2022 LSBC 34
Hearing File No.: HE20190070
Decision Issued: October 3, 2022
Citation Issued: November 1, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

THOMAS PAUL HARDING

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing dates:	May 9 and 10, 2022
Panel:	Michael F. Welsh, KC, Chair Carol Gibson, Public representative
Discipline Counsel:	J. Kenneth McEwan, KC and Emily A. Kirkpatrick
Counsel for the Respondent:	William G. MacLeod, KC
Written reasons of the Panel by:	Michael F. Welsh, KC

CITATION AND PROCEDURAL BACKGROUND

[1] The Respondent was found by this Panel to have committed three instances of professional misconduct. All were in making uncivil and untrue comments about the lawyer on the defence side of a personal injury matter to that lawyer's instructing client (an insurance adjuster). The Respondent is now before the Panel to determine the appropriate sanction. The decision on Facts and Determination (the "F&D decision") is found at 2021 LSBC 02.

[2] The difficulty for the Respondent, and for this Panel, in determining that sanction is that this is not his first time at the well for this type of misconduct. Instead, as detailed later, he has a disciplinary record rife with incivility.

[3] As a preliminary matter, the Panel at this point comprises Michael F. Welsh, KC, the Bencher chair, and Carol Gibson, the public representative. Ardeth Walkem, KC, the lawyer member of the Panel, was appointed a judge of the Supreme Court of British Columbia after the hearing on Facts and Determination but before the F&D decision was rendered. The Law Society President ordered that the remaining two-person Panel proceed with this Disciplinary Action hearing and decision. The authority of the President (now the Tribunal Chair) to make this type of order under the Rules was recently confirmed by the review board in *Law Society of BC v. Singh*, 2022 LSBC 13 at paras. 31 to 42.

FINDINGS AT THE FACTS AND DETERMINATION STAGE

[4] Stated within a brief compass, the facts and findings are as follows.

[5] The Respondent acted as counsel for a plaintiff in a personal injury action. The defendant was insured by ICBC and represented by legal counsel (CB). In the course of settlement discussions, the Respondent sent CB a draft Bill of Costs claiming a total of $25,533.09, including tariff items and disbursements. The action was settled by telephone between the two lawyers, with agreement on amounts for damages and Part 7 claims for the Respondent's client, along with disbursements of approximately $7,900. Later that day, the Respondent emailed CB and confirmed that the action had settled "for $190,000 NEW MONEY plus costs". The Respondent testified that CB told him in that telephone call that ICBC would only seek minor adjustments on costs.

[6] CB, by return email, confirmed that the settlement funds had been requisitioned and that they were in the process of being paid to the Respondent's firm in trust. He also noted that they were working out the numbers for the Bill of Costs.

[7] The Respondent's client executed a full and final release of all claims, with the Respondent as the witness, which confirmed the settlement amount of $190,000 and noted "costs and disbursements to be assessed/agreed".

[8] Over the course of several months of email correspondence between CB, the ICBC adjuster and the Respondent, CB made offers to settle costs and disbursements with sums ranging from $15,000 to $21,907.50.

[9] In emails to the instructing adjuster, the Respondent claimed CB had previously agreed to pay the Bill of Costs "as presented" and had broken his word. He said that CB "is walking into a buzz saw" and that "breach of his promise is a pretty serious matter". The Respondent said he will do his best to make the Registrar enforce the Bill of Costs. CB, who had been copied, responded by email that at no time did he agree to pay the costs as presented. The Respondent then emailed back to CB and the adjuster stating "[CB's] 'clear recollection' is the reason my firm will not deal with [him] by telephone, or in person except in a courtroom with the DARS [Digital Audio Recording System] running."

[10] In the end, the Respondent's client accepted the last costs offer from the defendant of $21,907.50, and the Respondent advised the adjuster and CB of that acceptance.

[11] While the Panel accepted the Respondent's submission that he honestly believed an understanding had been reached on costs with CB on October 26, 2018, the Respondent also admitted in his testimony that he knew it was not a legally enforceable agreement. We found that the Respondent knew his comments to the adjuster were not true, his conduct toward CB was discourteous and uncivil, and he was not acting in good faith in his dealings with CB and the adjuster. We determined that this constitutes professional misconduct.

POSITION OF THE PARTIES ON DISCIPLINARY ACTION

[12] The Law Society seeks a suspension of between two and three months. The Respondent, while acknowledging that the appropriate sanction in this case is a suspension, argues for a period of two weeks to one month, although in oral submission his counsel said it should be, at most, two months.

SUBMISSIONS

[13] In its submissions, the Law Society emphasized the Panel's finding that the Respondent knew his statements to the adjuster were not true. The Law Society submits that in assessing disciplinary action, we must consider that the Respondent

knowingly made false statements, which he knew were defamatory of CB and were designed to impugn CB's integrity with his client.

[14] The Law Society further submits that the comments were made as part of a set of tactics to pressure or bully the adjuster and CB to capitulate on the costs issue. As noted in the F&D decision, those tactics included issuing a subpoena to witness to CB for the Registrar's costs hearing and serving it on CB along with a box of chocolates.

[15] The Law Society also referred to the Respondent's professional conduct record ("PCR") stating that it shows he has a propensity to make accusations about other counsel's conduct, or alleged misconduct, on his files.

[16] From the Respondent's PCR, the Panel finds the following is relevant to the issues in this hearing. We note in passing that there are two other discipline decisions respecting quality of service to clients that we do not consider as substantially relevant, and that a recent hearing panel decision finding misconduct by the Respondent over matters including comments he made, which was set aside by the Court of Appeal, and which has no relevance before us (see *Law Society of BC v. Harding*, 2022 BCCA 229).

(a) In 2003, the Respondent was fined $1,000 and costs by a hearing panel for stating at a Family Law Section dinner that another lawyer, whose former clients had retained the Respondent and were suing him, had admitted conduct that should get him disbarred and that the Respondent would see him disbarred. The Respondent stopped the comments when asked by others present and later retracted the comments and apologized to the other lawyer (2003 LSBC 20).

(b) In 2004, the Respondent had a conduct review for stating in court that opposing counsel on a file had breached an undertaking and offered false evidence, misstated facts or law, asserted untruths and failed to conduct himself as a "reasonably [*sic*] trial lawyer". The court found no basis for the comments and the Respondent apologized. However, similar comments then arose on a contested costs hearing. The Respondent admitted a need to reflect on his comments and that he had been enraged. He said he was now consulting with other counsel when a response might be considered "inflammable" and understood his clients were better served if he did not get into personal disputes with opposing counsel. The Conduct Review Subcommittee recommended no further action and opined (incorrectly) that similar matters were unlikely to occur.

(c) In 2005, the Respondent was subject of another conduct review for writing in letters that another lawyer had counselled perjury and exerted some pressure on a witness to give untruthful evidence. He admitted the letters went out unedited in a hurry and that only afterward did he have second thoughts. He commented that when he sees what he feels to be dishonourable conduct, the idea of mincing words does not appeal to him and that "sometimes you need to yell". He had arranged with an associate to review his potentially "flammable" letters and to take more time when issues that "enrage" him arise to ensure his communications are appropriate and not subject to criticism. Again, no further action was recommended, but it was tellingly stated: "[h]e also understands that there is a limit to the patience of the Law Society concerning a potential future occurrence of similar conduct, and that both his interests and his clients' are ultimately best served by reflecting more carefully before transmitting his views."

(d) In 2013, the Respondent was found by a hearing panel to have committed professional misconduct for rude and discourteous comments to an opposing counsel (2013 LSBC 25). He implied that the lawyer was "stupid and dishonest" and had imposed a "stupid undertaking". After a reply by the lawyer, the Respondent made dismissive comments of the lawyer's understanding of English usage saying, in part: " … were you to look it up, that 'Mr. [sic] is not part of your last name but is in fact an 'honorific' signifying respect. Since none applies, I did not use it. All that separates us from the great apes is the precise use of language. In your case apparently not." The hearing panel found that a short suspension together with the Respondent undertaking to continue with anger management counselling and treatment with a psychologist would be the most appropriate disciplinary action, but as the Law Society only sought a $2,500 fine along with the undertaking, the hearing panel reluctantly accepted that outcome (2014 LSBC 06).

(e) In 2014, the Respondent was found by a review board to have committed professional misconduct in an incident at a tow lot where his mother-in-law's car was impounded. In order to induce the RCMP to attend on what was a civil dispute, the Respondent said he would "take a crowbar and smash up the place" and then blocked the entrance with his vehicle (2015 LSBC 45). That decision was upheld by the BC Court of Appeal (*Harding v. Law Society of British Columbia*, 2017 BCCA 171). The Respondent was suspended for three weeks (2018 LSBC 09).

(f) Lastly, the Respondent had another conduct review in 2021 in part for making discourteous and unprofessional comments about a Supreme Court judge and the opposing party in emails to his client. He described the judge as "Kind of an odd guy", "Sometimes just nasty. And flips from nice to nasty." and possibly, " … having a senior moment …", and referred to the other party as a "lying hag". He admitted his comments were improper and unprofessional, but also told the Subcommittee that while he does engage in "tone checks" on his written communications, he sometimes has difficulty recognizing when such a step is required or beneficial. He also troublingly said that he felt "targeted" by the Law Society.

[17] Counsel for the Respondent submits that in the overall context of discourtesy as professional misconduct, this is not a grave matter. CB never alleged that he had suffered any harm from the comments and there is no evidence that anyone else was harmed. Further, the Respondent apologized to CB first by a note, and later in person. CB accepted that apology.

[18] With respect to the Respondent's PCR, counsel for the Respondent submits that in none of the prior situations was there even any suggestion of dishonesty or the Respondent preferring his own interests to those of his clients. It was commitment to his client's cause in each case that was found to be excessive.

[19] Counsel for the Respondent further submits that the Respondent's PCR shows sincere efforts by the Respondent to change his behaviour and moderate his language when the actions of others may cause him to consider comments that "cross the line". As noted, the Respondent took a course of treatment for anger management under an undertaking to the Law Society, and as noted in the most recent conduct review, he renewed his commitment to "check his tone". In the last several years, this is the only situation of incivility that has brought the Respondent before a hearing panel where professional misconduct has been found. As counsel put it, the Respondent has made sincere attempts to improve.

[20] Counsel for the Respondent also referred us to a number of letters from senior BC lawyers who have known the Respondent for many years, who know his history before the Law Society and who have read the F&D decision. Many of the letters state the opinion that the Respondent has made successful efforts to moderate his tongue and has sought advice and assistance from them with his problem of making potentially uncivil comments. A number again note that the Respondent's history of incivility is tied into his passionate commitment to the interests of his clients. Lastly, the references speak to the Respondent's high competence in his litigation

and advocacy skills, his mentorship and assistance of other lawyers, both professionally and personally, the numerous courses he has taught through the Association of Trial Lawyers of British Columbia and other organizations, and of his contributions to assist the disadvantaged in our society, including substantial food bank assistance and purchasing items such as hats or socks for the homeless.

ANALYSIS

[21] We begin by quoting from an opinion piece by Malcolm Mercer, chair of the Ontario Law Society Tribunal:

> I refer to civility not to talk about the substance of the civility requirement but simply to observe that the point of the civility requirement in respect of disputes is to better ensure that the adversarial process operates properly. An advocate who is improperly 'uncivil' may achieve a better result for his or her client (although the opposite is often true) but such is corrosive of the legal system. (*Enlightenment Now!* Slaw blog posted September 4, 2020: http://www.slaw.ca/2020/09/04/enlightenment-now)

[22] These remarks are apropos of the Respondent and echo recommendations made to him in conduct reviews and by hearing panels. They are also relevant to the suggestions by his counsel, and in some of the reference letters, that it is somehow mitigating that when he acts like this, it is not for personal gain but in overzealous service of his clients. While, as noted later, this can be a factor in some cases, we see little or any application here.

[23] In fact, we completely disagree with those suggestions. Certainly, making derogatory comments about lawyers and judges for personal gain, at the expense of the client, is highly aggravating, but it does not follow that the same conduct in the misguided service of the client belies its severity.

[24] The Panel notes that the remarks made in this case did not occur in a vacuum. While they reflected inflamed feelings over what the Respondent felt was a betrayal in principle on how much the costs might be adjusted, they were also done, at least in part, to exert pressure on the defendant to pay more costs than it offered. The Respondent was sowing discord and distrust between the other counsel and the instructing adjuster. Taking these improper actions to further a client's case, even if done *gratis*, is not mitigating or even neutral. While if it had been for his personal interest that would be especially aggravating, as Mercer points out, done in purported service of his client, it remains aggravating as it corrodes the very legal system in which we serve our clients.

[25] While the Panel has not quoted extensively from the reference letters, as stated earlier, all the writers were aware of the Respondent's PCR and had read the F&D decision. Some spoke to concerns of the writer about the dichotomy between the ability of the Respondent and his service to the profession and the public, and his propensity to engage in making inflammatory or derogatory comments. Others spoke simply to his service and skill. We have carefully considered the reference letters, and quote from a couple, but we also note the somewhat limited role they play in disciplinary action proceedings.

[26] As stated in the recent decision of *Law Society of BC v. Gregory*, 2022 LSBC 17 at paras. 45 and 46:

> The Panel may consider good character evidence in determining an appropriate sanction, but such evidence has limited weight in disciplinary matters. We agree with the perspective that '[v]irtually all lawyers are responsible for some good deeds, and virtually all are held in high esteem by some other lawyers and clients. The discipline hearing panel must ensure that the process is not transformed from a deliberative process into a referendum among members of the profession' (Gavin Mackenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf (consulted on June 2, 2022), Thomson, Reuters, at para. 26:18, p. 26-59).
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> As explained by the review panel in *Law Society of BC v. Johnson*, 2016 LSBC 20, at paras. 45 to 46, ' … to put too much weight on character letters would, in effect, put the friends and colleagues of the Respondent in the place of the members of the hearing panel and would detract from the Law Society's duty to protect the public interest.'

[27] As in *Gregory*, we consider that the Respondent is well respected by his colleagues, but " … character reference letters are not determinative and amount to only one factor to be considered when determining the appropriate sanction. As character reference letters are to be given limited weight, they provide limited consideration to mitigating penalty" (at para. 49).

[28] We turn to the principles of relevance in this case, based on what are often called the "consolidated *Ogilvie* factors" (see *Law Society of BC v. Dent*, 2016 LSBC 05 at paras. 19 to 23).

[29] As recently stated in *Law Society of BC v. McLeod*, 2022 LSBC 24 at paras. 9 to 11:

> In *Law Society of BC v. Dent*, the hearing panel wrote that panels should move away from the long list of factors set out in *Ogilvie* and instead utilize a "modern approach" where the relevant *Ogilvie* factors are considered under four distinct headings:
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> (a) nature, gravity and consequences of conduct;
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> (b) character and professional conduct record of the respondent;
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> (c) acknowledgement of the misconduct and remedial action; and
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> (d) public confidence in the legal profession including public confidence in the disciplinary process.
>
> This approach was recently reaffirmed in *Law Society of BC v. Lee*, 2022 LSBC 05.
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> Accordingly, in the modern approach, not all of the *Ogilvie* factors come into play in every proceeding and the weight to be placed on the various factors varies based on the particular facts of each matter.

[30] All are of importance here.

[31] With respect to the nature, gravity and consequences of the conduct, we find it was of moderate severity on its own, not accounting for the PCR, even though the Respondent had no personal financial gain and there was no evidence of harm to CB or CB's client.

[32] With respect to the Respondent's character and PCR, this is not a "one off" situation as has arisen in some of the cases to which we were referred. The Respondent is a very senior member of the profession with a long history of this sort of conduct, although as his counsel pointed out, it is somewhat less frequent in recent years. That a PCR is relevant is beyond question, being mandated for consideration under Rule 5-6(5). Its weight will depend on the circumstances of each case. Here, we find the Respondent's PCR one of the most significant factors in our decision as there are now decades of this behaviour. Against that the Respondent's otherwise good reputation is also relevant, but for the reasons noted earlier respecting his reference letters, it is of more limited weight.

[33] As to acknowledgement of the misconduct and remedial action, the Respondent has accepted the F&D decision and made his submissions in light of it. However, the specific remedial steps he has taken are limited and are the same ones he has tried on numerous occasions with little, if any, success. As we have lingering concerns

that he can change his ways, "rehabilitation" is a concern. The Respondent has a repeated pattern, which seems almost habitual, of firing off a catchy but pejorative sentence without first thinking about the import of what he is saying.

[34] As is stated in a reference letter from J. Scott Stanley, who has known the Respondent professionally since 1994 and who has spoken with the Respondent about his PCR and the need to change his behaviour, the Respondent will:

> … do things that he thought others would perceive as clever and humorous. There is also an element of wanting to project an image of grandiosity. The act of sending a box of chocolates to his opposing counsel is likely an example of this. While the humour and levity are welcomed by some, they are not welcomed by all. Mr. Harding is highly intelligent and his attempts at humour and levity often miss the mark completely. They can come across as cruel and insulting. *I have encouraged Mr. Harding to avoid these behaviours and to focus on the serious work of advancing the interest of his clients.*
>
> [emphasis added]

[35] That the Respondent loves the proper use of the English language and a clever turn of phrase is clear from the comments that form the citation in this case and from those in prior situations that led to conduct reviews and citations. However, he has let that love overtake his ability to speak wisely and temperately. We were all taught when young that when you have nothing good to say, then say nothing. That appears to be a lesson he has not yet learned.

[36] Finally, when considering public confidence in the legal profession, including confidence in our disciplinary process, we have to consider both specific deterrence to the respondent and general deterrence within the profession, where issues of civility are of increasing concern. We must also consider similar cases and how our decision maintains the public integrity of the legal profession.

[37] We have reviewed a number of decisions where professional misconduct was found based on intemperate or derogatory comments, including the Respondent's own prior cases, together with: *Law Society of BC v. Johnson*, 2014 LSBC 50 (aff'd 2016 LSBC 20); *Histed v. Law Society of Manitoba*, 2021 MBCA 70; *Law Society of Upper Canada v. Murphy*, 2010 ONLSHP 23; *Law Society of BC v. Vlug*, 2014 LSBC 40; *Law Society of BC v. Barker*, 1993 LSDD No. 189; *Foo v. Law Society of British Columbia*, 2017 BCCA 151. They suggest a fairly wide range of suspension periods, from two weeks up to and including six months in appropriate circumstances.

[38] The Respondent has to stop this self-destructive and corrosive behaviour. Ultimately it lies within him to do so. As one of his references, Mr. Hoogbruin, states, the actions that bring him over and again before the Law Society are often "self-inflicted wounds". Mr. Hoogbruin laments what he perceives as the enormous toll these repeated incidents, and the conduct reviews and discipline hearings that follow, have on the Respondent, emotionally, energetically and financially. No one wants to see the Respondent here, but despite his counselling, his turning to peers for advice, his having written communications vetted, it continues to happen. The Respondent clearly has much to offer his clients and the profession and he has a record of good service to both, but he must vanquish this linguistic demon that controls him.

[39] We agree that the time has unfortunately arrived when fines are insufficient and a suspension from practice is the only option. After a review of the case law, the Respondent's PCR and the consolidated *Ogilvie* factors, we find that the two to three-month suspension proposed by the Law Society is the appropriate range for a disciplinary action here. The one-month suspension proposed by the Respondent is insufficient to provide the necessary message to the Respondent, the profession and the public. Overall, we have determined that a two-month suspension is warranted and we hope that it will give the Respondent time to reflect on where this behaviour is taking him in his career and his life, and to finally take the steps needed to stop.

COSTS

[40] The parties have agreed that the costs, disbursements and applicable taxes of the Law Society will be set at $14,000 all-inclusive.

ORDERS

[41] The Respondent is suspended from the practice of law for a period of two months. The commencement of that suspension will be on a date as agreed by the parties, or failing agreement, as determined by the Panel with the parties having leave to provide submissions on the commencement date.

[42] The Respondent must pay costs to the Law Society in the total amount of $14,000, payable within 45 days or as agreed between counsel for the parties.