2023 LSBC 20
Hearing File No.: HE20180044
Decision Issued: May 30, 2023
Citation Issued: June 7, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

DONALD ROY MCLEOD

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION

Hearing date:	March 6, 2023
Panel:	Bruce A. LeRose, KC, Chair Thelma Siglos, Public representative Sarah Westwood, Bencher
Discipline Counsel:	Robin N. McFee, KC Maya Ollek
Counsel for the Respondent:	Jeffery E. Wittman
Written reasons of the Panel by:	Bruce A. LeRose, KC

BACKGROUND

[1] This is the story of a senior counsel taking advantage of an unrepresented party and a Court that relied on the senior counsel's expertise and experience to ensure that a just and proper outcome was achieved. When the senior counsel was called on his deplorable misconduct he doubled down and used every trick of his trade and every tool in his tool box to justify his misconduct. The result was protracted and costly litigation not only for his client but also the unrepresented party who was forced to retain counsel.

[2] On September 10 to 12 and December 3 and 13, 2019, this Panel conducted a hearing with respect to a citation issued by the Law Society on June 7, 2018 (the "Citation") against Mr. Donald R. McLeod (the "Respondent").

[3] The first allegation in the Citation comprised three sub-allegations of failures by the Respondent to discharge his professional obligations as an officer of the Court:

> 1. Between September 2015 and March 2016, in the course of representing your client [SM] in a family law matter, you failed to discharge your professional obligations as an officer of the court by:
>
> (a) misstating facts in court and/or failing to correct the record regarding the start date and end date of a pension division, contrary to one or more of rules 2.1-2(c), 2.2-1, and 5.1-1 of the *Code of Professional Conduct for British Columbia* ("the *BC Code*");
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> (b) abusing the court's process by instituting a contempt application and a recusal application when you knew or ought to have known that the applications were unfounded, premature, and/or without merit, contrary to one or more of rules 2.2-1, 5.1-1, 5.1-2(a), and 5.1-2(b) of the *BC Code*; and
>
> (c) drafting and relying on an affidavit of your staff which materially misrepresented the position of the pension plan, and the position of opposing counsel, regarding the requirement of a copy of the opposing party's birth certificate, contrary to one or more of rules 2.1-2(a), 2.1-2(c), 2.2-1, 5.1-1, and 5.1-2(e) of the *BC Code*.
>
> This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Professional Act*.

[4] The second allegation comprised two sub-allegations of failures of the Respondent to discharge his professional obligations to opposing counsel.

> 2. Between September 2015 and March 2016, in the course of representing your client [SM] in a family law matter, you failed to discharge your professional obligations to opposing counsel by:
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> (a) instituting a contempt application against opposing counsel personally, and a recusal application, when you knew or ought to have known that the applications were unfounded, premature, and/or without merit, contrary to rules 2.1-4(a), 2.2-1, and 7.2-1 of the *Code of Professional Conduct for British Columbia* ("the *BC Code*"); and
>
> (b) communicating with opposing counsel in a discourteous manner, contrary to one or more of rules 2.1-4(a), 5.1-5, 7.2-1, and 7.2-4 of the *BC Code*.
>
> This conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Professional Act*.

[5] The Panel issued its decision on facts and determination (the "F&D Decision") on July 3, 2020: *Law Society of BC v. McLeod*, 2020 LSBC 33. The Panel determined that the Respondent committed professional misconduct with respect to both allegations in the Citation. Specifically, the Panel determined as follows:

> Allegation 1(a)
>
> (a) The Panel determined that the Respondent's conduct in failing to correct the record regarding pension division dates was contrary to rule 2.1-2(a) of the *BC Code* which requires a lawyer's conduct to be characterized by "candour and fairness". The Respondent's conduct was also found to be contrary to rule 5.1-1 of the *BC Code* which requires a lawyer acting as an advocate to represent a client "resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect" (F&D Decision, paras. 144 to 145).
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> Allegation 1(b)
>
> (b) The Panel determined that this sub-allegation was made out and the Respondent's conduct in bringing the contempt and recusal applications was contrary to rule 2.2-1 and rule 5.1-1 of the *BC Code*. Rule 2.2-1

requires a lawyer 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" (F&D Decision, paras. 106 and 121 (a)).

Allegation 1(c)

(c) The Panel determined that this sub-allegation was not made out. (F&D Decision, para. 148).

Allegation 2(a)

(d) The Panel determined that in bringing the contempt application against opposing counsel (the "Complainant") personally and the recusal application, the Respondent acted contrary to rule 2.1-4(a) of the *BC Code* which requires a lawyer's conduct toward other lawyers to be characterized by courtesy and good faith. The Respondent's conduct was also found to be contrary to rule 7.2-1 of the *BC Code* which requires a lawyer to be civil and act in good faith with all persons with whom the lawyer has dealings in his practice. However, the Panel found that the Respondent's conduct in bringing the contempt application against the Complainant personally did *not* amount to a second instance of acting contrary to rule 2.2-1 of the *BC Code*, as the principles of *R. v Kienapple*, [1975] 1 SCR 729, applied (F&D Decision, paras. 112, 121, 121(b)).

Allegation 2(b)

(e) The Panel determined that this allegation was not made out (F&D Decision, para. 156).

[6] The Respondent appealed to the Court of Appeal the determinations in the F&D Decision that allegations 1(a), 2(a) and 2(b) amounted to professional misconduct. The Law Society of British Columbia (the "Law Society") cross-appealed the finding that bringing an action in civil contempt against the Complainant personally did not amount to a second instance of the Respondent acting contrary to rule 2.2-1 of the *BC Code*. The Court of Appeal issued reasons for judgement on August 12, 2022, indexed as *McLeod v Law Society of British Columbia*, 2022 BCCA 280 (the "Appeal Decision"). The Court of Appeal:

(a) dismissed the Respondent's appeal with regard to the Panel's finding that he committed professional misconduct in failing to correct the record regarding pension division dates in allegation 1(a);

(b) dismissed the Respondent's appeal from the Panel's finding in relation to allegations 1(b) and 2(a) that he committed professional misconduct by instituting the contempt applications;

(c) allowed the Respondent's appeal of the Panel's finding in relation to allegations 1(b) and 2(a) of the Citation that the Respondent failed to discharge his professional obligation as an officer of the Court and to opposing counsel by instituting the recusal application; and

(d) allowed the Law Society's cross-appeal and set aside the Panel's finding with respect to allegation 2(a) that the Respondent's instituting a contempt application against the Complainant personally was not a second instance of the Respondent acting contrary to rule 2.2-1 of the *BC Code*.

[7] The Panel's task now is to determine what is the appropriate sanction for the misconduct found to have occurred as required by section 38(5) and (7) of the *Legal Profession Act*, SBC 1998, c. 9 (the "*Act*").

POSITION OF THE PARTIES

Law Society of British Columbia

[8] The Law Society's position on appropriate sanction is a four-month suspension and costs in the amount of $25, 303.58.

[9] The Respondent committed multiple instances of professional misconduct, acting contrary to rules 2.1-2(a), 2.1-4(a), 2.2-1, 5.1-1 and 7.2-1 of the *BC Code*. These rules all require that lawyers conduct themselves with honour and integrity, and display courtesy, respect and civility in their dealings with courts and other members of the legal profession.

[10] Rules 2.1-2(a) states:

2.1-2 To courts and tribunals

(a) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part

> of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

[11] Rule 2.1-4(a) states:

> 2.1-4 To other lawyers
>
> (a) A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanor toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.

[12] Rule 2.2-1 states:

> **2.2-1** 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.

[13] Rule 5.1-1 states:

> **5.1-1** When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

[14] Rule 7.2-1 states:

> **7.2-1** A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealing in the course of his or her practice.

[15] The Law Society's position on sanction is that the Respondent's professional misconduct was very serious and when taken with his professional conduct record a four-month suspension is appropriate in all of the circumstances.

Respondent

[16] The Respondent's position on sanction is that the appropriate penalty is a six-week suspension and that each party bears their own costs or in the alternative that the Law Society only be entitled to 60 per cent of the costs it seeks.

[17] In support of the Respondent's position on sanction the Respondent claims there are four mitigating factors that the Panel should take into consideration when determining the appropriate penalty.

1. The Respondent has already faced sanction for his misconduct.

2. The Respondent has apologized to the Complainant for his misconduct.

3. The Respondent is in poor health.

4. The Respondent plans to retire soon.

[18] For the reasons that follow, the Panel rejects the Respondent's argument on penalty and accepts the position of the Law Society.

DISCUSSION

[19] The statutory starting point is section 38 of the *Act*, which empowers this Panel with a broad range of sanctions it may impose when instances of professional misconduct are made out against a respondent. The overarching policy principle guiding a panel's determination of appropriate sanction is found in section 3 of the *Act*, which reads in full as follows:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by:
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[20] *The Law Society of BC v Ogilvie*, 1999 LSBC 17, at para. 10 is generally quoted in disciplinary sanction hearings as it sets out a list of factors to be considered by hearing panels. The *Ogilvie* factors are:

> (a) the nature and gravity of the conduct proven;
>
> (b) the age and experience of the respondent;
>
> (c) the previous character of the respondent, including details of prior discipline;
>
> (d) the impact upon the victim;
>
> (e) the advantage gained, or the be gained, by the respondent;
>
> (f) the number of times the offending conduct occurred;
>
> (g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
>
> (h) the possibility of remediating or rehabilitating the respondent;
>
> (i) the impact on the respondent of criminal or other sanctions or penalties;
>
> (j) the impact of the proposed penalty on the respondent;
>
> (k) the need for specific and general deterrence;
>
> (l) the need to ensure the public's confidence in the integrity of the profession; and
>
> (m) the range of penalties imposed in similar cases.

[21] In *Law Society of BC v Dent*, 2016 LSBC 05 paras. 16 to 19, the hearing panel expressed its view that hearing panels should focus the analysis and give more weight to those factors that are truly relevant to the case at hand. Since *Dent,* disciplinary panels have tended to apply *Dent's* "modern approach" grouping the various factors under four distinct headings rather than a rote application of all of the *Ogilvie* factors:

> (a) nature, gravity and consequences of conduct;

> (b) character and professional conduct record of the respondent;
>
> (c) acknowledgement of the misconduct and remedial action; and
>
> (d) public confidence in the legal profession including public confidence in the disciplinary process
>
> *Law Society of BC v McLeod*, 2022 LSBC 24, at paras. 9 to11 ("*McLeod 2022 disciplinary action*").

[22] The Law Society's position is that this Panel should consider the broader consolidated factors in *Dent* as the appropriate framework for the Panel to assess the appropriate sanction in this matter.

[23] The Respondent disagrees. The Respondent's submits that there are factual circumstances of this case that require the Panel to incorporate specific *Ogilvie* factors into the broader *Dent* analysis.

[24] Those factual circumstances are the four mitigating factors referenced in paragraph [17] of these reasons. As previously stated, the Panel does not accept the Respondent's position regarding those factors. In the reasons that follow, it has however considered those factors within the *Dent* analysis.

Nature, gravity and consequences of the conduct

[25] The Panel made certain findings in the F&D Decision that we re-state here to demonstrate the nature, gravity and consequences of the Respondent's conduct.

[26] The Citation arose from events the occurred between September 2015 and March 2016 when the Respondent represented a client in a family matter. The family matter came before Justice Macintosh at the British Columbia Supreme Court as a summary trial proceeding in September 2015 (the "Summary Trial").

[27] Justice Macintosh stated clearly to the Respondent at the Summary Trial that, because the opposing party was unrepresented and the Court was not overly familiar with the law governing pension division, the Court would rely on the Respondent to assist the Court in obtaining an appropriate result regarding the pension division. When it was obvious to the Respondent that the Court was confused about the correct approach to take with respect to dividing the pension benefits the Respondent did nothing to clear up this confusion, rather took paltry advantage of this confusion.

[28] The Respondent is and was at the time very senior counsel and knew that, except in exceptional circumstances, pension benefits were to be divided based on the date of the start of co-habitation to the date of separation. In addition, the evidence was clear that he and the unrepresented party had discussed this prior to the Summary Hearing, and that the unrepresented party believed that this was the order that would be made.

[29] During his final submissions at the Summary Trial, however, the Respondent stated that the period of entitlement should be the total period during which the pension accrued, namely from "when [the unrepresented party] began paying into it … until the date of the order".

[30] Ultimately, on the date of the Summary Trial, the Court made an order that adopted the Respondent's final submissions and calculated the period of entitlement from the date the unrepresented party started paying into the pension to the date of trial (the "Pension Order"); this resulted in a windfall to the Respondent's client. The Respondent made no submissions that would have justified such a deviation from the norm, and did not make any effort to clarify with the court or otherwise correct the record as to why such an unusual order was being made. As later became clear, this was not the order the court intended to make, and was in fact an error.

[31] The mistaken Pension Order granted at the Summary Hearing caused the unrepresented party to hire counsel who ultimately became the Complainant in these proceedings.

[32] The Complainant was forced to bring on not one but two applications before Justice Macintosh to ultimately correct the mistake made at the original Summary Hearing.

[33] The Panel rejected the Respondent's arguments that it was part of his job to get the best outcome for his client and that he was entitled to defend the Pension Order as it was a legal order. While it may have been legal, it was clearly not the order the Court intended to make, and was without evidentiary basis.

[34] In addition, while the Complainant, who was new counsel for the unrepresented party, attempted to negotiate with the Respondent and subsequently apply to the Court to correct the Pension Order, the Respondent pressed hard for the Complainant to produce a certified copy of the birth certificate of the now represented client so he could register same with the pension authority and have the pension divided according to the mistaken Pension Order.

[35] When the Complainant refused to turn over a certified copy of her client's birth certificate the Respondent responded by bringing contempt applications against both the Complainant and her client. Before this Panel, when asked in direct examination why the Respondent filed the contempt applications, he testified that he did so "to force the issue" and that he expected, in response to this filing, that the Complainant would telephone him and he would be able to talk to her about the birth certificate and the matter would become moot.

[36] The Respondent did not withdraw the contempt applications, even after the mistaken Pension Order was ultimately corrected. Justice Macintosh, following the hearing of the contempt applications, found that they were "premature, unfounded and deserving of chastisement". The Panel found in the F&D Decision that in bringing the contempt applications "unsupported by the facts, and for an ulterior purpose, the Respondent failed to discharge his obligations as an officer of the court." His action was "neither fair nor deserving of respect." The Respondent was using the Court's process to force an unjust outcome.

[37] There was no justification for the Respondent bringing on the contempt application against the Complainant personally. This was high handed and extremely sharp practice and put the Complainant to the expense of retaining outside counsel to respond to the contempt application.

Character and Professional Conduct Record

[38] The Respondent was called and admitted to the bar in British Columbia on July 10, 1981. At the time of the misconduct, the Respondent was approximately a 35-year call.

[39] The Respondent has a lengthy Professional Conduct Record ("PCR"). This record reveals that the Respondent consistently transgresses foundational professional obligations. His PCR was summarized as follows by the hearing panel in *McLeod 2022 disciplinary action* at para. 23:

> (a) Conduct Review (January 24, 1991): The Conduct Review Subcommittee found that the Respondent had, on three occasions, acted and spoken "intemperately and rudely" with members of the public and that he had also "exceeded the bounds of appropriate conduct" in his dealings with the police on a fourth matter. No further disciplinary action was imposed.
>
> (b) Conduct Review (November 20, 1997): The Respondent participated in a conduct review respecting two complaints, which led the

> Conduct Review Subcommittee to discuss with him the importance of courtesy in dealing with members of the public, including opposing litigants, as well as a series of letters sent by the Respondent to opposing counsel, which the Subcommittee described as "bizarrely rude" and "shockingly ill-judged". The Subcommittee recommended that the Respondent consider seeking assistance in developing methods of controlling his responses to others and conducting himself in greater dignity, but did not impose any further disciplinary action at that time.
>
> (c) Conduct Review (January 19, 2004 and continued on November 29, 2004): The Conduct Review Subcommittee considered the Respondent's conduct in one matter with respect to unreasonably pursuing a client for fees, including opposing her discharge from bankruptcy to the point that the Court characterized his actions as a "vendetta", and in another matter, in using the client's confidential medical information to impugn the client's credibility in a taxation proceeding by alleging that the client suffered from psychiatric impairment. The Subcommittee Interim Report noted that the Respondent appeared to pursue matters of a personal legal nature in an unreasonable and excessive fashion and assumed a monitoring role and required him to undertake certain remedial steps to avoid such a pattern of conduct in the future. The conduct review was adjourned for the Respondent to receive treatment and counselling, which he did. The Subcommittee issued its final report on December 13, 2004, finding that it was satisfied that the Respondent had demonstrated a real desire to address the types of problems that "litter his discipline history" and found that no further action was necessary.
>
> (d) Citation (issued August 19, 2013): The hearing panel determined that the Respondent had breached Chapter 5, Rule 1 of the *Professional Conduct Handbook* then in force, by disclosing confidential client information, and the breaches constituted professional misconduct (*Law Society of BC v McLeod*, 2014 LSBC 16). The hearing panel imposed a one-week suspension and a fine of $2,500 (*Law Society of BC v. McLeod*, 2015 LSBC 03).
>
> …

[40] The Respondent's PCR also included the citation addressed in the *McLeod 2022 disciplinary action* decision:

> (e) Citation (issued June 7, 2018): This citation was issued on the same date as the Citation giving rise to the present proceedings. The

citation was heard on June 17 and 18, 2019. The hearing panel found the Respondent committed professional misconduct in failing to conduct himself in a manner characterized by courtesy and good faith, contrary to rules 2.1-4(a) and 7.2-1, between September 2016 and January 2017 in the course of acting for his clients to obtain a committeeship order over JS, by proceeding without providing notice of the committeeship application hearing to JS's counsel, the complainant JH, when he knew or ought to have known that JS was represented by JH who intended to participate in the application. In its decision on facts and determination, the hearing panel summarized the Respondent's treatment of JH as follows:

> [149] Perhaps the most revealing comment made by the Respondent to [JH] can be found in his email to her of December 21, 2016. In that email, the Respondent suggested that [JH] had become a potential "officious intermeddler." This perception of [JH]'s role and conduct permeates his treatment of her. He did not perceive her as counsel but more an interference in his attempts to meet the expectations of his clients.
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> (*Law Society of BC v McLeod*, 2019 LSBC 33).

The Respondent appealed this finding to the Court of Appeal and the Law Society cross-appealed on a question of law. The Court of Appeal dismissed the Respondent's appeal and the Law Society's cross-appeal in reasons indexed as *McLeod v. Law Society of British Columbia*, 2021 BCCA 299. The hearing panel, in its decision on disciplinary action, imposed a suspension of six weeks (*McLeod 2022 disciplinary action*).

[41] The Respondent's lengthy PCR is a seriously aggravating factor. Virtually all of the items referenced in the Respondent's PCR have an uncanny resemblance to the matter before this Panel. In summary it is apparent that given the Respondent's age and history of past interactions with the Law Society there is little chance of rehabilitating the Respondent's conduct.

Acknowledgment of the misconduct and remedial action

[42] The Respondent refused to acknowledge his misconduct or apologize to the Complainant until after the ruling of the Court of Appeal confirming his professional misconduct in this matter. The Panel has concluded that the apology was, as they say, a day late and a dollar short. Justice Macintosh had already proclaimed that the bringing of the application for contempt was worthy of chastisement. It was at that time that the Respondent should have sincerely

and unreservedly apologized to the Complainant. This Panel found the Respondent to have committed professional misconduct. Even had the Court of Appeal overturned in their entirety this Panel's findings of professional misconduct, this behaviour merited an apology.

[43] The Respondent states in his apology letter to the Complainant that he is apologizing "for my professional misconduct" in his dealings with the Complainant. The Respondent further states he has:

> …diligently reviewed my handling of this case in connection with my professional obligations to the Court and to you as opposing counsel. This has been a rather humbling experience for me. I have reviewed my obligations under the BC Code and have learned from my experience on this file. I will conduct myself in accordance with the BC Code in any and all matters that I now, or will have, with you.
>
> I would have written this apology sooner, but as you know, certain of the Hearing Panel's findings were subject to an appeal to the Court of Appeal. The Court of Appeal rendered judgment on August 12, 2022.

[44] It is apparent that it was only upon the Court of Appeal's upholding of the findings of professional misconduct that the Respondent felt he had anything to apologize for, notwithstanding Justice Macintosh's findings at the contempt hearing, begging the question as to whether the Respondent would have apologized had the Court of Appeal dismissed the findings of professional misconduct.

[45] The Respondent makes no commitment to take remedial action other than to review the *BC Code* and act accordingly; something all lawyers are required to do in any event. Given the Respondent's PCR, and the similarity of the factual matrix underlying the complaints in that PCR, it is clear that simply reviewing the *BC Code* and considering his actions is insufficient to address the concerns underlying the findings of professional misconduct.

[46] The Respondent's late and begrudging apology, and failure to undertake any substantive efforts at remedial action is not, as the Respondent suggests, a mitigating factor. Instead, this Panel finds this to be an aggravating factor and supports the imposition of a stronger sanction than that suggested by the Respondent.

Public confidence in the legal profession, including public confidence in the disciplinary process

[47] The Law Society is mandated to uphold and protect the public interest in the administration of justice by, among other things, ensuring the independence, integrity, honour and competence of lawyers, and by regulating the practice of law and supporting lawyers in fulfilling their duties in the practice of law.

[48] Central to that mandate is maintaining public confidence. Public confidence in self-regulation must be jealously guarded. At para. 19 in *Ogilvie*, the hearing panel stated:

> 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.

[49] This Panel adopts the ruling in *McLeod 2022 disciplinary action* at paras. 33 and 34:

> [33] The Respondent's misconduct goes to the root of public confidence in the legal profession. As stated in Chapter 2 of the *BC Code*, the Canons of Legal Ethics, which include 2.1-4(a), reflect the critical role of the lawyer in the legal system:
>
> > 2.1 Canons of Legal Ethics
> >
> > These Canons of Legal Ethics in rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned…
> >
> > A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.
> >
> > *In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.*
> >
> > [emphasis added]

[34] Similarly, the Commentary to rule 7.2-1 makes clear the importance of the requirement of courtesy and good faith for public confidence in the legal profession:

> [1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. *The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.*
>
> [2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanor toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgement to be clouded by emotional factors and hinder the proper resolution of the matter. *Personal remarks or personally abusive tactics interfere with the orderly administration of justice* and have no place in our legal system.
>
> [emphasis added]

[35] The Supreme Court of Canada in *Groia v. Law Society of Upper Canada*, 2018 SCC 27, wrote, at para. 63:

> … The duty to practice with civility has long been embodied in the legal profession's collective conscience — and for good reason. Civility has been described as 'the glue that holds the adversary system together, that keeps it from imploding' … Practicing law with civility brings with it a host of benefits, both personal and to the profession as a whole. Conversely, incivility is damaging to trial fairness and the administration of justice in a number of ways.

[50] The Respondent brought the contempt proceedings for an improper purpose and without foundation. He was neither candid nor fair with the Court in the original hearing regarding pension division, and his obstructions and refusal to correct the Pension Order caused harm, in the form of delay, extra costs, and penalties, both to his client, the Complainant, and the Complainant's client. This behaviour is contrary to the expectations of integrity, courtesy, and good faith

the Law Society expects of its members and goes to the root of public confidence in the legal profession.

[51] The Panel finds that this factor as well is an aggravating factor in determining the appropriate sanction to impose on the Respondent.

Range of sanctions in other cases

[52] The Law Society submitted six previous panel decisions to support its position on sanction. *Law Society of BC v Kirkhope*, 2013 LSBC 18 is the only decision that assists the Panel in arriving at an appropriate sanction.

[53] In *Kirkhope* the lawyer drafted an order in a family law case and provided it to the opposing lawyer. The opposing lawyer responded to the draft order saying that she had noted discrepancies and was waiting for copies of the transcript to arrive to resolve the terms of the order. While there was the ongoing dispute about the terms of the order, the lawyer accepted instructions from a client to hold in trust a support payment that the client was obligated to pay, pursuant to a court order, when the lawyer knew or ought to have known that this would facilitate a breach of a court order by the client. The panel determined that the actions by the lawyer and client aimed to use the non-payment of spousal support as a strategy to compel the opposing party to respond more quickly to a settlement proposal regarding the division of assets. The panel determined that this amounted to professional misconduct.

[54] In the decision on disciplinary action, *Law Society of BC v. Kirkhope*, 2013 LSBC 35, the hearing panel noted that:

(a) the lawyer participated in a strategy that resulted in the breach of a court order;

(b) the lawyer was an experienced practitioner with two prior citations;

(c) the conduct occurred in the context of a contested family matter;

(d) the lawyer admitted that he participated in the strategy with the hope it would motivate the complainant and her legal counsel to act a certain way; and

(e) the lawyer admitted his misconduct and took steps to address it.

The hearing panel ordered a 45-day suspension.

[55] In *McLeod 2022 disciplinary action*, the hearing panel observed at para. 39 that sanctions imposed in recent disciplinary cases "suggest an increasing tendency of hearing panels to impose serious disciplinary action in situations where lawyers breaching the core requirements of the legal profession threaten public confidence in lawyers." This Panel finds the observations of the panel in *McLeod 2022 disciplinary action* instructive and adopts the same approach for the purposes of determining an appropriate sanction in this matter.

[56] As noted above, the Respondent submits that there are four mitigating factors the Panel should consider when determining the appropriate sanction.

[57] First, the Respondent submits that he has already faced sanction for this misconduct. The Respondent suggests that in dismissing the contempt applications the Court ordered his client to pay Special Costs and as such he has already been sanctioned. The Panel rejects this premise. Firstly, the order for Special Costs lay against his client not him. Secondly, the Respondent went to great lengths to protect himself in this regard by getting written instructions to proceed with the contempt application even though he knew such application had little chance of success. If anything, this is an aggravating factor not a mitigating one.

[58] Second, the Respondent states that his apology to the Complainant is a mitigating factor this Panel must consider. As previously referenced in these reasons the apology came very late in the process. The misconduct occurred in 2015 and 2016 and it wasn't until some seven years later, after going to the Court of Appeal, that he finally put pen to paper. The time for an apology to his friend was after the contempt application when Justice Macintosh stated that it was worthy of chastisement.

[59] The Panel finds that the apology is simply an afterthought and a strategy to attempt to mitigate the sanction the Respondent must face.

[60] The third and fourth mitigating factors are that the Respondent is in ill health and plans to retire soon. The Respondent relies on the case of *Law Society of BC v. Schauble*, 2011 LSBC 27, at para. 11, for the proposition that in light of this intention "any suspension imposed would be effective upon his return to the practice of law in British Columbia". In *Schauble*, however, the respondent had already retired two months before the hearing on disciplinary action; the reasoning in *Schauble* does not apply to the Respondent in this matter.

[61] While the Panel agrees with the Respondent's submission that a hearing panel may consider a lawyer's stated intention to retire when determining the

appropriate penalty to impose, the Panel does not find this factor assists the Respondent in this case. No medical evidence of the Respondent's poor health and no evidence of any actual plan to retire were presented to the Panel. On the day of the Disciplinary Action hearing the Respondent was a "no show" and the Panel was advised that he couldn't make it because he was starting a Supreme Court trial. The Panel has determined that these mitigating factors have not been made out.

[62] The Respondent has also submitted a number of letters of reference and support from numerous colleagues and associates. The Panel has reviewed these letters and has concluded that they are of little assistance to the Panel in this case. They speak of the Respondent's meritorious service to the profession and to the public over the many years and the fact that he has helped many clients over the years. The Panel finds, however, that the Respondent also has a long history of rude and discourteous behavior towards others including those with whom he has practiced. There is no reliable information in the references that cause the Panel to conclude that the misconduct we are dealing with is an isolated instance. In fact, the Panel finds the opposite is true, the misconduct is not an isolated instance; for this reason, little weight can be given to the letters of reference.

[63] Finally, the Respondent argues that, having faced a previous suspension of only six weeks, an escalation to four months represents a 166 per cent increase in penalty and that this is excessive given the principles of progressive discipline.

[64] To be clear, this Panel finds that a four-month suspension would not be excessive even if this had been the Respondent's first suspension. The Respondent's behaviour underlying the findings of professional misconduct is fundamentally contrary to the standards of behaviour the Law Society expects of lawyers and the Respondent has a long history of acting in this manner. Thus, while progressive discipline does merit an increase in penalty, this Panel finds that it is not the principles of progressive discipline alone that inform the length of the penalty to be imposed.

[65] The Panel has concluded that the appropriate disciplinary action is a four-month suspension, to commence 30 days after the issuance of these reasons.

COSTS

[66] The Law Society seeks costs in the amount of $25,303.58 which represents the full tariff amount under Schedule 4 [Tariff for Hearing and Review Costs].

[67] The Respondent submits that since two of the five sub-allegations in the Citation were dismissed each party should bear their own costs or in the alternative that the Law Society only be entitled to 60 per cent of its tariff costs. In support of this proposition, the Respondent points to several cases, including *Law Society of BC v. Harding*, 2015 LSBC 25, a case where there were five separate allegations of professional misconduct, and the hearing panel dismissed three of them.

[68] In response to the Respondent's submission, the Law Society submits that, contrary to the situation in *Harding*, there were two primary allegations in the Citation and professional misconduct was found by the Panel on each of those primary allegations in the Citation.

[69] Counsel for the Law Society submitted that the allegations in the Citation were comparable to the situation in a civil proceeding for breach of contract where numerous breaches of clauses within the contract are alleged, and the court finds that, while not all of the clauses may have been breached, the breach of the contract is established. In such a case the successful litigant is generally entitled to all of the litigant's costs.

[70] For the purposes of this particular hearing the Panel adopts the Law Society reasoning. The Citation alleges two breaches of professional misconduct, with each breach consisting of, respectively, three and two sub-allegations. This Panel found, and the Court of Appeal upheld, both primary findings of professional misconduct; that each sub-allegation was not made out does not change the fact that the Law Society was successful in that the Respondent was found to have committed professional misconduct on account of both allegations. Accordingly, this Panel declines to find that the success of the parties was 'divided'.

[71] Having found the Law Society to have been successful in this matter, the total quantum of costs must be considered. Law Society Rule 5-11 gives the Panel the discretion to order that the Respondent pay the costs of a hearing. In doing so, the Panel must have regard to the tariff of costs in Schedule 4 to the Rules, but it may order costs in an amount other than that permitted in the tariff if it considers it reasonable and appropriate to do so. In deciding to exercise its discretion, the Panel may consider the factors referred to in the pre-tariff decision of *Law Society of BC v. Racette*, 2006 LSBC 29, at para. 13 and 14, including:

(a) the seriousness of the offence;

(b) the financial circumstances of the Respondent;

(c) the total effect of the Penalty, including possible fines and/or suspensions;

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[72] The Respondent's substantive submissions on costs focused largely on argument that either the parties should bear their own costs, or that this Panel should consider success to have been divided, and accordingly only award the Law Society 60 per cent of the costs it seeks, based on the dismissal of two of the sub-allegations. Having found no merit in the Respondent's arguments, the Panel will nevertheless consider the *Racette* factors in light of the case as a whole. The Panel has weighed the following:

(a) The Respondent is in his 70's, but continues to practice full-time, in fact being unable to attend this hearing due to starting a Supreme Court trial.

(b) The Respondent made no submissions and provided no evidence regarding his ability to pay or otherwise.

(d) The Respondent did make admissions which no doubt shortened the hearing, although the matter still required two days.

(e) The Panel finds the Respondent's professional misconduct to be serious, in that it goes to the heart of a lawyer's responsibilities to the profession and the court, meriting a significant suspension. As stated in the *McLeod 2022 disciplinary action* decision regarding the Respondent, the professional misconduct in this matter breaches the core requirements of the legal profession, threatening public confidence in lawyers.

(f) Other than the submissions relating to ill health and his intention to retire at the end of these proceedings, the Respondent provided neither evidence nor submissions regarding the total effect of the penalty proposed by the Law Society.

(g) The profession should not bear the full amount of costs involved in having the adverse decision made against Respondent.

[73] Given the considerations above, this Panel finds that the Law Society is the successful party in this matter and that full tariff costs should be awarded. This Panel therefore orders the Respondent must pay costs to the Law Society in the

amount of $25,303.58 to be paid within five months of the issuance of this decision.