

2022 LSBC 41
Hearing File No.: HE20210023
Decision Issued: November 7, 2022
Citation Issued: July 23, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

WILLIAM JAMES HEFLIN

RESPONDENT

**DECISION OF THE HEARING PANEL
ON FACTS AND DETERMINATION**

Written submissions:	March 16 and April 6, 2022
Supplemental submissions:	June 23, 2022
Panel:	Cheryl D'Sa, Chair Brendan Matthews, Public representative Krista Simon, Lawyer
Discipline Counsel:	Kathleen Bradley
Appearing on his own behalf:	William J. Heflin

INTRODUCTION/PRELIMINARY MATTERS

[1] A citation authorized by the Discipline Committee of the Law Society of British Columbia (the "Citation") was issued against William James Heflin (the

“Respondent”) on July 23, 2021. The Respondent admits that he was properly served with the Citation on July 23, 2021.

- [2] On March 10, 2022, a motions adjudicator ordered that the Complainant be identified as “X”. There shall be no references to the Complainant’s full name or initials.
- [3] An extensive Notice to Admit was deemed admitted on December 14, 2021, pursuant to Rule 5-4.8 of the Law Society Rules.
- [4] The parties agreed that this matter could proceed by way of written submissions, without a full hearing.

CITATION

[5] The Citation reads as follows:

1. On or about October 1, 2020, in relation to your client or former client X in a family law matter, you sexually harassed and/or sexually assaulted X, including through unwelcome comments, advances, and physical contact, contrary to one or more of rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia* and your fiduciary duties.

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

ISSUES

- [6] Issue #1: Do the Respondent’s acts constitute sexual harassment and/or sexual assault, contrary to one or more of rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia* (the “BC Code”) and his fiduciary duties?
- [7] Issue #2: If yes, does the Respondent’s conduct constitute professional misconduct or conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*, SBC 1998 c. 9 (the “Act”)?

Admitted facts

- [8] Much of the evidence is admitted by way of an extensive Notice to Admit regarding both facts and documents, dated November 5, 2021.

[9] In addition to notes, transcripts, emails and letters, the following were also admitted by way of the notice to admit procedure:

- (a) audio recording of the Respondent's October 1, 2020 meeting with X;
- (b) five audio recordings of messages the Respondent left X on her voicemail;
- (c) video recording made on November 19, 2020 on X's home security camera;
- (d) video recording still dated November 19, 2020 taken from a video recording made by X's home security camera; and

[10] The following relevant facts have been admitted by way of the Notice to Admit.

Background

[11] The Respondent was retained by X in 2017 for a family law matter in which she was seeking child and spousal support. X suffered a nervous breakdown that year, which the Respondent was aware of.

Courthouse meeting and subsequent events

[12] On October 1, 2020, the Respondent met with X in a meeting room in the Victoria Courthouse; the meeting was requested by the Respondent because he intended to inform X that he could no longer act as her counsel.

[13] The Respondent told X that he could no longer act as her counsel. He explained that his decision to withdraw as her counsel was based on his thoughts of retirement, his intent to run for city council, and his interest in having a sexual relationship with her.

[14] The Respondent then asked X to sign a Notice of Intention to Act in Person, without fully explaining the implications of it to her. X signed the Notice. The Respondent (through conversation) continued to leave open the possibility that he could act for her.

[15] The Respondent then left the meeting room to file the Notice with the Registry. When the Respondent was out of the room, X turned on the audio recording function of her cellular telephone. The Respondent was not advised by X that the conversation was being recorded.

- [16] Following his return from filing the Notice of Intention to Act in Person, the Respondent stated, “Okay, well, I’m not your lawyer anymore.” X replied, “You’re not?”. The Respondent replied, “Now I can do what I want.”
- [17] During the conversation, the Respondent kissed X several times, hugged her, and touched her breast.
- [18] The first kiss occurred shortly after the Respondent told X he was no longer her lawyer.
- [19] X crossed her arms and moved her body close to the table. She turned her head and did not look directly at the Respondent.
- [20] The Respondent moved closer to X and straddled her area with his legs. One leg was in front of her and the other was behind her. X remained close to the table with her arms crossed. The Panel notes that the Respondent specifically denied straddling X in his written submission. However, the Respondent had already admitted this fact in the Notice to Admit. As such, the Panel cannot give the Respondent’s submission on this fact any weight because it was not in proper evidence before the Panel.
- [21] The Respondent kissed X a second time.
- [22] The second kiss occurred when X stated “... just a peck”. The Respondent also touched X’s breast at that time.
- [23] Towards the end of the meeting, when the Respondent stated, “Just give me a hug”, the Respondent hugged X.
- [24] The Respondent kissed X a third time. After the third kiss, the Respondent said, “If you don’t stop that we will never get out of here.”
- [25] At no time did X expressly consent to the Respondent’s verbal or physical advances.
- [26] Towards the end of the interaction, X wished the Respondent luck and said “... but you know if you could just take, even take one case, my case ...” and the Respondent said, “Maybe I will.” X then stated, “And then just call me.”
- [27] Prior to the October 1, 2020 meeting, X had not given any indication to the Respondent that she was interested in a romantic relationship with him. One week later, X made a complaint to the Law Society alleging that there had been an incident at a courthouse where her lawyer had kissed her.

[28] After the courthouse meeting, the Respondent continued to attempt to contact X by calling her and leaving voicemails and visiting her home once.

ISSUE #1

[29] Do the Respondent's acts constitute sexual harassment and/or sexual assault, contrary to one or more of rules 2.2-1 and 6.3-3 of the *BC Code* and his fiduciary duties?

POSITION OF THE PARTIES

Respondent's position

[30] A summary of the Respondent's position is as follows:

- a. X was not a vulnerable person, although he does acknowledge that she had a "breakdown".
- b. The meeting at the courthouse was to discuss X's matter, and in the course of that meeting, he made the determination to "get off the file". He already had the Notice of Intention to Act in Person prepared.
- c. He admits that he kissed X three times while in the meeting room at the courthouse. He describes two subsequent acts of kissing as "we were kissing each other." He admits to touching X's breasts outside her clothing, and hugging X during the third act of kissing. His evidence is that "X contrived to touch my penis outside my clothes with one hand during that kiss."
- d. He asserts that consent is the "real crux of this matter" and admits there was no overt consent given. His position is that "our mutual conduct is so indicative of consent that consent at the time must be inferred in favour of myself."
- e. He asserts that there was no power dynamic and X was no longer his client when the impugned actions occurred.
- f. He agrees that X "exclaimed in surprise: "You touched my breast!", but that this was "not said in anger or with any condemnation."
- g. He posits that the Panel should evaluate consent from what "he had to deal with, not X's state of mind."

- h. He interpreted X's responses to his actions as favourable, and her complaint as a subsequent change of mind.
- i. He left five voicemail messages for X over a period of approximately two months, and did so because he had specific permission to call. Without that, he would not have done so. He attended X's home because he believed that he had implicit permission based on X giving directions to her home.

[31] Although the Panel reviewed the Respondent's written submissions, much of the submissions contained testimony that must be given little or no weight because it was not before the Panel in proper evidence.

Law Society's position

[32] A summary of the Law Society's position is as follows:

- a. X did not consent to the sexual activity. She was taken by surprise, was alarmed, and did not know what to do. She tried to steer the conversation back to her case, but the Respondent repeatedly guided it back to discussions of an affair.
- b. The Respondent deserted his client at a time when she needed him most. He put his own interests ahead of hers by leaving her without legal representation in order to pursue his own sexual interests. He harassed and assaulted a client who was in a vulnerable state, in circumstances where the power dynamic was highly imbalanced. Although he has admitted his actions, he refuses to acknowledge the impropriety of them.
- (c) The Respondent told X that he had three things to say: that he was thinking of retiring; that he wanted to run for city council; and that he wanted a sexual relationship with her. X stated that at that point, she went numb and froze. She could not process what was happening. She thought the Respondent was joking. She was not expecting it as they had barely met, and their conversations had always been about her case. She felt awkward and shocked. Her ears were ringing, and she could not process what the Respondent was saying.
- (d) X thought that no one would believe what was happening to her, so she turned on the audio recording feature of her phone and put it on the

table underneath her wallet. She thought CW, her former lawyer and friend, could listen to it and tell her what to do.

- (e) X explained that she tried to “play it off” as she did not want to make the Respondent feel bad that she did not want it to happen. She did not want him to feel embarrassed or rejected. She thought he was a “nice guy” making “not a very good move”. She trusted him because he was an older man, and she thought he was going to help her move forward with the child support application.
- (f) The Respondent asked X if she liked it. X explained that although she said yes, she was thinking, “I don’t know why I’m saying this, what the hell’s going on.” She said she remained seated with her arms crossed and her body pressed up to the table. She felt stuck.
- (g) As they continued to talk, X attempted to direct the Respondent to other subjects.
- (h) X explained that the Respondent attempted to kiss her a few other times. One time, she said, “... oh wow, you’re trying to kiss me ...” as she leaned away, but then said he could give her a peck on the cheek.
- (i) The Respondent talked about how he wanted the affair to happen. X joked that she just needed a “sugar daddy”. She explained she said that instead of just saying “no” because she thought that if the Respondent realized she was joking about it, he would think that she was not taking his offer seriously. The Respondent told X that he could not afford her and her kids.
- (j) As X left the courthouse, she took some hand sanitizer and put it on her lips and face. She does not recollect how she got home. Once there, she sat in her room and cried, thinking, “How the hell did I let that happen.”
- (k) X does not understand why she did not leave the room when the Respondent left to file the paper. She felt frozen and incapable of moving. She thinks about why she did not hit him or do something else. She has experienced nightmares. Her explanation to herself is that she respected the Respondent and was thinking about his feelings instead of hers. She did not want to hurt his feelings.

- (l) X did not consent to the Respondent's verbal or physical advances. She continues to be affected by the incident. She struggles socially and at home because she thinks the Respondent may attend at her home again. She has talked to a counsellor about the incident.
- (m) During her interview with a Law Society investigator, X played the audio recording of the incident for the investigator. After they listened to the recording together, X explained that she felt she had said things she should not have. She did not know why she went along with what the Respondent said. She noticed that her voice changed to a higher pitch when the Respondent talked about what he wanted to do, and she giggled or laughed during those parts of the conversation as well. She does not understand why she did not stop him or say "no". She does not understand why she put his feelings before hers, and does not want him to be put in a situation where he would not be able to support himself and his wife. The incident brought up suppressed trauma about an incident that happened to her as a child. She suspects the way she reacted to the Respondent was because it brought back all of those feelings of not knowing what to do, what to say, or how to act.
- (n) The Respondent confirmed that prior to meeting with X on October 1, 2020, there had been no indication from her that she was interested in a relationship with him, nor had he said anything about a romantic relationship to her.
- (o) The investigator played the audio recording of the incident for the Respondent during the interview. The Respondent explained that after he first kissed X, "There was a hint of surprise I think but then it turned into acquiescence and agreement I thought."
- (p) The Respondent thought that any imbalance in the power dynamic between himself and X had ended by virtue of him having resigned as her counsel. He recalled that X mentioned she wanted him to continue to act for her, but he was not prepared to act for her any longer. The Respondent did not recommend other counsel to X before he withdrew from her file.
- (q) The Respondent knew that X was having mental health difficulties, but thought that she was "well during the meeting or [he] would have never brought it up." He stated, "I don't really care to be involved with people who aren't sane." He knew "[o]f some of her struggles but they were over a year in the past."

- (r) The Respondent recalled having said “I’m gonna kiss you again”, to which X replied, “Just a peck”. Immediately following her comment, he touched her breast. The Respondent admitted that he did not have X’s consent to touch her breast.
- (s) The Respondent was asked if at any point during the meeting he understood X to say that she wanted to pursue a relationship with him. He replied, “It was all maybe, maybe not but you can call.”
- (t) The Respondent explained that when he said, “You’d better stop doing this, we’re not gonna get outta here”, it was in response to X touching his penis towards the end of the meeting.
- (u) The Respondent stated that when he wrote in his letter to the Law Society that it was the first time that yes actually meant no, he was referring to X’s actions in giggling, laughing, “being a bit coquettish”, being suggestive, and going “along with the whole thing”. He further explained, “Maybe we will, and maybe we won’t is where we left it.” He did not interpret any coquettishness as her trying to say “no”.
- (v) The Law Society’s position is that much of the evidence tendered by the Respondent is not admissible. The Respondent did not tender additional evidence or seek to withdraw the deemed admissions.

LAW AND ANALYSIS

Onus and burden of proof

[33] The onus of proving the Citation is on the Law Society, and the standard of proof is on a balance of probabilities: *Foo v. Law Society of British Columbia*, 2017 BCCA 151 at para. 63. The evidence must be scrutinized with care, and must be sufficiently clear, cogent and convincing: *Law Society of BC v. Schauble*, 2009 LSBC 11 and *Law Society of BC v. Seifert*, 2009 LSBC 17 citing with approval *F.H. v. McDougall*, 2008 SCC 53.

The law of sexual harassment

[34] The *BC Code* provides:

6.3 Harassment and discrimination

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.

[35] The commentary to rule 6.3 clarifies that “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.” Accordingly, a review of human rights laws is important to the analysis at hand.

[36] The Respondent has not provided any legal authority to assist the Panel in assessing the nature of the alleged conduct. The Law Society has provided extensive submissions on this element of the Citation, which provides a helpful overview, and worthwhile reviewing in some detail.

Law Society’s submissions

[37] Sexual harassment is not specifically defined in the British Columbia *Human Rights Code*, RSBC 1996 c. 210 or the *Canadian Human Rights Act*, RSC 1985 c. H-6. Both statutes contain provisions prohibiting discrimination on the basis of sex, which is further developed in human rights case law. The Panel relies on *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252 as the leading case on sexual harassment. The Supreme Court of Canada offered a broad definition of sexual harassment as sex discrimination: unwelcome conduct of a sexual nature that leads to adverse consequences for its victims. At para. 33 of *Janzen*, and cited with approval in *Law Society of BC v. Butterfield*, 2017 LSBC 02 at para. 24, the court provided a non-exhaustive definition of sexual harassment as follows:

Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v.*

Ladas, supra, and as has been widely accepted by other adjudicators and academic commentators, 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.

[38] The Panel accepts the three-part test set out in *Janzen*, as articulated in the materials before us:

1. the conduct must be sexual in nature;
2. the conduct must be unwelcome, and
3. the conduct must detrimentally affect the relevant environment or lead to adverse consequences.

The conduct must be sexual in nature

[39] Sexual harassment includes behaviour on a wide spectrum: subtle sexual innuendos, overt or crude sexual remarks, leering, grabbing, affectionate gestures, propositions for dates or sexual favours, pinching, grabbing, hugging, patting, leering, brushing against, and touching. Sexual harassment may occur in a single or multiple incidents; it may be physical or verbal. Sexual harassment can include sexual assault. We adopt the definition of sexual assault from the criminal law context (*R. v. Ewanchuk*, [1999] 1 SCR 330 at para. 23): non-consensual sexual touching.

The conduct must be unwelcome

[40] Evaluating whether the conduct is unwelcome is an objective test, invoking the reasonable person standard. In *Dutton v. British Columbia (Human Rights Tribunal)*, 2001 BCSC 1256 at para. 70, the court held:

... 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.

- [41] Thus, consideration of “whether the respondent knew, or ought reasonably to have known that his actions were unwelcome”, as well as the power imbalance between the parties, must be considered: *J.B. v. Russell*, 2020 HRTO 462 at para. 120.
- [42] In *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158 at para. 82, we are cautioned about the implication of gender-based myths and stereotypes at play when a complainant is required to disprove consent or where a response to unwanted conduct is not a clear rejection of sexual advances. 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.
- [43] The following Law Society discipline decisions from across the country were referenced, providing context for the scope of sexual harassment and/or sexual assault in the lawyer and client relationship.
- [44] *Butterfield* – the lawyer made comments of a sexualized nature to one employee and touched her lower back, and some of the conduct occurred in the presence of another employee. The conduct was admitted and the panel held that the lawyer knew or reasonably ought to have known that his actions would result in humiliation and intimidation of both employees.
- [45] *Law Society of Saskatchewan v. Hale*, 2021 SKLSS 5 – the lawyer engaged in unwanted conduct during a meeting at the courthouse. He moved close to his client, made suggestive comments and ran his hands up and down her thighs. The lawyer admitted the allegation that he sexually harassed his client in the course of his professional practice.

- [46] *Law Society of Upper Canada v. Langlois*, 2008 ONLSHP 46 – the lawyer attended the client’s home, where he embraced the client, kissed the client on the cheek, caressed her back and buttock, and brushed his hands against the side of her breast. The lawyer’s conduct amounted to sexual harassment of a vulnerable client, and he was found guilty of professional misconduct.
- [47] *Law Society of Manitoba v. Davis*, 2001 MBL 4 – the lawyer made unwelcome comments and overtures of a sexual nature, including attempting to kiss or actually kissing despite resistance. The lawyer attended the client’s home with a gift. The lawyer admitted he sexually harassed his client, and the panel concluded the sexual harassment amounted to a breach of trust that undermines the lawyer-client relationship.
- [48] *Law Society of Upper Canada v. Sinukoff*, 2012 ONLSHP 12 – the lawyer solicited sexual favours for a fee, and touched the client on her neck and breast without consent. The lawyer admitted to sexual harassment, which was conduct unbecoming.
- [49] *Law Society of Upper Canada v. Bondzi-Simpson*, 1999 CanLII 18462 (ON LST) – the lawyer made sexual advances, including kissing and touching his client’s breast and attempting to discuss sexual matters with her. The lawyer’s conduct amounted to sexual harassment.
- [50] *Law Society of Ontario v. Tweyman*, 2021 ONLSTH 166 – the lawyer engaged in verbal conduct of a sexual nature, which had an adverse impact to the client. The lawyer was found to have sexually harassed the client through his sexually suggestive, obscene or derogatory comments.

The conduct must detrimentally affect the relevant environment or lead to adverse consequences

- [51] In *Hale*, the panel considered the impact to the client, including the physical violation of her sexual integrity. In *Tweyman*, the impugned conduct was found to be conduct that might reasonably have been expected to cause harm (insecurity, discomfort, offence or humiliation) to the client. In *Bondzi-Simpson*, the impact of the lawyer’s conduct was considered: it made the client anxious and upset, and caused her to blame herself for allowing the sexual talk to continue.

Respondent’s submissions

- [52] The Respondent’s legal authorities relate only to consent and the defence of mistaken but honest belief in consent. It appears this relates to the specific

allegations of sexual assault or unwanted sexual touching, although, as noted above, this would also be a part of the allegation of sexual harassment. The Respondent cites *R. v. Glennie*, 1999 CarswellBC 330, [1999] BCJ No. 310, 41 WCB (2d) 248 and *R. v. White*, [1986] BCJ No. 66, 24 CCC (3d) 1 (BCCA). The Respondent writes in his submission:

In an era where females are empowered and are emphatically capable of looking after their own interests and concerns: an era where no means no, I find it difficult to understand how X could quietly accept what was occurring without a murmur only to complain to the Law Society later. I have already conceded to the investigator that there was no specific consent to the act complained of.

- [53] The Respondent’s position regarding consent does not accord with current approaches in law. As noted above, in the more recent case of *R. v. Barton*, 2019 SCC 33 (CanLII), [2019] 2 SCR 579, the Supreme Court of Canada clarifies the law of consent. In particular, the court clarifies that the defence should be referred to as honest but mistaken belief in communicated consent, although this does not change the requirements of the defence itself. At minimum, there must be some evidence that a complainant of assault must have communicated consent – this is, effectively, a shift away from “no means no” to “yes means yes”. Thus, the Respondent cannot rely on silence, passive behaviour or ambiguous contact as evidence of consent. Implied consent is not a defence. Of note, the Respondent’s admission that there was “no specific consent to the act complained of” falls short of the defence upon which he seeks to rely.

Law Society’s reply submissions

- [54] The Law Society cautions the Panel that a discipline hearing is not a criminal hearing and thus criminal law principles may inform the Panel’s analysis, though they are not determinative. Their submissions outline updates to the law of consent, highlighting that implied consent is not a valid defence to sexual assault.

Summary, application and analysis

- [55] The Law Society suggests that this Panel’s analysis should focus on whether a reasonable person, considering the point of view of the Respondent, as well as the point of view of X, and considering the power imbalance between them, would have considered the Respondent’s actions to be unwelcome. The Panel agrees that this is the approach to be taken.

[56] This Panel accepts the evidence set out in the Notice to Admit. By way of summary, the Panel accepts that:

- (a) X did not consent to the sexual activity. She was taken by surprise, alarmed, and did not know what to do. She had thoughts about how she could end the encounter and exit the room they were in. She tried to steer the conversation back to her case, but the Respondent repeatedly guided it back to discussions of an affair. Once she left the company of the Respondent, X drove home, although she does not recall driving home. She was in disbelief about what happened, and cried when she arrived home.
- (b) X did not consent to the Respondent's verbal or physical advances. She felt like she could not get out and felt frozen.
- (c) X has felt shame about the incident. X has experienced self-doubt and blame about whether she would be believed.
- (d) X describes struggling socially and at home because she thinks the Respondent may attend at her home again. She has experienced periods of sleeplessness and nightmares. She has talked to a counsellor about the incident.
- (e) X continues to be affected by the incident.
- (f) After the Respondent left the meeting room where the impugned conduct took place, X did not speak with the Respondent again.

[57] X's evidence is that she turned her head to avoid the first kiss, and she crossed her arms and leaned into the desk. Considered together, all this evidence supports the finding that X did not communicate consent to the Respondent's actions.

[58] The lawyer-client relationship is one of trust, and often involves a power imbalance. X was a vulnerable person at the time of her meeting with the Respondent. She was seeking assistance with an important family law matter, including child support. She suffered mental health issues, which she had disclosed to the Respondent. She was in a precarious financial situation, as she was only receiving CPP disability benefits, and was in a dispute with her disability insurer regarding eligibility for benefits.

[59] This Panel finds that the evidence establishes that the Respondent did not have X's consent to engage in the conduct complained of. The defence of honest but mistaken belief in communicated consent does not apply in the circumstances, and

for further clarity, the Respondent's assertion of implied consent is no defence to his actions.

- [60] Given that the Panel has found that the Respondent's conduct inside the courthouse alone amounts to sexual harassment, it is not necessary for the Panel to further consider the subsequent telephone calls and the Respondent's attendance at X's home.
- [61] Notwithstanding anything in the above analysis, the Panel accepts that it does not have jurisdiction to decide whether the Respondent committed sexual assault under the *Criminal Code*. The Panel sought guidance from the parties on the following question:

If the Panel makes a finding that the conduct including touching X amounted to sexual harassment, is it necessary for the Panel to also address sexual assault?

- [62] The Law Society's supplementary submission was that the finding would not be necessary in that context. The Respondent did not submit a response.
- [63] Accordingly, having found the Respondent's acts constitute sexual harassment, there is no need to consider whether the Respondent's acts constitute sexual assault as set out in the Citation.

ISSUE #2

- [64] If the answer to the question raised on Issue #1 is yes, does the Respondent's conduct constitute professional misconduct or conduct unbecoming the profession, pursuant to s. 38(4) of the *Act*?

LAW AND ANALYSIS

Professional misconduct v. conduct unbecoming

- [65] Having found that the Respondent's conduct constituted sexual harassment, the Panel must now decide whether that conduct constitutes professional misconduct or conduct unbecoming.
- [66] The hearing panel in *Law Society of BC v. Berge*, 2005 LSBC 28 adopted the "distinction that professional misconduct refers to conduct occurring in the course

of a lawyer's practice while conduct unbecoming refers to conduct in the lawyer's private life."

[67] *Law Society of BC v. Martin*, 2005 LSBC 16 sets out the test for professional misconduct. The test to be applied to this matter is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members."

[68] The pertinent sections of the *BC Code* in this analysis are rules 6.3-3 and 2.2-1.

6.3.3 states that a lawyer must not sexually harass any person.

2.2-1 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.

[69] Section 1 of the *Act* sets out the definition of conduct unbecoming the profession:

'conduct unbecoming the profession' includes a matter, conduct, or thing that is considered, in the judgment of the benchers, a panel or a review board,

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession.

POSITION OF THE PARTIES

Law Society's position

[70] The Law Society submits that the Respondent committed professional misconduct, given that the conduct occurred in the courthouse, in the context of a professional meeting, and that his relationship with X did not extend beyond the professional relationship. The Law Society also submits that after the Respondent filed the Notice of Intention to Act in Person and returned to the courthouse meeting room, X did not think the solicitor-client relationship had ended. Further, the Respondent still had some file materials and there were outstanding legal fees. The submissions of the Law Society state: "as well, during his Law Society interview, the Respondent conceded that he may have said something about the possibility of a relationship once he was no longer X's lawyer."

- [71] The Law Society’s alternative argument is that if the Panel concludes “that the conduct occurred in the course of the Respondent’s private life, ... the conduct was contrary to the best interests of the public and the legal profession, and that it harmed the standing of the legal profession, and therefore amounted to conduct unbecoming the profession.”

Respondent’s position

- [72] The Respondent submits “the key aspect of whether my conduct was ‘professional misconduct or conduct unbecoming the profession’ turns purely on the issue of consent.” Further, the Respondent states that:

... there was no coercion nor was there any power imbalance between us. I had already quit as her counsel and had given her the materials from my file (with the except [sic] of a pleadings binder I subsequently discovered and turn [sic] over to the investigator to return to X.

- [73] The Respondent’s submissions do not further address the issue of professional misconduct versus conduct unbecoming.

Application and analysis

- [74] Based on the foregoing, the Panel finds that the appropriate test to apply is that of professional misconduct, rather than conduct unbecoming the profession. In determining the correct test, the Panel considered that the incident in question took place in the Victoria Courthouse, mere moments after the Respondent had X sign a Notice of Intention to Act in Person. Further, the recording indicates that after the initial kiss occurred, the Respondent and X discussed potential representation in the future. The context does not suggest that the conduct occurred in the Respondent’s personal life, but rather while he was still representing X and immediately after. Further, the Respondent left open the possibility that he could continue to act for X.
- [75] Having determined the test to apply, the Panel must now consider whether the facts in this matter disclose a marked departure from that conduct the Law Society expects of lawyers, constituting professional misconduct.
- [76] On this issue, the Respondent’s submissions only state that “if consent is demonstrated to exist, then it is not a marked departure from that conduct the Law Society expects of its members.” Having found earlier in this decision that consent did not exist, and that the Respondent’s conduct amounted to sexual harassment, the Panel finds that the behaviour constitutes a marked departure from that conduct the Law Society expects of lawyers and is specifically in violation of rule 6.3.3 of

the *BC Code*. 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. Further, X still owed the Respondent payment for legal fees. Of utmost importance, the recording indicates that X did not think the solicitor-client relationship had ended when the Respondent first returned from filing the Notice of Intention to Act in Person. When the Respondent told X he was not her lawyer anymore, she replied, “You’re not?”

[77] The Respondent was in a fiduciary relationship with X. The Panel disagrees with the Respondent’s assertion that there was no power imbalance. Although the Notice of Intention to Act in Person had been filed, it was not appropriate conduct as a lawyer in a courthouse to return to the meeting room and indicate to X that he could now do whatever he wanted. Relying on the filing of the Notice of Intention to Act in Person to engage in this conduct is an oversimplification of the solicitor-client relationship. Fees were still outstanding, the Respondent had left open the possibility of acting for X again, and some file materials had not yet been returned. The Respondent also had knowledge that X suffered a nervous breakdown and needed help in her legal matter. It was wholly inappropriate for the Respondent to conduct himself in such a manner. Such conduct is neither acting honourably nor is it acting with integrity as required by rule 2.2-1 of the *BC Code*. This conduct in totality constitutes a marked departure from what the Law Society expects of lawyers.

[78] Having found a marked departure from that conduct the Law Society expects of lawyers, the Panel finds that the Respondent committed professional misconduct.

CONCLUSION/DETERMINATION

[79] The Respondent’s actions, to which he admits, were unwelcome sexual conduct and resulted in adverse consequences for X. This Panel finds that the Respondent’s acts constitute sexual harassment contrary to the *BC Code*.

[80] The Respondent’s conduct occurred while he was engaged in a solicitor-client relationship with X. This Panel finds that his conduct amounts to professional misconduct pursuant to the *Act*.