2023 LSBC 27
Hearing File No.: HE20220027
Decision Issued: July 10, 2023
Citation Issued: July 12, 2022
Citation Amended: May 29, 2023

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

TIMOTHY D. KLAASSEN

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	June 9, 2023
Panel:	Maia Tsurumi, Chair Brian Dybwad, Bencher Kris Gustavson, Public representative
Discipline Counsel:	Marsha J. Down
Appearing on his own behalf:	Timothy D. Klaassen
Written reasons of the Panel by:	Maia Tsurumi

INTRODUCTION

[1] On July 5, 2022, the Discipline Committee authorized a citation against the Respondent (the "Citation"). The Citation was issued on July 12, 2022 and amended on May 29, 2023 (the "Amended Citation")

[2] On May 4, 2023, the Respondent signed a letter of admission of a disciplinary violation, admitting professional misconduct and consenting to a specific disciplinary action.

[3] The parties provided joint submissions on professional misconduct and penalty (the "Joint Submissions") under Rule 5-6.5 of the Law Society Rules (the "Rules"), including a Joint Book of Exhibits with an agreed statement of facts (the "ASF").

[4] Under Rule 5-6.5, parties are permitted to jointly submit an agreed statement of facts, the respondent's admission of a discipline violation and consent to a specified disciplinary action.

[5] The hearing occurred on June 9, 2023. Both parties made oral submissions.

[6] The Joint Submissions ask the Hearing Panel (the "Panel") to:

(a) find the Respondent committed professional misconduct contrary to section 38(4) of the *Legal Profession Act*, SBC 1998, c. 9 (the "Act") as described in Allegation 1(a) of the Amended Citation;

(b) impose a four-week suspension on the Respondent to commence on a date to be mutually agreed on by the Respondent and the Law Society;

(c) order the Respondent to pay costs of $1,000; and

(d) direct under Rule 5-8(2) that any information that could identify the victim or a witness in the underlying criminal matter be redacted in any document, broadcast or transmission provided to the public.

[7] The Panel accepts the Joint Submissions, including the ASF and:

(a) find the Respondent's conduct constituted professional misconduct;

(b) find the proposed disciplinary action is in the public interest in the administration of justice;

(c) impose the proposed disciplinary action; and

(d) make an order under Rule 5-8(2) to protect the identity of the victim and witnesses in the underlying criminal proceeding.

CITATION

[8] The Amended Citation alleged professional misconduct under section 38(4) of the Act. Specifically, that between August 31, 2018 and November 1, 2018, the Respondent, while representing the accused in a criminal matter in the Provincial Court of British Columbia, stated on several occasions orally in court and in an application filed with the Provincial Court that Crown Counsel had fabricated evidence.

[9] Allegation 1(a) of the Amended Citation stated the Respondent failed to act with courtesy and/or, civility contrary to one or both of rules 2.1-4 and 7.2-1 of the *Code of Professional Conduct for British Columbia* (the "*Code*").

[10] Allegation 1(b) said the Respondent made representations to the Court that the Respondent knew or ought to have known could not reasonably be supported by the evidence, contrary to one or both of rules 5.1-1 and 5.1-2 of the *Code*.

[11] The Law Society is not pursuing Allegation 1(b).

[12] The Respondent admits they were served with the Citation on July 12, 2022 and with the Amended Citation on May 29, 2023, in accordance with Rule 4-19 of the Rules.

FACTS

[13] The facts set out below are summarised from the ASF and other exhibits in the Joint Book of Exhibits, as well as evidence from the Respondent at the hearing.

Respondent's Background

[14] The Respondent was called and admitted as a member of the Law Society of British Columbia on November 10, 1995. Since that time has practised primarily criminal law at small firms in Houston and Terrace, BC, and as a sole practitioner in Smithers and Terrace.

[15] The Respondent now practices criminal law exclusively and approximately 90% of the work is legal aid.

Circumstances Leading to the Professional Misconduct Alleged in the Amended Citation

[16] The Respondent acted for an accused (the "Accused") who was charged criminally in two separate matters. One involved sexual touching of a child under 16 years and sexual assault (the "Sexual Touching Charges") and the other involved possession and access of child pornography for the purposes of distribution or sale (the "Child Pornography Charges").

[17] The Accused pleaded not guilty to the Child Pornography Charges and guilty to the Sexual Touching Charges. In relation to the latter, the Accused had a court-ordered psychological assessment.

[18] There were several contested pre-trial applications related to the Child Pornography Charges. These applications arose from Charter Notices filed by the Respondent on behalf of the Accused, challenging the admissibility of evidence sought to be led by the Crown.

[19] Crown Counsel and the Respondent were at odds on various issues and their interpersonal dealings were described in the Joint Submissions as "challenging."

[20] At a pre-trial conference on August 8, 2018, responding to submissions by Crown Counsel the Respondent said Crown Counsel was "making stuff up out of thin air" (the "Out of Thin Air Comment").

[21] On August 22, 2018, Provincial Court Judge Wright heard the pre-trial applications in the Child Pornography Charge. At the hearing, the Crown asked the Respondent to withdraw the Out of Thin Air Comment and asked the court to determine the appropriateness of the Respondent's behavior using *Groia v. Law Society of Upper Canada*, 2018 SCC 27 as a framework. Although Crown Counsel raised these issues, she did not bring an application to deal them.

[22] The Respondent asked for time to review the recording of the August 8, 2018 proceedings before providing a response to the request to withdraw the Out of Thin Air Comment.

[23] At this time, the presiding judge, Judge Wright, said it was obvious counsel were not getting along and expected counsel to conduct themselves properly.

[24] In submissions on August 22, 2018 about one of the pre-trial applications, Crown Counsel said the Crown intended to tender evidence at the trial of the Child Pornography Charges from a "psychiatrist" who had assessed the Accused for the purpose of the Sexual Touching Charges, and she said this evidence explained the Accused's predilection for child pornography and his interest in young female children, particularly between the ages of 2 and 12 years (the "Crown Misstatement").

[25] The Respondent told the court they were very concerned about this submission as it had very prejudicial information that should not have been before the court. As a result, the hearing was adjourned to August 31, 2018. Judge Wright told the Respondent they would then have to respond to the Crown's request about the Out of Thin Air Comment.

[26] By the August 31, 2018 hearing, the Respondent had reviewed the recording of August 8, 2018 and informed the court the defence would be bringing a stay of proceedings or a mistrial application "given the actions of the Crown."

[27] Judge Wright advised the Respondent they had to provide formal notice of such an application but allowed the Respondent to discuss the basis for their anticipated application. The Respondent said the Crown fabricated prejudicial evidence in her submissions. They reiterated this allegation later in the hearing. The basis for the Respondent's allegation was the Crown Misstatement on August 22, 2018.

[28] On September 18, 2018, the Respondent filed a "Charter Notice – Crown Misconduct" application (the "Charter Application"). Asking for a stay of proceedings, or in the alternative a mistrial, of the Child Pornography Charges. The Charter Application sets out four areas of alleged Crown misconduct during the prosecution, which include the circumstances that gave rise to the Out of Thin Air Comment on August 8, 2018 and the Crown Misstatement on August 22, 2018. The Charter Application states Crown Counsel intentionally fabricated evidence. In an addendum to the Charter Application, the Respondent states again that the Crown intentionally fabricated evidence.

[29] On November 1, 2018, Judge Wright heard the *Vukelich* application to determine whether there was sufficient evidence to allow the Charter Application to proceed to a full hearing. During the *Vukelich* application, the Respondent quoted the Crown Misstatement and said this was where Crown Counsel fabricated an admission of the Accused. The assessment was done by a psychologist and not a psychiatrist as alleged by the Crown and the assessment did not say specifically the words "particularly between the ages of 2 and 12 years old." The assessment said the victims are between ages four and six.

[30] Judge Wright invited the Respondent to recharacterise the Crown Misstatement as a misstatement and not a lie, but the Respondent declined to do so.

[31] On November 6, 2018, Judge Wright gave his decision on the *Vukelich* application, concluding the Crown Misstatement, did not raise even a *prima facie* case. Further, the Crown Misstatement was a "fair and reasonable statement" based on what the Accused had told the psychologist.

[32] Since the November 6, 2018 decision on the *Vukelich* application, there has been no suggestion of discourtesy or incivility between the Respondent and Crown Counsel

relating to the Child Pornography Charges, the Sexual Touching Charges or any other matter.

Law Society Complaint and Investigation

[33] On November 17, 2020, Lori E. Stevens, Regional Crown Counsel, submitted a complaint to the Law Society about the Respondent's allegations that Crown Counsel fabricated evidence and misled the Court.

[34] During the investigation, the Respondent was cooperative, responding to questions from the Law Society and providing numerous documents to assist the investigation, including three responses.

[35] In their October 11, 2021 response to the Law Society, the Respondent resiled from their stated position that Crown Counsel fabricated evidence about the psychologist's report and the Respondent said they now viewed it as a misstatement. Regardless of whether the Respondent was acting on their client's instructions to bring the Charter Application, they had a professional obligation to ensure that there was a reasonable basis for doing so.

[36] In both their October 11, 2021 and June 13, 2022 responses to the Law Society, the Respondent said they would be willing to write to Crown Counsel and apologise.

[37] In an interview with the Law Society, the Respondent admitted Crown Counsel did not fabricate evidence. They said her conduct was not intentionally misleading and they resiled from their previous position about fabricated evidence.

[38] In the ASF, the Respondent admits that between August 31 and November 1, 2018, while representing the Accused, they stated on several occasions in court, in writing and orally, that Crown counsel had fabricated evidence and that these statements were not based on a reasonable assessment of the evidence. They admit by doing so, they failed to act with courtesy and/or civility contrary to rules 2.1-4 and/or 7.2-1 of the *Code* and admits this was professional misconduct.

LEGAL FRAMEWORK

Joint Submissions

[39] Joint submissions regarding disciplinary action are statutorily prescribed by Rules 5-6.5(1) to (3), which state:

5-6.5(1) The parties may jointly submit to the hearing panel an agreed statement of facts and the respondent's admission of a discipline violation and consent to a specified disciplinary action.

(2) If the panel accepts the agreed statement of facts and the respondent's admission of a discipline violation

(a) the admission forms part of the respondent's professional conduct record,

(b) the panel must find that the respondent has committed the discipline violation and impose disciplinary action, and

(c) the Executive Director must notify the respondent and the complainant of the disposition.

(3) The panel must not impose disciplinary action under subrule (2) (b) that is different from the specified disciplinary action consented to by the respondent unless

(a) each party has been given the opportunity to make submissions respecting the disciplinary action to be substituted, and

(b) imposing the specified disciplinary action consented to by the respondent would be contrary to the public interest in the administration of justice.

[40] Rule 5-6.5(3) reflects the principles set out in *R. v. Anthony-Cook*, 2016 SCC 43, at paras. 31, 34, 36-40, including certainty for the parties, eliminating the negative aspects involved in requiring witnesses to testify and creating efficiencies in the system.

[41] The public interest test in *Anthony-Cook* requires a trial judge to accept a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest: *Anthony-Cook*, at paras. 32, 41-43. A joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "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 criminal justice system": *Anthony-Cook*, at para. 33.

[42] Thus, a joint submission should not be rejected lightly, "[r]ejection denotes a submission that is so unhinged from the circumstances of the case that its acceptance would lead reasonable and informed persons aware of all the relevant circumstances to believe that the proper functioning of the regulatory system has broken down. This is an undeniably high threshold": *Anthony-Cook*, at para. 34.

[43] Law Society discipline decisions have applied the *Anthony-Cook* test when assessing the appropriateness of joint submissions under Rule 5.6.5: see for example *Law Society of BC v. Davison*, 2022 LSBC 23, at paras. 10-11; *Law Society of BC v. Lang*, 2022 LSBC 4, at paras. 27 to 28, citing *Law Society of Upper Canada v. Archambault*, 2017 LSDD No. 100, at para. 15.

[44] However, recent panels have noted there is a question about whether *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 impacts a disciplinary panel's reliance on the *Anthony-Cook* test: *Law Society of BC v Shabestari*, 2022 LSBC 44, at paras 34-39; *Law Society of BC v. Seeger*, 2022 LSBC 29, at para. 12.

[45] In *Abrametz*, the issue was whether a lengthy delay in a discipline proceeding brought by the Law Society of Saskatchewan was inordinate and amounted to abuse of process warranting a stay of proceedings. But the Court also sounded a note of caution about the ready transplantation of precepts of criminal law to professional disciplinary proceedings: *Abrametz*, at paras. 48 and 54.

[46] The panel in *Seeger* concluded the question of whether the public interest test in *Anthony-Cook* should continue to be applied in the context of proceedings before this Tribunal is best left to a case in which it is necessary to decide the issue.

[47] The panel in *Shabestari* concluded the *Anthony-Cook* public interest test still applies to Rule 5-6.5 proceedings: *Shabestari,* at paras 37-39. The panel said:

> [38] *Abrametz* did not consider or revisit the public interest test specifically established in *Anthony-Cook*. The principle issue in *Abrametz* was the appropriateness of a stay of proceedings based on inordinate delay, and not whether a joint submission in a discipline proceeding on sanction was appropriate, and what the criteria for accepting or rejecting the proposed disciplinary action is. Rule 5-6.5 legislatively mandates and directs this Tribunal, when considering joint submissions, to only reject the proposed disciplinary action if it is contrary to the public interest in the administration of justice.
>
> [39] The wording of Rule 5-6.5 is virtually identical to that of the *Anthony-Cook* public interest test, leading further support to our conclusion that *Anthony-Cook* is still applicable.

[48] For the same reasons, we agree the *Anthony-Cook* test applies in the context of joint submissions in Tribunal disciplinary hearings.

Onus of Proof and Test for Professional Misconduct

[49] The Law Society bears the onus of proving on a balance of probabilities that the facts alleged constitute professional misconduct: see *Foo v. Law Society of BC*, 2017 BCCA 151, at para. 63.

Assessing Professional Misconduct

Professional misconduct generally

[50] There is no statutory definition of professional misconduct. However, prior Tribunal decisions hold that professional misconduct is a marked departure from conduct reasonably expected of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171; see also *Seeger*, at para. 15 and *Law Society of BC v. Edwards*, 2020 LSBC 21, at paras. 44-46.

[51] *Martin* is an objective test and has been accepted by many Tribunal panels and affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35.

Incivility and professional misconduct

[52] Whether incivility constitutes professional misconduct was considered in *Groia*. The Court held the following factors are relevant: (1) what the lawyer said, including whether allegations were made in bad faith and/or without a reasonable basis; (2) the manner and frequency of the lawyer's behaviour; and (3) what the presiding judge said about the behaviour and the lawyer's response to this: *Groia*, at paras. 36, 59, 81-110.

[53] At issue in *Groia* was whether Mr. Groia's courtroom conduct warranted a finding of professional misconduct. Mr. Groia was hired to defend a client against charges brought by the Ontario Securities Commission (the "OSC"). Mr. Groia believed the prosecutor had not properly met the OSC's disclosure obligations. He made repeated attacks on the professionalism of the prosecutor, alleging impropriety. He was frequently sarcastic and insulting in his attacks. The judge eventually directed him to cease repeating his misconduct allegations and he followed this direction.

[54] Regarding its conclusion that there can be professional misconduct if either good faith or a reasonable basis is lacking, the Supreme Court said this is appropriate because "[t]he consequences for the opposing lawyer's reputation are simply too severe to require anything less than a reasonable basis….": *Groia*, at para. 86. A reputation for integrity takes a long time to build up but can be torn down overnight and may never be fully restored: *Groia* at para. 85. The panel in *Law Society of BC v Lessing*, 2022 LSBC 06 adopted these statements by the Supreme Court in *Groia*: at para. 70.

[55] Allegations do not lack a reasonable basis simply because they are based on legal error: *Groia*, at para. 88. It is not professional misconduct to challenge opposing counsel's integrity based on a sincerely held but incorrect legal position so long as the challenge has a sufficient factual foundation, such that if the legal position were correct, the challenge would be warranted.

[56] With respect to the manner and frequency of a lawyer's behaviour, a single outburst does not usually attract sanction but repetitive attacks on opposing counsel are more likely to cross the line into professional misconduct: *Groia*, at para. 100. The Court cautioned that, "[s]trong language that, in other contexts, might well be viewed as rude and insulting" may regularly be necessary when challenging a lawyer's integrity, but "[c]are must be taken not to conflate the strong language necessary… with the type of communications that warrant a professional misconduct finding": *Groia* at para. 101.

[57] The presiding judge's reaction to the lawyer's behaviour a relevant consideration, as is how the lawyer behaved thereafter. A lawyer who crosses the line but heeds the judge's direction and behaves appropriately from then on is less likely to have engaged in professional misconduct: *Groia*, at para. 110.

[58] *Groia* recognises the importance of civility to the legal profession and the corresponding need to target behaviour that detrimentally affects the administration of justice and the fairness of a particular proceeding: *Groia*, at paras. 62-69. But decision makers must also be sensitive to the lawyer's duty of resolute advocacy — a duty of particular importance in the criminal context because of the client's constitutional right to make full answer and defence: *Groia*, at paras. 62, 70-76.

[59] The Court of Appeal in *Law Society of BC v. Harding*, 2022 BCCA 229 reviewed the *Groia* approach for assessing professional misconduct in cases where a lawyer challenges the opposing party's integrity. The Court adopted the *Groia* test for professional misconduct in relation to alleged incivility in the courtroom: see e.g., *Harding*, para. 60.

[60] In summary, when determining whether a lawyer's in-court behaviour crosses the line from resolute advocacy into professional misconduct because of incivility we must consider the following:

(a) what the lawyer said and if the lawyer alleges prosecutorial misconduct or otherwise challenges opposing counsel's integrity, then whether the allegations were made in good faith and have a reasonable basis: *Groia*, at paras. 36, 59, 81-97 and *Harding*, at para. 60;

(b) the manner and frequency of the lawyer's behaviour: *Groia*, at paras. 36, 59, 98-101 and *Harding*, at para. 60;

(c) the trial judge's reaction to the lawyer's behaviour and if the lawyer modified their behaviour afterward: *Groia*, at paras. 36, 59, 102-110 and *Harding*, at para. 60;

(d) the dynamics, complexity and particular burdens and stakes of the trial: *Groia*, at para. 79 and *Harding*, at para. 60;

(e) the importance of civility to the legal profession and the need to target behaviour that tends to detrimentally affect the administration of justice and fairness of a proceeding: *Groia*, at paras 63-69 and *Harding*, at para. 60. However, professional misconduct does not require the lawyer's behaviour to bring the administration of justice into disrepute or to have impacted trial fairness; and

(f) the duty to practice with civility cannot compromise the lawyer's duty of resolute advocacy: *Groia*, at paras. 71-76 and *Harding*, at para. 60.

ANALYSIS

Professional Misconduct

[61] The Panel finds the ASF has no evidentiary conflicts and no issues of credibility. The Panel also finds the ASF establishes sufficient facts on which to determine whether the Respondent's conduct amounted to professional misconduct.

[62] The Citation alleges the Respondent's conduct was contrary to rule 2.1-4 or 7.2-1 of the *Code*, or both. Rule 2.1-4 provides:

> (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 demeanour 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.

[63] Rule 7.2-1 provides:

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

[64] For the reasons below, the Panel finds the Respondent's actions described in Allegation 1(a) of the Amended Citation were professional misconduct.

[65] The Respondent said Crown Counsel fabricated evidence. They accused her of making up evidence and presenting this to the court to prejudice their client. This was a very serious challenge to her integrity. Such an attack on a lawyer's integrity can damage their reputation, even if unsubstantiated.

[66] The Law Society does not allege the Respondent failed to act in good faith. But it says the Respondent acted without a reasonable basis.

[67] The Panel finds the Respondent's allegations about Crown Counsel fabricating evidence were not motivated by bad faith. They were the product of the frustration they felt during the proceedings for the Child Pornography Charges, as the Respondent believed Crown Counsel repeatedly misstated their position, including in documents filed with the court, referred to their client's applications as frivolous and in the Crown Misstatement did not accurately reflect what the psychologist had said about the Accused's interest in young females.

[68] However, the facts in the ASF and the Respondent's admission, which the Panel accepts, show the Respondent had no reasonable basis for stating Crown Counsel fabricated evidence.

[69] The Respondent admits they had no reasonable basis for their statements and in their written and oral responses to the Law Society they acknowledge Crown Counsel' conduct was not intentionally misleading and they resile from their position about fabricated evidence.

[70] The Panel agrees with the Joint Submissions that the Respondent's allegations were not made in a manner that was rude, sarcastic, mocking or otherwise offensive. But the frequency of the Respondent's statements points towards professional misconduct.

[71] At the August 31 and November 1, 2018 hearings, Judge Wright challenged the Respondent about the basis for their allegations but the Respondent maintained Crown Counsel had fabricated evidence. The Respondent ceased their allegations only after Judge Wright's November 6, 2018 decision on the *Vukelich* application.

[72] Judge Wright's November 6, 2016 decision on the *Vukelich* application was entered as an exhibit at the hearing for the truth of its contents. Judge Wright found the Respondent made "totally unfounded allegations" about Crown Counsel and this was of great concern to the court. The Panel finds Judge Wright's findings of fact highly persuasive: *Law Society of British Columbia v. Edwards*, 2020 LSBC 21, at para. 11.

[73] Turning to the dynamics, complexity and particular burdens and stakes of the trial, this was a complex criminal trial with liberty at stake for the Accused and challenging dynamics

between the Respondent and Crown Counsel prior to the Respondent's Charter Application.

[74] While civility is important to the legal profession, in the context of the criminal proceedings, the Supreme Court's direction that the duty to practice civilly cannot compromise a lawyer's duty of resolute advocacy is particularly relevant.

[75] For criminal defence lawyers, fearless advocacy extends beyond ethical obligations into the realm of constitutional imperatives. Defence lawyers advancing an accused's right to make full answer and defence "are frequently required to criticize the way state actors do their jobs": *Groia*, at para. 75, citing *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, at para. 32; *Doré v. Barreau du Québec*, 2012 SCC 12, at paras. 64-66. These criticisms range from routine *Charter* applications — alleging, for example, an unconstitutional search, detention, or arrest — to serious allegations of prosecutorial misconduct: *Groia*, at para. 75. Defence lawyers must have sufficient latitude to advance their clients' right to make full answer and defence by raising arguments about the propriety of state actors' conduct without fear of reprisal.

[76] Therefore, when defining incivility and assessing whether a lawyer's behaviour crosses the line, care must be taken to set a sufficiently high threshold that will not chill the kind of fearless advocacy that is at times necessary to advance a client's cause: *Groia*, at para. 76.

[77] Nevertheless, the Respondent made their statements without a reasonable basis and thus the threshold was crossed.

[78] Finally, the Panel notes the Respondent admits their conduct constituted professional misconduct. While the Panel must apply the legal requirements to the facts and make its own decision, the fact that the Respondent agrees with the Law Society that they breached rules 2.1-4 and/or 7.2-1 is a highly relevant consideration.

[79] In summary, the Panel accepts the Joint Submissions and the Respondent's admission of misconduct and find the Respondent's allegations against Crown Counsel in the context of the Charter Application was professional misconduct: they repeatedly made statements, without a reasonable basis, that challenged the integrity of Crown Counsel and they maintained their allegations even though the presiding judge repeatedly questioned the basis for their allegations.

Disciplinary Action

[80] The parties jointly propose a four-week suspension as a penalty for the Respondent's professional misconduct.

[81] When there are joint submissions on disciplinary action, Rule 5-6.6(3)(b) and *Anthony-Cook* say a panel must not diverge from the specified disciplinary action unless imposing the specified disciplinary action would be contrary to the public interest in the administration of justice.

[82] To determine if the proposed penalty would not be contrary to the public interest in the administration of justice, the Panel will consider factors such as those set out in *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45:

(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 to be gained, by the respondent;

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

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the 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.

[83] The *Ogilvie* factors are applied through the "prism" of public protection: *Law Society of BC v. Gellert*, 2014 LSBC 05, at paras. 44 and 46.

[84] The usual approach to determining the appropriate disciplinary sanction is to apply only those *Ogilvie* factors relevant to the circumstances of the case: *Ogilvie*; *Law Society of BC v. Dent*, 2016 LSBC 05, at paras. 19 to 23. In this case, the Panel finds the following *Ogilvie* factors relevant:

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

(b) the previous character and professional conduct record of the Respondent;

(c) acknowledgement of the misconduct and remedial action and the presence or absence of other mitigating circumstances, including the impact on the respondent of criminal or other sanctions or penalties;

(d) the need for specific and general deterrence, which also relates to the possibility of remediating or rehabilitating the Respondent; and

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

[85] Applying the *Ogilvie* factors to the Respondent's professional misconduct, the Panel concludes the proposed penalty of a four-week suspension and costs of $1,000 are in the public interest in the administration of justice.

Nature, gravity and consequences of the conduct

[86] Civility in the legal practice is very important and so the nature, gravity and consequences of the Respondent's professional misconduct, which involved an unreasonable attack on the integrity of opposing counsel in court, indicate a serious sanction is warranted. However, the Respondent did not act in bad faith, which makes their conduct less egregious.

[87] The evidence in the ASF and at the hearing was that the Respondent's misconduct did not negatively impact the Accused's trial or other criminal proceedings.

The previous character and professional conduct record of the Respondent

[88] The Respondent's professional conduct record ("PCR") is an aggravating factor, especially considering the principle of progressive discipline and the need for specific deterrence.

[89] The PCR consists of only one conduct review from 9 years ago (February 27, 2014) and the Respondent acknowledged their misbehaviour and apologised to opposing counsel.

[90] However, the conduct under review was like the professional misconduct at issue now. The Respondent made unwarranted, discourteous and offensive remarks to opposing counsel, accusing him in court of misleading the court and of being a liar, contrary to rule 7.2-1 of the *Code*. Furthermore, the Respondent assured the Conduct Review Subcommittee that the incidents were isolated and would not be repeated.

[91] The Respondent has a positive history of contributions to the legal profession through the Continuing Legal Education Society of BC, the Canadian Bar Association – BC Branch, Legal Aid BC and the Prince Rupert County Bar Association. They have also for many years done important work providing legal aid to criminally accused in remoter parts of the province.

[92] The Respondent's past character is a somewhat mitigating factor, because while a panel may consider good character evidence in determining an appropriate sanction, such evidence has limited weight: *Law Society of BC v Gregory*, 2022 LSBC 17, at paras 45-49.

Acknowledgement of the misconduct and remedial action and other mitigating circumstances

[93] Militating strongly against a severe penalty is the Respondent's early and continued acknowledgment of their professional misconduct, including their work with the Law Society to make a joint submission under Rule 5-6.5, admitting their professional misconduct and consenting to a specified disciplinary action. As stated in *Law Society of BC v Johnson*, 2019 LSBC 4 at para. 39:

> Joint submissions…are important to the resolution of Law Society proceedings. They are the product of informed discussions between the parties, who are familiar with their respective cases and have agreed on a particular result…There are often significant costs associated with a contested hearing, not only to the parties but also to the profession. By agreeing to a joint submission, counsel have saved the significant costs associated with a contested hearing.

[94] Further, at the hearing, the Respondent apologised again to Crown Counsel for their professional misconduct and any harm it may have caused her. In response, Crown Counsel asked to speak to the Panel and said she accepted the Respondent's apology and appreciated their response to the investigation and Amended Citation.

[95] Although, as noted above in relation to progressive discipline, the need for deterrence is an aggravating factor, it is also a mitigating factor here, as the Respondent's conduct after Judge Wright's November 6, 2018 decision, during the investigation and at the hearing indicate they sincerely regret their professional misconduct and is unlikely to repeat it.

[96] A mitigating factor, which addresses specific and general deterrence, is the Respondent's evidence about how their professional misconduct has negatively affected their reputation in the legal profession. They have been approached by other lawyers in their region who are concerned about the allegations in the Citation and Legal Aid BC, who they do most of their work with, is now maintaining a watching brief of their services.

Public confidence in the legal profession and the disciplinary process

[97] For the public to have confidence in the disciplinary process, as set out in section 3 of the Act, it is important to uphold and protect the public interest in the administration of justice.

[98] The Respondent's misconduct involved unreasonably attacking the integrity of opposing counsel in court. Without appropriate sanction, the public could lose confidence in both our profession and our disciplinary process.

[99] The panel in *Law Society of BC v Dent*, 2016 LSBC 5 held "similar cases" is a primary factor to consider in relation to public confidence. Similar types of misconduct should attract similar disciplinary sanctions to give confidence in the disciplinary process.

[100] While there is no fixed range of sanction for incivility amounting to professional misconduct, authorities presented by the parties dealing with this issue indicate a four-week suspension is appropriate:

(a) *Law Society of BC v McLeod*, 2022 LSBC 24: the panel found the lawyer failed to conduct himself in good faith and in a courteous manner. He also had a lengthy PCR with substantively similar incidents and only made a short and limited apology the day before the hearing. The lawyer was suspended for six weeks;

(b) *Lang*: the incivility involved offensive and profane language in communicating with the opposing party and her adult son at the courthouse. The hearing panel accepted the proposed joint submission of a $10,000 fine; and

(c) *Harding*: the respondent acted in bad faith by knowingly making false statements to a third party and he had a long history of uncivil and intemperate comments and accusations about opposing counsel. The PCR included three citations and three conduct reviews, with the panel finding his disciplinary record was "rife with incivility." He was suspended for 8 weeks.

[101] The Panel accepts the proposed sanction of a four-week suspension will ensure the Respondent is seen to be, and is, held accountable for their actions. A suspension is a serious sanction.

Determination on disciplinary action

[102] After considering the relevant mitigating and aggravating factors above, the Panel concludes the four-week suspension proposed by the parties is proportionate, appropriate and in the public interest in the administration of justice.

[103] The public has confidence in the legal profession and the disciplinary process when sanctions are proportionate to the misconduct, are fair and reasonable in all the circumstances and provide for specific and general deterrence.

[104] The Respondent practices criminal law, primarily providing legal aid, in rural and remote parts of the province, including in areas serviced only by circuit courts. Because of this, the parties asked the Panel to order the suspension to start on a date mutually agreed by the parties. The Panel finds doing so is in the public interest in the administration of justice.

COSTS

[105] The Respondent agrees to pay $1,000 in costs to the Law Society. This amount is consistent with the range of costs for a Rule 5-6.5 hearing in Item 25 of Schedule 4 – Tariff for Discipline Hearing and Review Costs.

[106] The Panel finds the proposed costs are reasonable and appropriate as the Respondent admitted their misconduct early in the process and fully cooperated with the Law Society to resolve the Citation.

[107] As is the Tribunal's general practice these costs will be payable on or before 30 days from the date of our decision.

RULE 5-8(2) ORDER

[108] The parties also asked the Panel to make an order under Rule 5-8(2) to ensure information that could identify the victim or any witnesses in the underlying criminal matter is redacted from the transcript of the hearing or exhibits before these are provided to the public under Rule 9-1.

[109] The parties say this is required to prevent disclosure of sensitive and confidential information to the public and to abide by the court ordered publication ban under s. 486.4 of the *Criminal Code* in the criminal proceeding, which was ordered to protect the complainant.

[110] The Panel finds a Rule 5-8(2) order is appropriate to ensure the publication ban is maintained.

ORDERS

[111] The Panel orders that:

(a) the Respondent is suspended from the practice of law under section 38(5)(d) of the Act for a period of four weeks, commencing on a date to be mutually agreed by the parties;

(b) the Respondent will pay costs to the Law Society in the amount of $1,000, inclusive of disbursements, payable within 30 days of this decision; and

(c) pursuant to Rule 5-8(2), any information that could identify the victim or a witness in the underlying criminal proceeding is to be redacted from any document provided to the public and from any other broadcast or transmission to the public.