplinary action unless we find that the proposed sanction is contrary to the public interest in the administration of justice. As in *R. v. Anthony Cook*, Rule 5-6.5(3)(b) also imposes a high threshold before a joint submission on disciplinary action is to be rejected by the Panel.

[12] As this matter comes before the Hearing Panel as joint submissions, we have drawn heavily from those submissions which consist of: (a) a letter of admission from the Respondent, (b) written submissions from the Law Society on both facts and disciplinary action; (c) written submissions from the Respondent on disciplinary action only; (d) a Book of Authorities; and (e) a Joint Book of Exhibits including an Agreed Statement of Facts dated December 8, 2022 ("ASF"). With few exceptions, the attachments to the ASF were provided as proof of certain statements being made but not for proof of the contents of the statements.

[13] As reflected in the Citation, the Hearing Panel will refer to the employee in allegation 1 as "A" and the employee in allegation 2 as "B."

AGREED STATEMENT OF FACTS

[14] The following facts are drawn from the ASF:

Respondent's Background

[15] The Respondent was called and admitted as a member of the Law Society of British Columbia on September 5, 2001. He practised at two law firms between 2001 and 2011.

[16] Since March 2011, the Respondent has practised law at CBM Lawyers LLP ("CBM") in Langley, British Columbia. The Respondent has been a partner with CBM since 2015 and currently practises primarily in the areas of business and real estate law.

[17] The Respondent is currently one of two partners at CBM. CBM has its main office in Langley with satellite offices in Langley, Aldergrove and Maple Ridge, British Columbia.

The Event

[18] On June 20, 2020, CBM hosted a firm summer event at a restaurant in Vancouver (the "Event"). In June 2020, approximately 50 staff and lawyers worked at CBM and approximately 40 of them attended the Event.

[19] CBM provided round-trip bus transportation for attendees from its Langley office to the restaurant in Vancouver. CBM intended that attendees sit one person per row on the bus to maintain social distancing. The Event provided an open bar for attendees.

Allegation 1

[20] In 2018, A was employed by CBM as an articling student. From the date of her call to the bar to October 19, 2020, A was employed by CBM as an associate lawyer. In approximately January 2019, the Respondent began to act as a mentor to A.

[21] On June 20, 2020, the Respondent and A both took the company-provided bus to and from the Event. At the Event, the Respondent engaged in the following conduct:

(a) During the bus ride to the Event, the Respondent complimented A on her sunglasses and the colour of her lipstick.

(b) During the Event, the Respondent performed what he called a "creepy uncle" routine, which involved him peering from around a corner, staring with a "creepy" expression on his face. The Respondent had done the "creepy uncle" routine before. It was a "thing he does."

(c) The Respondent performed the "creepy uncle" routine both inside and outside the restaurant while photos were being taken.

(d) During dinner, the Respondent appeared approximately four times at A's table as a "creepy uncle."

(e) The Respondent felt that the "creepy uncle" routine was a joke and that it was humorous. He felt it was a routine intended to be a parody of an uncle who behaved strangely, but not in a sexually suggestive manner.

(f) Several times during the Event, while at the restaurant, the Respondent stood close to A and put his hands on the back of her chair.

(g) After eating dinner, A stated that she had become bloated from dietary issues. The Respondent heard A say that she was pregnant with a "food baby" and responded "Oh, don't you do this to me."

(h) A began visiting tables of her colleagues and making jokes about the "food baby." After she visited several tables, the Respondent joined in and joked that the "baby" was his baby.

(i) The Respondent does not dispute or deny that at one point during the Event, he held A close, by the arm, and touched her stomach with his other hand as part of the joke about the "food baby."

(j) The Respondent does not dispute or deny that he pulled A aside and told her that all jokes aside, he thought they would make a really good baby together, that he would take care of A and that she would not have to worry about anything. The Respondent told A he thought that with her eyes they would make a really good baby together.

(k) On the return bus trip to Langley, the Respondent had a container of alcohol in his jacket pocket. He consumed more alcohol.

(l) For part of the return bus trip, the Respondent sat next to A. The Respondent told A that she had been "ballsy" to ask for a raise and that his law partner had been mad at her for doing so. The Respondent talked to A about the stress of being a partner and how the firm was not making money during the pandemic. The Respondent talked to A about another lawyer's billable hours and how that lawyer had not been pulling their weight. The Respondent also talked about how someone had asked for a raise when they did not deserve one. During this conversation, the Respondent also told A that she had a bright future at the firm.

[22] The Respondent and A had a good productive working relationship until the Event.

[23] On or about June 23, 2020, the Respondent apologized to A in person at the firm for his behaviour at the Event.

[24] On July 7, 2020, A met with Doug Simpson, the other partner at CBM, and advised him of the Respondent's behaviour at the Event and provided him with her written notes on the matter.

[25] On July 8 and 9, 2020, A met with Cheryl Scott about the Respondent's behaviour at the Event. Ms. Scott was the office administrator at CBM whose duties included human resources. At that time, Ms. Scott had been employed by CBM for 19 years.

[26] A then retained counsel in relation to her workplace concerns. On July 30, 2020, A's counsel sent a letter to the Respondent and CBM. In August 2020, counsel for CBM and A's counsel exchanged letters.

[27] On or about August 26, 2020, A filed a workplace bullying and harassment report with WorkSafeBC in relation to CBM.

[28] On September 4, 2020, CBM revised its Respectful Workplace Policy and implemented a Bullying and Harassment Policy in its stead. The new policy included third-party whistleblower protection, and was approved by WorkSafeBC.

[29] On October 7, 2020, WorkSafeBC issued an inspection report, finding that the employer's response to A's complaint was compliant with s. 21(1)(a) of the *Worker's Compensation Act.*

[30] On October 19, 2020, A approached the Respondent to discuss the Event but the Respondent declined to do so. A advised the Respondent she would tender her resignation. On that day, following her interaction with the Respondent, A tendered her resignation to Ms. Scott.

[31] In January 2021, A filed a discrimination complaint against the Respondent and CBM with the BC Human Rights Tribunal

[32] In that complaint, A alleged that she had been constructively dismissed by CBM and that she also believed that it was clear she had no future at CBM given that the Respondent was in a position of power at CBM.

[33] In May 2021, the Review Division of WorkSafeBC found that a s.21(1)(a) order should be issued to CBM and issued a direction that CBA conduct a new investigation through an impartial third party.

[34] Subsequently, an impartial third party, conducted a new investigation. In October 2021, the third party provided a report to CBM about the findings. A and B declined to participate in that investigation.

Allegation 2

[35] Employee B was employed by CBM as a practicum legal assistant in the summer of 2019 and then subsequently as a legal assistant until she left CBM in February 2021.

[36] B also attended the Event and took the company provided bus to and from the Event.

[37] The Respondent's interactions with B on June 20, 2020 included the following:

(a) During the "creepy uncle" routine at the Event, the Respondent stood behind B while she was seated at a table, leaned over the back of her chair and in doing so, brought his head and upper body quite close to her so that they almost touched and in doing so, made B feel uncomfortable. A photograph of that moment was attached to the ASF.

(b) During the return bus trip, the Respondent was near the back of the bus dancing in the aisle. While standing behind B, the Respondent moved his hand toward her head. B pushed his hand away and told him not to touch her head. The Respondent responded by saying words to the effect of "It's not like I made this motion." while making a downward gesture with his hand, miming a sexually suggestive act involving a head moving towards the Respondent's crotch. He did not touch B's head when he made the comment and gesture. The Respondent walked away after B told him to "buzz off."

[38] During her annual review with Ms. Scott, B reported the Respondent's actions on the return bus trip from the Event. When asked if she was comfortable working with the Respondent, B replied that she felt comfortable knowing that she and the Respondent did not work in the same CBM office.

LEGAL PRINCIPLES ON DETERMINATION OF FACTS

[39] The test for whether conduct amounts to 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. The term "professional misconduct" is not defined in the *Legal Profession*

Act (the "*Act*"), the Rules or the *Code of Professional Conduct for British Columbia* (the "*Code*").

[40] The "marked departure" test is an objective test: *Law Society of BC v. Sangha*, 2020 LSBC 03, at para. 67. A hearing panel must consider the appropriate standard of conduct expected of a lawyer and then determine whether the lawyer falls markedly below that standard: *Law Society of BC v. Lawyer 12,* 2011 LSBC 35 at para. 8; and *Foo v. Law Society of British Columbia,* 2017 BCCA 151 at paras. 52-57.

[41] Even though the Respondent admits to professional misconduct, the Hearing Panel must still determine whether the Respondent's behaviour at the Event amounts to professional misconduct. In this case, the parties jointly submit that the Respondent's conduct is properly characterized as professional misconduct as the conduct occurred at a work-related event, involved employer-employee relationships and was a marked departure from the conduct that the Law Society expects of its lawyers.

[42] The majority of cases show that sexual harassment at the workplace has been characterized as professional misconduct, or a breach of an express *Code* provision specifically prohibiting sexual harassment by lawyers. In some sexual harassment cases notably those involving joint submissions, the conduct has been characterized as conduct unbecoming a lawyer.

[43] Rule 2.2-1 of the *Code* states that "[a] lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity"

[44] The commentaries to rule 2.2-1 state:

> [1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If clients have any doubt about their lawyers' trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
>
> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

> [3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Sexual Harassment

Code of Professional Conduct for British Columbia

[45] Rule 6.3 of the *Code* includes the following provisions:

> 6.3-1 The principles of human rights laws and related case law apply to the interpretation of this section.
>
> 6.3-2 A term used in this section that is defined in human rights legislation has the same meaning as in the legislation.
>
> 6.3-3 A lawyer must not sexually harass any person.
>
> 6.3-4 A lawyer must not engage in any other form of harassment of any person.
>
> 6.3-5 A lawyer must not discriminate against any person.

[46] The commentary to rule 6.3 states:

> [1] A lawyer has a special responsibility to comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

[47] The *Code* does not include a definition of "sexual harassment". Given rule 6.3-1, one may apply human rights legislation, the principles of human rights law, and related case law to this case: *Davison*, at para. 42; *Law Society of BC v. Butterfield*, 2017 LSBC 02, at para. 24.

The Link Between Sexual Harassment and Sex Discrimination

[48] The term "sexual harassment" is not defined in British Columbia's *Human Rights Code*, RSBC 1996, c 210 or the federal *Canadian Human Rights Act*, RSC 1985, c. H-6. However, the term has been recognized as a category of conduct that may ground a claim of sex discrimination.

[49] As discussed in *Davison*, the hearing panel explained at para. 46:

> Sexual harassment is a form of sex discrimination. Today, women continue to be at an increased risk of violence and harassment, including through sexual assaults and sexual harassment: *Calgary (City) v. Canadian Union of Public Employees Local 37*, 2019 ABCA 388, at para. 46; *R. v. Friesen*, 2020 SCC 9, at para.68; *R. v. Goldfinch*, 2019 SCC 38, at para. 37.

[50] The leading case involving sexual harassment is *Janzen v. Platy Enterprises*, 1989 CanLII 97 (SCC), [1989] 1 SCR 1252, a case decided over 30 years ago. In *Janzen*, the Supreme Court of Canada considered whether sexual harassment is a form of sex discrimination. The Court accepted at p. 26 that since 1980, human rights boards and courts in Canada for all intents and purposes have unanimously recognized that certain forms of sexual harassment constitute sex discrimination. The Court further explained at p. 36, that sexual harassment can constitute discrimination on the basis of sex even though sexual harassment involves treating some persons within a group differently from others in the same group usually based on the victim's personal characteristics such as sexual attractiveness. The Court adopted the following reasons from *Zarankin v. Johnstone* (1984), 5 CHRR D/2274 (BC Bd) at p. 2276 (appeal to BCSC dismissed):

> Although it might be thought that sexual harassment would not amount to sex discrimination unless all employees of the same gender were equally recipients of it, that is fallacious. So long as gender provides a basis for differentiation, it matters not that further differentiation on another basis is made.…Similarly, an employer who selects only some of his female employees for sexual harassment and leaves other female employees alone is discriminatory by reason of sex because the harassment affects only one group adversely.

[51] The *Canadian Human Rights Act* defines harassment and sexual harassment as discriminatory practices based on a prohibited ground of discrimination:

> Harassment
>
> 14(1) It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,

> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.
>
> Sexual harassment
>
> (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

[52] Similarly, section 13 of the *Human Rights Code* prohibits discrimination in the workplace based on among other things, sex, sexual orientation, gender identity or expression:

> Discrimination in employment
>
> 13(1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

International Bar Association Report

[53] In April 2022, the International Bar Association released a report called "Beyond Us Too? Regulatory Responses to Bullying and Sexual Harassment in the Legal Profession" (the "IBA Report").

[54] In the foreword to the IBA Report at p. 2, the legal profession's harassment problem was described as "endemic, cultural and societal." The IBA Report also stated:

> Some may query the authority or motivation for legal regulators to prioritise [sexual harassment claims] given the other harms which regulation is designed to address. In response, I refer to the primary reason for regulating lawyers, which is to maintain public confidence in the legal profession and promote the public's trust in both the administration of justice and rule of law.
>
> Workplace sexual harassment and bullying have been against the law for some time now, in many countries. Yet lawyers who would not otherwise break laws (eg, by stealing their clients' funds) nonetheless continue to harass or bully their colleagues. This type of attitude to the rule of law–in which a distinction is drawn between the laws a lawyer will and won't obey–is unlikely to inspire public confidence in the profession or the rule of law. It therefore rightly concerns legal regulators.

[55] The IBA Report closes with a passage from a 2022 New Zealand Lawyer and Conveyancers Disciplinary Tribunal decision that "underscores the toll of harassment and the need for urgent action":

> We wish to comment briefly on the effects on the complainants, and the other two (then) junior women lawyers who gave evidence. Of the group, two have left New Zealand–one specifically as a result of these events; at least one has left the profession; another changed her area of practice so as to avoid contact with [the respondent]; another felt her career had been adversely affected. It is a mark of shame for the profession that its most junior members have shouldered the burden of bringing these events to notice, but it reflects only positively on them.…

[56] We agree with the conclusion of the IBA Report at page 50 that "[t]here is no place for bullying or sexual harassment in the legal profession." The IBA Report suggested that regulatory bodies tackle the "scourge of inappropriate behaviour" in that bullying and harassment were widespread within legal workplaces. The IBA Report suggested that regulatory bodies will be a crucial part of a wider campaign for change to make a meaningful difference in sending a "deterrent signal" to the profession and support to victims.

Caselaw

[57] Sexual harassment is broadly defined as unwelcome conduct of a sexual nature that leads to adverse consequences for its victims. In *Janzen*, at p. 33, the Court described sexual harassment as an abuse of power:

> …When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[58] Thus, *Janzen* established that the test for sexual harassment requires that the conduct (a) be sexual in nature; (b) be objectively unwelcome; and (c) either detrimentally affect the relevant environment or lead to adverse consequences for the victim(s) of the harassment.

First Requirement: Sexual Nature of Conduct

[59] The first requirement under *Janzen* is that the conduct be of a sexual nature. This refers to any "sexually oriented" practice.

[60] Sexual harassment encompasses a wide range of behaviours of a sexual nature, including subtle sexual innuendos and crude sexual remarks: *Dian Greene v. Revolution Environmental Solutions LP*, 2019 BCHRT 199 at para. 34; *Janzen*, pg. 31. The misconduct may have arisen as a result of one incident or multiple incidents, and may be physical or verbal, and overt or subtle: *Hodgson v. Coast Storage and Containers*, 2020 BCHRT 55 at para. 29.

[61] In *Janzen*, the Court at p. 30, provided the following list of concrete examples of sexually harassing behaviour:

> Sexual harassment can manifest itself both physically and psychologically. In its milder forms it can involve verbal innuendo and inappropriate affectionate gestures. It can, however, escalate to extreme behaviour amounting to attempted rape and rape. Physically, the recipient may be the victim of pinching, grabbing, hugging, patting, leering, brushing against, and touching. Psychological harassment can involve a relentless proposal of physical intimacy, beginning with subtle hints which may lead to overt requests for dates and sexual favours.

[62] A common theme in the cases is that sexual harassment is ultimately about an abuse of power: *Al-Musawi v. One Globe Education Services,* 2018 BCHRT 94 at para. 30. As the Supreme Court of Canada in *Janzen* noted at pp. 30 to 33:

> Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands.
>
> …
>
> … Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands…This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particulary [sic] blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.
>
> …
>
> The main point in allegations of sexual harassment is that unwelcome sexual conduct has invaded the workplace, irrespective of whether the consequences of the harassment included a denial of concrete employment rewards for refusing to participate in sexual activity.
>
> …
>
> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

[63] In *Wollstonecroft v. Crellin,* 2000 BCHRT 37, the tribunal considered the power dynamics between a supervisor and employee in determining whether conduct amounted to sexual harassment. In that case, the supervisor spoke with an employee about, among other things, his wife's sex life, his sexual needs, and prior sexual encounters. At the hearing, the respondent argued that these discussions were no longer taboo in society and that he was having an "adult exchange." The tribunal found at para. 76 that the supervisor and the employee were governed by a supervisor-employee relationship and not friendship as

argued by the supervisor. The tribunal concluded that the supervisor ought to have known that the degree of sexual detail he was disclosing was likely to make the employee feel uncomfortable.

[64] The *Wollstonecroft* case confirms that a supervisor must consider the power imbalance at work and within that power imbalance, the acceptability of certain behaviours or personal topics of conversations with an employee.

Second Requirement: Objectively Unwelcome Conduct

[65] The reasonable person test is usually applied when determining objectively unwelcome conduct: *Law Society of BC v. Heflin,* 2022 LSBC 41, para. 41. In *Dutton v. British Columbia (Human Rights Tribunal),* 2001 BCSC 1256, at para. 70, the Supreme Court of British Columbia approved of the reasonable person test regarding unwelcome conduct:

> … The test for determining whether conduct is unwelcome is an objective one: taking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant? A complainant is not required to expressly object to the conduct unless the respondent would reasonably have no reason to suspect that it was unwelcome ...
>
> Not only overt, but also subtle indications of unwelcomeness may be sufficient to communicate that the conduct is unwelcome. The fact that a complainant submits to or tolerates sexual demands does not necessarily mean that they are welcome or solicited. Behaviour may be tolerated and yet unwelcome at the same time. The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage. …

[66] In *J.B. v. Russell*, 2020 HRTO 462 at para.120, the reasonable person test was described as follows:

> The issue in this case is whether the respondent knew, or ought reasonably to have known that his actions were unwelcome.…The specific issue in this case is whether a reasonable person, considering the point of view of the applicant as well as that of the respondent, and considering the power imbalance between them, would have considered the [respondent's actions] to be unwelcome.

[67] Some concerns have been raised about ensuring that decision-makers do not perpetuate myths and stereotypes. In *The Employee v. The University and another (No.2),* 2020 BCHRT 12, at paras.177 to 180, the tribunal held that "myths and stereotypes" must not be considered when determining whether conduct is unwelcome. Those myths and stereotypes include: (i) lack of protest; (ii) delay in reporting; and (iii) participating in prior behaviour.

[68] Concerns over applying the reasonable person test have been raised in *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 at paras. 82 to 86. In *Ms. K*, the tribunal discussed the concerns that requiring a complainant to prove that conduct was objectively unwelcome may invite scrutiny of the complainant's own conduct and behaviour, creating space for problematic stereotypes and assumption-based reasoning that may improperly influence adjudication of a complaint. In *Heflin*, para. 42, the hearing panel acknowledged the caution raised in the *Ms. K* case against perpetuating gender-based myths and stereotypes. The hearing panel explained:

> …In *R. v. Barton*, 2019 SCC 33, the court confirms, that in the criminal law context, the law has evolved to reject the idea that women can be understood to consent unless they say "no". In *Ms. K*, the tribunal accepted that this evolution in law is relevant to the human rights context, and found that a complainant could prove that conduct was unwanted by establishing it had an adverse impact on them. A complainant is not required to prove that a reasonable person would know that the conduct was not welcome.

[69] We acknowledge the caution and concerns raised by *The Employee* and *Ms. K* cases. As a hearing panel, we acknowledge that when considering the requirement of "objective" unwelcome conduct, we should guard against perpetuating any gender-based myths or stereotypes or other myths or stereotypes that may arise.

Third Requirement: Adverse Consequences

[70] The *Janzen* test requires that the impugned conduct either detrimentally affects the relevant environment or leads to adverse consequences for the victim(s) of the harassment. The adverse consequences may be "any sexually-oriented practice that endangers…continued employment, negatively affects…work performance, or undermines…personal dignity": *Janzen*, p. 33.

[71] In British Columbia, several courts and tribunals have found that the sexual harassment in itself can constitute the adverse treatment required for a finding of

sexual discrimination. For example, in *Davison*, the hearing panel stated at para. 65:

> As explained in *Janzen*, at p. 30, unwelcome conduct is conduct that "detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment." In *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, at paras. 29, 30, 58 and 71, the court explained that it is uncontroversial in law that alleged conduct in itself can reach the level of sexual harassment to constitute an adverse treatment.

Law Society Cases

[72] There have been three reported Law Society disciplinary cases in British Columbia involving sexual harassment.

[73] In *Butterfield*, a lawyer admitted that he had committed professional misconduct by sexually harassing two employees: a law student and a paralegal. He made comments of a sexualized nature to the law student such as that she should show more cleavage, wear shorter skirts, and he also touched her lower back. Once when the student wore a dark bra under her white shirt, he commented that he liked it. Another time he threw a file on the floor and said it was so he could watch the student bend over to pick it up. Some of the misconduct occurred in the presence of the paralegal.

[74] The hearing panel in *Butterfield* at para. 26 determined that the lawyer knew or reasonably ought to have known that his actions would cause both employees to be humiliated or intimidated. The lawyer dealt with the matter by way of a conditional admission of professional misconduct and consent to disciplinary action and agreed to pay a fine of $10,000. The hearing panel found that his admission of professional misconduct was well supported by the evidence. The hearing panel also found that the proposed disciplinary action "protects the public and reflects the rehabilitation of the Respondent."

[75] In *Davison*, the lawyer, who was one of two partners at his firm, was found to have committed professional misconduct for sexual harassment of multiple staff members as well as for creating a hostile work environment with unwanted sexual and racially discriminatory and offensive remarks. His conduct included numerous unwanted comments and touching of a sexual nature:

(a) the Respondent attempted, unsuccessfully, to kiss two employees;

(b) the Respondent massaged an employee's shoulders;

(c) the Respondent initiated or participated in sexual banter by making jokes and other comments of a sexual nature with employees of the firm;

(d) the Respondent told an employee that her ponytail was like "bondage hair";

(e) the Respondent made comments about clients' and employees' appearance, such as, "she looks nice" or "her skirt is pretty short";

(f) the Respondent made comments to an employee to the effect that if they knew each other when he was younger they would have dated;

(g) the Respondent asked an employee if she was wearing a bra; and

(h) the Respondent made frequent comments to an employee about her appearance such as her hair, lipstick, clothing and "college girl look" as well as greeted her with "hey sexy" and referred to her as his "work wife"

[76] The hearing panel in *Davison* stated at para. 104 that "[m]isconduct relating to sexual harassment and racial discrimination by lawyers are serious matters that require the panel to give the greatest weight to public interest and the maintenance of public confidence in the legal profession and the disciplinary process."

[77] The *Davison* case proceeded by way of a joint submission pursuant to Rule 5-6.5. The hearing panel found at para. 116 that "the Respondent's conduct amounts to professional misconduct as it rises to the level of conduct that constitutes a marked departure from that conduct the Law Society expects of lawyers." Further, the hearing panel accepted the proposed disciplinary action of a four and one-half month suspension and practice conditions, stating at paras. 118 to 119:

> Sexual harassment and racial discrimination have no place in the legal profession. The proposed sanction reflects the primary importance of the protection of the public and public confidence in the disciplinary process. We also find that racial discrimination is a serious offence that must attract serious sanction.

[78] An aggravating factor in *Davison* was that the lawyer who had engaged in sexual harassment over the course of several years continued to engage in the misconduct after the commencement of a Law Society investigation and the issuance of a citation for his misconduct.

[79] In *Heflin*, a lawyer was found to have committed professional misconduct by making unwelcome comments, advances and physical contact toward a client. While in a meeting room at a courthouse, the lawyer had the client sign a Notice of Intention to Act in Person. The lawyer then filed it at the registry and returned to the meeting room where he proceeded to kiss and hug the client and touch her breast. The hearing panel found his conduct constituted sexual harassment and was a marked departure from the conduct that the Law Society expects of lawyers. The hearing panel described the Respondent in *Heflin* as being in a fiduciary relationship with the client, referred to in the decision as X, and rejected the assertion that there was no power imbalance. The hearing panel explained at paras. 76 to 77:

> The Respondent admitted to expressing an interest in having a sexual relationship with X while he was still her counsel, he then asked her to sign a Notice of Intention to Act in Person without fully explaining its implications, he then filed the Notice of Intention to Act in Person and mere moments later, he kissed X, while still in the courthouse.

[80] Sexual harassment cases from other jurisdictions across Canada are also instructive. In *Law Society of Ontario v. Tweyman*, 2021 ONLSTH 166, a lawyer was found to have committed professional misconduct when he acted in a conflict of interest by engaging in a sexual relationship with a family law client and sexually harassed another client by making sexually suggestive, obscene, or derogatory comments to her.

[81] With respect to the sexual harassment allegation, the hearing panel noted that the lawyer:

(a) called his client "babe" and made other inappropriate comments about her body;

(b) told his client that he loved her;

(c) asked her to stick out her tongue and commented on her piercing;

(d) told her not to nurse in front of him because it was not attractive to him; and

(e) asked her to meet him at a restaurant but not tell his law clerk.

[82] The hearing panel in *Tweyman* found that these incidents involved verbal conduct of a sexual nature and that it was unnecessary to determine whether they were unwelcome sexual advances or implicit requests for sexual favours. The hearing

panel also found that the conduct might reasonably have been expected to cause insecurity, discomfort, offence, or humiliation to the client. The lawyer was sanctioned with a two-month suspension.

[83] In *Law Society of Saskatchewan v. Hale,* 2021 SKLSS 05, a lawyer was disciplined for having sexually harassed a client. The lawyer met his client for the first time at a courthouse. After the client's daughter left, the lawyer said he was "not expecting someone like her" and ran his hands up and down her thighs. Later he again stroked the client's thighs with his hands, this time in front of her daughter. The client had not consented to the touching.

[84] The hearing panel in *Hale* recognized at paras. 17 and 25 that society has become increasingly intolerant of sexual harassment:

> This committee endorses this modern enlightened approach that reflects the seriousness of this category of misconduct. We believe that sanctions which properly bring the offending Member to account for his behaviour reflect society's increased abhorrence for this type of behaviour.
>
> In determining whether this joint submission is appropriate, the overarching principle of protecting the public and ensuring public confidence in the profession must be of paramount concern. As noted, past sentences may not always accord with the current appreciation of the serious nature of this type of misconduct. Any sentence proposed must have a deterrent effect while also attempting to prevent any re-occurrence of this type of sexual assault by this member or any other lawyer, whether on a client, employee, lawyer or anyone else.

[85] The hearing panel in *Hale* at para. 23 held that while sexual harassment encompasses a range of misconduct, given the physical nature of the conduct by the lawyer against a vulnerable client, this was an egregious violation of the *Code of Professional Conduct for Saskatchewan*. The hearing panel determined that a six-month suspension was the appropriate penalty.

THE RESPONDENT'S LETTER OF ADMISSION

[86] The Respondent provided the Hearing Panel with a letter dated December 7, 2022, containing the Respondent's admission of a disciplinary violation and consent to a specified disciplinary action.

[87] Specifically, the Respondent admitted to the following:

(a) On June 20, 2020, he "sexually harassed A by making comments and gestures of a sexual nature, engaging in unwelcome sexual advances, and touching her without her consent contrary to rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia*";

(b) He "sexually harassed B by making a comment and gesture of a sexual nature, contrary to rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia*"; and

(c) His conduct in relation to A and B constituted professional misconduct, contrary to s. 38(4) of the *Legal Profession Act*.

[88] The Respondent also expressed remorse as set out below:

> "Finally, further to my apology in person to A on June 23, 2020. I wish to take this opportunity to apologize for my behaviour on June 20, 2020 at the Event. My behaviour was unacceptable and I am disappointed in myself. I recognize that my conduct at the Event fell short of the reasonable expectations of the profession and the public. I did not intend to upset A and B, but I recognize that they were upset by my behaviour that evening and I apologize for that. I have taken mindful steps to ensure that such conduct is not repeated."

[89] The Respondent consented to a six week suspension and agreed to pay costs in the amount of $2,500.

ANALYSIS

[90] Based on the evidence, we find that the Respondent sexually harassed A and B on June 20, 2020 by becoming intoxicated and acting in an inappropriate sexual manner toward A and B at the Event and on the bus ride home. An aggravating factor is that the Respondent was A and B's employer and one of two partners at the firm. As such, he was in a position of power over his employees. An additional aggravating factor is that the Respondent was also A's mentor.

[91] The Respondent's conduct on June 20, 2022 meets the test for sexual harassment, as set out in *Janzen*. With respect to the first requirement of the *Janzen* test, we find the Respondent's conduct towards both A and B were of a sexual nature.

[92] In regard to A, the Respondent held A close by the arm at the Event, touched her stomach and joked they were having a baby together. The Respondent took A aside and told her all jokes aside they would make a really good baby together

and he would take care of her and she would not have to worry about anything. This is an implied request for a sexual relationship.

[93] In regard to B, the photograph of the Respondent and B shows he was inappropriately close to B during his "creepy uncle routine" at the Event. The Respondent's face was almost touching the back of B's neck. On the return bus trip, while standing near B he moved to touch her head and when she told him not to touch her head he said "It's not like I made this motion" while making a downward gesture with his hand miming a sexually suggestive act involving a head moving towards the Respondent's crotch.

[94] The second requirement from *Janzen* is that the conduct must be objectively unwelcome. As noted by the Supreme Court of British Columbia in *Dutton*, this means that one must consider whether, taking into account all of the circumstances, a reasonable person would know that the conduct was not welcomed by the complainant. A complainant is not required to expressly object unless a respondent had no reason to suspect it was unwelcome.

[95] We have taken into account all of the circumstances and find that a reasonable person would have known that the conduct of a firm partner making sexual comments and gestures to two junior female employees would be objectively unwelcome behaviour.

[96] The parties were attending a firm event attended by the firm's partners including the Respondent. In *Heflin*, the hearing panel affirmed that "the power imbalance between the parties, must be considered" in determining whether a respondent knew or ought to have known that his actions were unwelcome.

[97] An aggravating factor in this case is that the Respondent was in an employer-employee role with both A and B and attending a firm event as a partner. Given that power imbalance, the Respondent should have been aware that he should avoid any conduct that may be objectively viewed as unwelcome conduct with his employees.

[98] In these circumstances, the Respondent has admitted his misconduct and has not suggested that his conduct was objectively welcome. To the contrary, in the ASF, the Respondent acknowledged that the "pregnancy talk" must have made A uncomfortable. Further the Respondent does not dispute or deny that he invaded A's personal space and made her feel uncomfortable on the return bus trip. We note that the expression on B's face in the photograph of the "creepy uncle" routine provides objective evidence that the conduct was unwelcome. The Respondent admits in the ASF that in coming so close to B he made her feel

uncomfortable. Finally, when the Respondent made a move to touch B's head, B told him not to do so and when he made a sexual gesture to B, she told him to "buzz off."

[99] The third requirement in the *Janzen* test is that the conduct detrimentally affects the relevant environment or leads to adverse consequences for the victim. The parties have focussed on the adverse consequences component of the third requirement. While sexual harassment in itself can constitute the adverse treatment required for a finding of sexual discrimination, in this case, the Respondent's conduct also had adverse consequences for A and B.

[100] The ASF outlines some of the adverse consequences on A:

(a) Prior to the Event, A and the Respondent had a good productive working relationship. He was her mentor. After the event, their relationship soured. A filed several complaints with several bodies about the Respondent's behaviour as she felt this was required to get her issue heard.

(b) A tendered her resignation and left employment at CBM approximately four months after the Event.

(c) A believed she had been constructively dismissed by CMB and that she believed she had no future at CBM given the Respondent was in a position of power at the firm.

[101] The ASF outlines an adverse consequence on B. When asked by Ms. Scott if she was comfortable working with the Respondent, B replied that she felt comfortable knowing that she and the Respondent did not work in the same CBM office.

[102] The Law Society also drew to our attention that although B participated in the Law Society's investigation into the Respondent's conduct and was interviewed by Law Society staff in July 2021, B declined to be contacted about the matter any further. In a brief email B sent the Law Society, B stated that "I can not take part in a trial as I need to keep my blood pressure and stress down."

[103] Based on the evidence from the ASF, we find that both A and B experienced adverse consequences from the Respondent's conduct.

Determination of Professional Misconduct

[104] After considering the evidence as a whole, we find that the evidence supports a finding that the Respondent's conduct on June 20, 2020 constitutes sexual harassment of A and B and that it contravened rules 2.2-1 and 6.3-3 of the *Code*.

[105] Further, we find that the Respondent's conduct amounts to a marked departure from the conduct the Law Society expects from its lawyers and rises to the level of professional misconduct.

DISCIPLINARY ACTION

[106] The parties propose a suspension of six weeks to start on the first day of the second month following the release of the Hearing Panel's decision.

General Principles

[107] In *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 54, a review panel confirmed that the starting point and primary purpose in determining the appropriate disciplinary action to be imposed under sections 38(5) and 38(7) of the *Act* is a consideration of the Law Society's mandate under section 3 of the *Act*.

[108] The review panel in *Lessing* noted that the object and duties set out in section 3 of the *Act* were reflected in the factors described in the following passage from *Law Society of BC v. Ogilvie* [1999] LSBC 17 at para. 10:

> Given that the primary focus of the *Legal Profession Act* is the protection of the public interest, it follows that the sentencing process must 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 following a finding of misconduct. In determining an appropriate penalty, the panel must consider what steps might be necessary to ensure that the public is protected, while also taking into account the risk of allowing the respondent to continue in practice.
>
> …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 members.

[109] The hearing panel then proposed a non-exhaustive list of 13 factors (the "*Ogilvie* factors") considered worthy of general consideration in disciplinary dispositions.

Those factors were further considered in *Law Society of BC v. Dent,* 2016 LSBC 05*,* where the panel examined the *Lessing* review panel's comments about the *Ogilvie* factors. The panel noted at para. 14:

> The review panel in *Lessing* observed that not all the *Ogilvie* factors would come into play in all cases and the weight to be given these factors would vary from case to case. But the review panel noted that the protection of the public (including public confidence in the disciplinary process and public confidence in lawyers generally) and the rehabilitation of the member, were two factors that, in most cases, would play an important role. The panel stressed, however, that, where there was a conflict between these two factors, the protection of the public, including protection of the public confidence in lawyers generally, would prevail.

[110] The hearing panel in *Dent* at paras. 19 to 23, also compressed the 13 *Ogilvie* factors into four consolidated factors:

(i) nature, gravity and consequences of conduct;

(ii) character and professional conduct record of the respondent;

(iii) acknowledgement of the misconduct and remedial action; and

(iv) public confidence in the legal profession including public confidence in the disciplinary process.

[111] We agree with the Law Society's submissions that the four consolidated *Ogilvie* factors should be applied in this case.

Application of Ogilvie Factors

First Factor: Nature, Gravity and Consequences of the Misconduct

[112] In *Law Society of BC v. Gellert,* 2014 LSBC 05 at para. 37, the hearing panel found that the nature and gravity of the misconduct will almost always be an important factor as it stands as a "benchmark" in assessing how best to protect the public and preserve its confidence in the profession.

[113] Public confidence in the integrity of the legal profession would be eroded if the sanction imposed did not reflect the seriousness with which a reasonably informed member of the public would view the totality of the misconduct.

[114] As discussed above, sexual harassment in the workplace is a "scourge of inappropriate behaviour" in the legal profession. Thus, the nature and gravity of the Respondent's conduct is serious. In his submissions, the Respondent acknowledged that the offences were serious and suggests that a six-week suspension reflected that seriousness.

[115] The Respondent, as a partner in a law firm, was in a position of power over his employees. Sexually harassing two junior employees at a firm event can only be described as serious. An additional aggravating factor is the fact that the Respondent became intoxicated at a firm event when he knew that he had a problem with alcohol.

[116] The consequences of the Respondent's misconduct are also serious, given the adverse impacts it had on A and B. At the time the misconduct occurred, A had only been a lawyer for 13 months. She filed complaints about the Respondent with WorkSafeBC, the Law Society, and the British Columbia Human Rights Tribunal. Further, A believed she was being constructively dismissed and resigned from her position at CBM.

[117] Even without more specific information on the impacts on A and B, we find that an employee who is sexually harassed by their employer suffers adverse impacts on that person's dignity and self respect. As explained by the Supreme Court, "[b]y requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being:" *Janzen*, p. 33.

Second Factor: Character and Professional Conduct Record

[118] The Respondent is 46 years old. He has practiced law in British Columbia since his call to the bar in September 2001. At the time of the misconduct, the Respondent was called to the British Columbia Bar for approximately 19 years.

[119] The Respondent has no disciplinary history and thus no Professional Conduct Record.

[120] In his submissions, the Respondent pointed out that there is no evidence that he engaged in sexual harassment in the 19 years of practice before the Event or since the Event. Further, the Respondent pointed out that there is no evidence that he engaged in sexual harassment of A or B at any other time.

[121] The Respondent admits that he is an alcoholic. As stated in the ASF, in 2015 the Respondent was found to meet the diagnostic criteria for alcohol dependence and

subsequently sought treatment for the disorder. This treatment included attending a residential treatment program in 2016 followed by two years of monitoring. The Respondent explained that he remained sober up until the Event.

[122] In his submission the Respondent explained that his behaviour at the Event was not part of a pattern of sexual harassment and that his behaviour was consistent with him having suffered a relapse at the Event as he was intoxicated in his interactions with A and B. We accept the Respondent's explanation for his behaviour.

Third Factor: Acknowledgement of the Misconduct and Remedial Action

[123] The Respondent has admitted to professional misconduct in regard to allegations 1 and 2 of the Citation, has made admissions of facts in the ASF and has agreed to proceed by joint submissions. We agree that these steps have spared the complainants and witnesses from needing to testify and the burden of participating further in this proceeding.

[124] The Respondent has apologized for his misconduct. He personally apologized to A for his behaviour three days after the Event. He provided the Hearing Panel with a Letter of Admission in which he apologized for his behaviour at the Event. He agreed to an ASF in which he acknowledged that he let A, the profession, his family and himself down.

[125] As stated in the ASF, various remedial steps have been taken:

(a) In September 2020, CBM instituted a revised Bullying and Harassment Policy which includes third-party whistle blower protection.

(b) The Respondent has taken steps to address his alcohol dependency. As set out in the ASF, shortly after the Event the Respondent participated in counselling about his alcohol dependency with the Lawyer's Assistance Program. Between July 10, 2020 and February 24, 2021, the Respondent attended counselling sessions at least twice per month, and sometimes three times per month.

(c) The Respondent participates in remote alcohol monitoring twice a day through Soberlink. Since he started his monitoring on December 14, 2021 and up to and including December 1, 2022 (the date of the report provided to the Law Society), the Respondent has performed 710 tests and has been compliant 99.43% of the time.

[126] The Law Society submits and we agree that the Respondent has taken remedial steps to manage his alcohol dependency. We accept that the Respondent's counselling and alcohol monitoring efforts amount to significant factors when considering the appropriate sanction to be imposed. We also accept that a higher sanction would have been appropriate if the Respondent had not made those efforts. We agree with the Law Society that the Respondent's efforts to address his alcohol dependency are measures that will protect the public, particularly since they reduce the need for specific deterrence and rehabilitation.

Public Confidence in the Legal Profession

[127] The primary purpose of disciplinary proceedings, as set out in section 3 of the *Legal Profession Act*, is to uphold and protect the public interest in the administration of justice. As stated by the panel in *Ogilvie* at para. 19:

> The public must have confidence in the ability of the Law Society to regulate and supervise the conduct of its members. It is only by the maintenance of such confidence in the integrity of the profession that the self-regulatory role of the Law Society can be justified and maintained.

[128] We agree with the IBA Report that there is a strong public interest in regulating sexual harassment in the legal profession. A suspension is a significant sanction imposed to protect the public interest and ensure public confidence in the integrity of the profession.

[129] The public interest includes delivering a general denunciation and deterrence of the kind of misconduct the Respondent has engaged in. The circumstances require a sanction that is in keeping with society's evolving views of sexual harassment.

[130] By imposing the proposed six-week suspension, we expect such a sanction to have both a specific and general deterrent effect. The proposed sanction is less than the sanction imposed in *Davison*; however, in that case, the lawyer's misconduct was repeated and prolonged and continued despite an ongoing investigation and citation into conduct of the same nature. In *Davison*, the lawyer also had a professional conduct record.

Determination on Disciplinary Action

[131] In light of the totality of the circumstances, including the nature of the misconduct, the Respondent's alcohol dependency and the remedial steps taken, we accept the proposed joint submission for a six-week suspension. We find that the proposed disciplinary action is not contrary to the public interest in the

administration of justice. In our view, the proposed disciplinary action will protect the public interest and maintain public confidence in the integrity of the profession.

[132] However, were it not for the constraints imposed by Rule 5-6.5, we would have considered imposing a lengthier suspension.

COSTS

[133] The parties submit that a costs order in the amount of $2,500 is appropriate in this case.

[134] The Law Society submits and we agree that the amount sought is consistent with the Tariff for Hearings under Schedule 4 to the Rules. Taking into account the complexity of the matter, the number and nature of allegations, the time at which the Respondent elected to make admissions relative to the scheduled hearing and the amount of pre-hearing preparation required, a costs order of $2,500 is appropriate.

[135] The Law Society submits and we agree that costs should be made payable on or before three months from the date of pronouncement of the Hearing Panel's decision.

ORDERS

[136] For all of the foregoing reasons, the Hearing Panel accepts the Respondent's admissions of professional misconduct under s. 38(4) of the *Legal Profession Act* and accepts the proposed disciplinary action pursuant to Rule 5-6.5.

[137] The Hearing Panel orders that the Respondent be suspended for six weeks, to start on the first day of the second month following the release of this decision.

[138] The Hearing Panel also orders that the Respondent pay to the Law Society costs in the amount of $2,500 within three months of the date of pronouncement of this decision.

Confidentiality Orders

[139] Additionally, given the serious nature of the misconduct, the parties seek an order pursuant to Rule 5-8(2) to prevent the disclosure of certain sensitive and confidential information to the public, such as the identities of the two employees

as well as the Respondent's medical reports and alcohol consumption monitoring report.

[140] Rule 5-8(1) provides that every hearing is open to the public unless an order is made to the contrary. In turn, Rule 5-8(2)(a) permits the panel to make an order to protect specific information from being disclosed "to protect the interests of any person". To obtain an order pursuant to Rule 5-8(2)(a), the party seeking the order must establish that:

(a) the tribunal's openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[141] Where the three prerequisites have been met and the order will protect the interests of a person, the order can be made.

[142] There is an important public interest in encouraging victims of sexual harassment to report incidents to regulatory bodies and provide evidence without fear of unnecessary trauma or embarrassment. The privacy interests of a person who makes an allegation of sexual harassment are very high. Further, the order sought in relation to the employees' identifying information is necessary to prevent the risk that A and B will be publicly identified without being overly broad. The benefits of the order sought far outweigh the minimal public interest in knowing the employees' identities. Granting the order with respect to the employees' information will protect the employees' interests.

[143] Accordingly, the Hearing Panel orders that the names or any identifying information of the two employees, A and B, be excluded from any portions of the Citation, ASF, transcript and exhibits of this proceeding. That is, if a member of the public requests copies of the Citation, ASF, exhibits or transcripts in these proceedings, the Citation, ASF, exhibits and transcripts should be redacted to remove any identifying information of the two employees who were subjected to the sexual harassment, before being provided to the public.

[144] There is also an important public interest in encouraging respondents to disclose evidence of relevant medical conditions and treatments. Personal medical

information is highly sensitive. The order sought in relation to the Respondent's medical reports and alcohol consumption monitoring report is necessary to prevent risk to the Respondent's dignity without being overly broad. Specifically, the order sought does not exclude the more general references to the Respondent's medical conditions and treatments. Rather, it limits the exclusion to the particulars. With respect to proportionality, we note that the Respondent did not rely on his medical conditions and treatments as a basis for a lower sanction. Further, all medical information relevant to the Hearing Panel's determination is referenced in the parties' submissions and does not form part of the proposed exclusion order. Consequently, there is little utility in the public having access to the Respondent's medical reports and alcohol consumption monitoring report.

[145] Accordingly, the Hearing Panel orders that those portions of exhibits that contain the Respondent's medical reports and alcohol consumption monitoring report be excluded from exhibits requested by the public. If a member of the public requests copies of the exhibits in these proceedings, those exhibits should be redacted to remove the Respondent's medical reports and alcohol consumption monitoring report before being provided to the public.