2022 LSBC 23
Hearing File No.: HE20200061
Citation issued: July 23, 2020
Hearing File No.: HE20210059
Citation Issued: November 8, 2021
Decision issued: July 12, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

ROWAN MACKENZIE DAVISON

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing dates:	April 6 and 7, 2022
Panel:	Jennifer Chow, QC, Chair Paul Barnett, Public representative Nicole Byres, QC, Lawyer
Discipline Counsel:	Jordanna Cytrynbaum
Counsel for the Respondent:	Henry C. Wood, QC
Written reasons of the Panel by:	Jennifer Chow, QC

OVERVIEW

[1] The Respondent is alleged to have engaged in sexual harassment of several employees at the Respondent's firm and to have created a hostile work environment at his firm between 2018 and 2021.

[2] Pursuant to Rule 5-6.5, the parties presented the Panel with two agreed statements of facts, the Respondent's admissions of disciplinary violation and consent to a specified disciplinary action.

[3] After careful consideration of the joint submissions, we accept the two agreed statements of facts and the Respondent's admissions of professional misconduct. As detailed below, the Respondent admits that he made unwelcome remarks and engaged in unwanted conduct of a sexual nature at his firm, and that he also made remarks of a racist or discriminatory nature to several employees. We find that the conduct is a marked departure from that standard expected of lawyers and constitutes professional misconduct.

[4] For the reasons set out below, we also accept the joint submissions on sanction as they meet the public interest in the administration of justice. We order the Respondent to be suspended from the practice of law for four and one-half months and to be subject to practice conditions, including requiring the Respondent to implement anti-sexual harassment and anti-discriminatory policies and procedures at the workplace.

BACKGROUND

[5] The Respondent is faced with two citations. Citation 1 alleges that at his firm, the Respondent engaged in sexual harassment of his employees through inappropriate conduct and remarks at the workplace. Citation 2 also alleges that the Respondent created a hostile workplace by making unwanted remarks of a sexual, discourteous, discriminatory or offensive nature to several employees.

[6] The Respondent admits that he was properly served with both citations. On March 29, 2022, the two citations were joined for hearing by consent.

[7] In regard to citation 1 issued on July 23, 2020 ("Citation 1"), the Respondent admits the conduct underlying allegations 1, 3 and 4 and that this conduct constitutes professional misconduct. The Law Society is not proceeding with allegation 2. The relevant details of Citation 1 are as follows:

1. Between approximately October 2018 and September 2019, you sexually harassed AB who was employed by your firm, when you did one or more of the following: (i) made comments or gestures of a sexual nature; (ii) engaged in unwelcome sexual advances; and, (iii) touched her without her consent, contrary to rule 6.3-3 of the *Code of Professional Conduct for British Columbia*.

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

3. Between approximately October 2018 and September 2019, you engaged in the harassment of persons employed by your firm by engaging in inappropriate conduct, or by making inappropriate statements, which you knew or ought to have known were one or more of the following: (i) unwelcome; (ii) intimidating; (iii) humiliating; and, (iv) which created a hostile work environment that would adversely affect other individuals employed by your firm, contrary to one or both of rules 6.3-3 and 6.3-4 of the *Code of Professional Conduct for British Columbia*.

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

4. Between approximately October 2018 and September 2019, in the course of communicating with persons employed by your firm, you made discourteous or offensive remarks to them, contrary to one or more of rules 2.2-1, 6.3-4 and 6.3-5 of the *Code of Professional Conduct for British Columbia*.

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

[8] In regard to citation 2 issued on November 8, 2021 ("Citation 2"), the Respondent admits the conduct underlying allegations 1 and 2 and that this conduct constitutes professional misconduct. The details of Citation 2 are as follows:

1. Between approximately January 2020 and January 2021, you sexually harassed your employee A, when you did one or both of the following: (a) made comments of a sexual nature; and, (b) engaged in unwelcome advances, contrary to one or both of rules 2.2-1 and 6.3-3 of the *Code of Professional Conduct for British Columbia*.

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

2. Between approximately February 2020 and January 2021, in the course of communicating with your employees A and B, you made discourteous, offensive, or discriminatory remarks to them, that you knew or ought to have known were one or more of the following: (a) unwelcome; (b) intimidating; (c) humiliating; and, (d) would likely create a hostile work environment that would adversely affect individuals employed by your firm, contrary to one or more of rules 2.2-1, 6.3-4 and 6.3-5 of the *Code of Professional Conduct for British Columbia.*

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

JOINT SUBMISSIONS

[9] As mentioned, this matter comes before the Panel pursuant to Rule 5-6.5, which allows hearings to proceed by way of joint submissions. The relevant portions of Rule 5-6.5 provides:

> **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.

[10] Rule 5-6.5 respects the principles that parties be allowed to provide certainty to alleviate the negative aspects involved in requiring witnesses to testify and to create efficiencies in the system: *Law Society of BC v. Lang*, 2022 LSBC 04, at paras. 27 to 28, citing *Law Society of Upper Canada v. Archambault*, 2017 LSDD No. 100, at para. 15. The principles that support approving a joint submission on sentencing were discussed by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, at para. 34: "[a] joint submission should not be rejected lightly … Rejection 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."

[11] In *R. v. Anthony-Cook*, at paras. 5, 29, and 31, the Supreme Court of Canada explained that the test to be applied to joint submissions on sentencing is a public interest test. The public interest test was stated as: "whether the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest." In the disciplinary context, the express wording of Rule 5-6.5(3)(b) is instructive and notably similar to the public interest test in *R. v. Anthony-Cook*. Rule 5-6.5(3)(b) expressly prohibits the Panel from diverging from the joint submissions on disciplinary action unless we find that the proposed sanction is contrary to the public interest in the administration of justice. As in *R. v. Anthony-Cook*, Rule 5-6.5(3)(b) also imposes a high threshold before a joint submission on disciplinary action is to be rejected by the Panel.

ISSUES

[12] The issues before the Panel are:

(a) whether to accept the Respondent's two agreed statements of facts and admission of professional misconduct or, alternatively, his admission of conduct unbecoming a lawyer; and

(b) whether to accept or reject the proposed global disciplinary sanction.

JOINT SUBMISSIONS ON FACTS

[13] The facts underlying Citation 1 and Citation 2 are substantially reproduced here from the parties' joint submissions, which include two agreed statements of facts.

[14] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 15, 1992. He is 66 years of age. At all material times, the Respondent and his wife were the sole partners of Dreyer Davison LLP (the "Firm"). Both mainly practise family law.

Citation 1, allegation 1

[15] Between approximately October 2018 and September 2019, the Respondent's interactions with AB included the following:

(a) Upon arriving at the office, it was the Respondent's practice to greet everyone. For most employees, that greeting involved a hug. For a lesser number of both men and women, it included a kiss on the top of their head, forehead or cheek. AB told the Respondent that she would only accept hugs from the side, and that she was not comfortable with him kissing her (the Respondent had on several occasions kissed her on the forehead or the top of the head).

(b) At the Firm's Christmas party in or around December 2018, the Respondent attempted, unsuccessfully, to kiss AB.

(c) On another occasion, the Respondent massaged AB's shoulder. She reacted tensely and the Respondent stopped.

(d) On February 21 and 22, 2019, the Respondent and his wife joined AB and two other employees in attending a family law conference in Vernon, BC. The Respondent made a comment suggesting that they "get one room together".

(e) On July 2, 2019, just days before another family law conference in Vancouver, BC, the Respondent again made a remark to AB about sharing a hotel room at the conference. The following day, AB expressed discomfort over the statement. Both AB and the Respondent attended the conference on July 4 and 5, 2019.

(f) On August 15, 2019, AB was wearing an outfit that she had recently acquired while shopping with the Respondent's wife. She was in the Firm's bookkeeper's office when the Respondent walked in and took

hold of one side of the collar of her new blazer. AB pulled her collar away from him and asked what he was doing. In response, the Respondent said that he was just looking at her outfit. AB replied "look with your eyes and not your hand". The Respondent laughed and walked out of the office. The next day, after AB expressed to the Respondent that she was upset over the incident, he apologized.

Citation 1, allegation 3

[16] Between approximately October 2018 and September 2019, the Respondent engaged in the following conduct:

(a) The Respondent initiated or participated in sexual banter, by making jokes and other comments of a sexual nature, with employees of the Firm.

(b) On one occasion, the Respondent told Witness 1, an employee, that her ponytail was like "bondage hair".

(c) On another occasion, the Respondent told Witness 2, another employee, that her voice was seductive.

(d) The Respondent made comments to his wife in the presence of other employees that she was "looking hot".

(e) As indicated above, it was the Respondent's practice to greet employees each workday morning. For some, that involved a hug. For some of those individuals, it also included a kiss on the top of the head, the forehead or the cheek.

(f) The Respondent spoke about his sex life with his wife with employees at the Firm, including that at times they were not having enough sex.

(g) At the Firm Christmas party in 2018, the Respondent tried to kiss Witness 3 on the lips. In order to avoid the kiss, Witness 3 told him words to the effect "no my partner would be jealous".

(h) On one occasion, the Respondent came into Witness 3's office and kissed her on the neck.

(i) The Respondent made comments about clients' and employees' appearance, such as, for example, "she looks nice" or "her skirt is pretty short".

(j) The Respondent made comments to Witness 4 to the effect that if they knew each other when he was younger, they would have dated.

(k) On one occasion, Witness 2 was wearing a sweater at the office made of a unique or different type of fabric. The Respondent touched Witness 2 on her arm and made a comment about the sweater.

(l) On another occasion, while she was sitting at her desk, the Respondent approached Witness 2 and moved her hair from her back to the side to look at her sweater. She was wearing an open back "v-type" sweater.

(m) One time when Witness 2 was at the office, the Respondent came up to her and asked her if she was wearing a bra, to which she responded "no". He then walked away.

Citation 1, allegation 4

[17] Between approximately October 2018 and September 2019, the Respondent made the following comments:

(a) The Respondent stated to employees at the Firm that another employee worked on "island time", which was intended to mean that she did things in a slow manner.

(b) On or about January 21, 2019, the Respondent engaged in an online written exchange with an office assistant in which he made the comment "Fukking Indians. All the same".

(c) One day at the Firm, the Respondent, in the presence of Witness 5 and other employees, referred to himself and others as "round eyed people". Witness 5 was the only person of South Asian descent in the group that the Respondent was speaking to. At some point thereafter, the Respondent sent a text message to Witness 5 to the effect "I did not mean to offend you, sorry if you took it the wrong way."

(d) Witness 6 of the Firm attended a welcome pizza lunch for Witness 5 and Witness 7. At the time, Witness 6 was dating a Caucasian man and Witness 7 was dating a man of South Asian descent. The Respondent said something to Witness 6, Witness 7 and others to the effect of "all you brown people are stealing the white people."

(e) Witness 3 witnessed the Respondent say that he did not like working with South Asian lawyers because they were difficult to work with.

Citation 1, the Law Society interview

[18] As part of the Law Society's investigation, the Respondent was interviewed on December 4, 2019. During the interview, the Law Society investigator, at times, expressed the Law Society's admonition of certain conduct that the Respondent admitted he had engaged in. The Respondent acknowledged the investigator's comments. Relevant portions of the Respondent's interview transcript in this regard include:

> [Investigator]:
>
> > As an investigator it is my primary role, I'm sure Henry has told you, to gather the facts. I'm an investigator first and foremost. There are often times that there is a professional conduct concern noted that I'll try and give some feedback on but that is not the purpose of the interview today. I will say, jokes that refer at any time to the colour of someone's skin, especially coming from a white man, regarding a person of colour are always inappropriate, especially in a professional setting. [An employee] was at the time working under your supervision and an employment agreement, as I understand, needed you as an employer and while that type of banter may have been mutual and he may not have said anything to you, in my view it's inappropriate and in the Law Society's view it's inappropriate.
>
> [Respondent]:
>
> > Thank you for that.
>
> [Investigator]:
>
> > Especially as it seems to me other people overheard it, they might think those types of comments with respect to the colour of someone's skin are appropriate and they're not. I've made my point and I'll move on.
>
> [Respondent]:
>
> > Thank you. If I may, I'll just say, one of the things that has also come out of this is I have to be much more private and discreet about conversation and behaviour that I do exhibit.
>
> [Investigator]:

> On that point, to be private and discreet, even making jokes with [an employee] just the two of you together regarding the colour of his skin are not appropriate.

[Respondent]:

> All right. Or my skin also though, right?

[Investigator]:

> In a professional office setting, commentary on the colour of people's skin joking in a professional setting is inappropriate.

[Respondent]:

> Okay.

…

[Investigator]:

> This will be a point where I give some feedback, Henry. Using the F word to a junior female employee can contribute and indeed create a sexualized environment and the Law Society's perspective is that you ought to avoid comments that refer to reproduction or sexual terms in the future, if that makes sense.

[Respondent]:

> It makes complete sense.

[Investigator]:

> 'Making puppies all day long,' people's minds might go to sex or sexually related activities and we want to avoid that in the workplace.

[19] On November 19, 2020, counsel for the Respondent wrote to the Law Society in response to a request made for information about the steps taken by the Respondent to address concerns following the investigation regarding Citation 1.

[20] Those steps were described in the letter as follows:

(a) Sensitivity Training Canada was hired to conduct a four-hour workshop for the entire office. That proceeded in early February 2020. Attendance was mandatory for everyone within the office.

(b) Witness 3 was designated as the Firm's HR person (while she was employed at the Firm). She then became the one to whom complaints of any sort were to be submitted.

(c) The Respondent obtained a copy of the Law Society practice resource: "Promoting a Respectful Workplace: A Guide for Developing Effective Policies". He and his wife tasked themselves to draft a policy guide for the Firm, which was completed with input and oversight from Sensitivity Training Canada.

[21] The letter also stated the Respondent had made significant changes to his behaviour:

> [The Respondent] will acknowledge that he was not sufficiently sensitive to any discomfort that his actions might cause for some of the people within the firm. The investigation resulted in his taking the matter very much to heart, however, and he went through a period of considerable self-reflection. To his credit, he has made significant changes to his way of interacting with both the women and the men within the firm.

[22] In regard to Citation 1, the Respondent also admits to the following:

(a) Regarding allegation 1, he engaged in the sexual harassment of AB by making comments to or in the presence of AB that were of a sexual nature or that contained sexual innuendo, and by touching, hugging and kissing AB. He ought to have known that his conduct was unwelcome and made AB uncomfortable.

(b) Regarding allegation 3, he engaged in the harassment of people at the Firm by conduct that was inappropriate. He ought to have known that his conduct was unwelcome, intimidating or humiliating, and adversely affected other employees.

(c) Regarding allegation 4, he made discourteous or offensive remarks in the course of communicating with persons employed by the Firm.

Citation 2, allegation 1

[23] Employee A began working at the Firm in April 2013, resigned on December 24, 2020 and left her employment on January 6, 2021.

[24] Witness 1 began working at the Firm commencing July 4, 2017 and left her employment on February 8, 2021. In early 2020, she was designated as the HR contact person within the Firm and was involved in hiring decisions.

[25] Between approximately January 2020 and January 2021, the Respondent admits he made frequent comments to employee A about her appearance such as her hair, lipstick, clothing and "college girl look", as well as greeted her with "hey sexy" and referred to her as his "work wife". At times, the Respondent stared at employee A from the doorway to her office while she worked. On occasions when employee A would tell him to leave or stop, the Respondent said words to the effect "too bad it's my name on the door."

[26] The Respondent suggested to employee A that they would have dated if they had known one another as teenagers.

[27] Between approximately January 2020 and January 2021, the Respondent made comments to employee A about the appearance of other female staff members and some clients.

[28] In early January 2020, the Respondent underwent surgery to remove his prostate, followed by a period of hospitalization and several weeks of significant pain for which he was prescribed potent pain medication. Chemotherapy and radiation treatment followed in turn.

[29] Employee A alleges that on three separate occasions in January 2020, the Respondent came into her office and propositioned her for sex. The Respondent has no recollection of those statements but his respect for employee A is such that he accepts he must have said something of the sort. His explanation is that it must have been a misguided attempt at humour by trying to make light of the trauma he was going through in connection with his medical condition.

[30] Thereafter, in or around April 2020, when the Respondent and employee A were both looking at cars together, the Respondent told employee A words to the effect "well we both know there's a way you can afford those cars..."

Citation 2, allegation 2

[31] At some time during 2020, in the context of considering prospective candidates who applied to work at the Firm, the Respondent stated separately to each of employee A and Witness 1 that they were not to hire any brown people. When employee A and Witness 1 questioned the Respondent about this statement, the Respondent told them words to the effect that he was "tired of the drama brown people bring to the office."

[32] The Respondent acknowledges his poor judgment and admits the inappropriateness and wrongfulness of such statements.

Citation 2, the Law Society interview

[33] As part of the investigation into Citation 2, the Law Society conducted interviews, including of the Respondent. During the Respondent's second interview held on September 28, 2021, the Law Society investigator and the Respondent had the following exchange:

> [Investigator]:
>
> > Generally, I guess one of the concerns from the regulator is that you know we went through the Law Society process before and the concerns about making any comments about the ethnicity of people or comments of a sexual nature in an office setting with you as the employer to employees was inappropriate and the concerns are, if from reading [employee A's] complaints and [Witness 1's] interview that some of the conduct may have continued despite the prior Law Society matter and I wanted to give you the opportunity to address that concern.
>
> [Respondent]:
>
> > Of course. Now, I was, I don't know if appalled is the right word but certainly shameful with the previous investigation that I had sort of been so blind to the times and hadn't kept up. Since then, it's been first and foremost in my mind. We did do the sensitivity training and I, I can assure the Law Society that I've done a complete about face, a 180. Please don't but you could talk to any staff member and they would have nothing but glowing things to say about me. The only two people whom I have, so with [employee A], you'll recall that in her interview, she had not

> expressed any concerns about my behaviour and [inaudible 64:56] *so I carried on pretty much as before with [AB] because she was I thought my friend and my confidante and there was nothing problematic about my behaviour.* And somewhat the same extent with [Witness 1] because you know I don't know if you know or not but [Witness 1], she came to us as an articling student so she had been with us [inaudible 65:26] years. You know as far as I knew, we were very close. *She had house sat for us, she was very supportive throughout the previous investigation so again, I felt that I could be more candid with, with her. But beyond those two people, I'm a completely different person, completely different person, it's all business. You know I keep my eyes down and it's very, very professional.*
>
> [emphasis added]

[34] In regard to Citation 2, the Respondent admits to the following:

(a) Regarding allegation 1, his conduct was unwelcome and caused employee A to be uncomfortable, embarrassed or intimidated; and

(b) Regarding allegation 2, his conduct was discourteous and offensive. His conduct towards employee A and Witness 1 was unwelcome, intimidating or humiliating.

[35] The Respondent admits that the entirety of his conduct described above constitutes professional misconduct or, alternatively, conduct unbecoming a lawyer.

DISCUSSION

A. Whether to accept the agreed facts and the Respondent's admission of professional misconduct

[36] At the hearing, the parties presented the Panel with two agreed statements of facts, excerpts from transcripts of two Law Society interviews with the Respondent, and several character reference letters, including a letter from the Respondent to the Panel. The Panel has considered all of this evidence in making this decision.

Test for Professional Misconduct

[37] Professional misconduct is not defined in the *Act* or the Rules. However, the well-known *Martin* test requires the panel to determine whether the proven facts "disclose a marked departure from that conduct the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16; aff'd in *Re: Lawyer 12*, 2011 LSBC 35.

[38] In *Law Society of BC v. Sangha*, 2020 LSBC 03, at para. 67, the hearing panel clarified any confusion in the jurisprudence and confirmed the *Martin* test as an objective test.

Duty to act with honour and integrity

[39] Rule 2.2-1 of the *Code of Professional Conduct for British Columbia ("BC Code")* considers, objectively, the manner in which a lawyer interacts with clients, tribunals, the public and other members of the profession, stating that lawyers must do so honourably and with integrity. In particular, rule 2.2-1 and its commentaries provide:

> 2.2 Integrity
>
> **2.2-1** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> Commentary
>
> **[1]** Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If clients have any doubt about their lawyers' trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
>
> **[2]** Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

> **[3]** Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.
>
> **[4]** Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

Harassment and discrimination

[40] Rule 6.3 of the *BC Code* deals with harassment and discrimination and 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.

[41] The commentary to rule 6.3 states:

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

[42] As the *BC Code* does not include a definition of "sexual harassment", and given rule 6.3-1, one may rely on human rights legislation, the principles of human rights law and related jurisprudence in this case.

Human rights legislation

[43] "Sexual harassment" is a category of conduct that may ground a claim of discrimination although it is not a defined term in the British Columbia *Human Rights Code*, RSBC 1996, c. 210 or the federal *Canadian Human Rights Act*, RSC 1985, c. H-6.

[44] The *Canadian Human Rights Act* defines harassment and sexual harassment as follows:

> **Harassment**
>
> **14 (1)** It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
>
> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.
>
> **Sexual Harassment**
>
> **(2)** Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

[45] Section 13 of the *Human Rights Code* prohibits discrimination in the workplace:

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

> summary conviction offence that is unrelated to the employment or to the intended employment of that person.

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

[47] The Supreme Court of Canada set out the legal test for sexual harassment in *Janzen v. Platy Enterprises*, 1989 1 SCR 1252 as follows:

> … 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 … 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.
>
> [emphasis added]

The three elements of sexual harassment

[48] As explained in *Hodgson v. Coast Storage and Containers*, 2020 BCHRT 55, at para. 28, there are three elements to the test of sexual harassment. The conduct at issue must:

(a) be of a sexual nature;

(b) be unwelcome; and

(c) result in adverse consequences for the complainant.

Conduct of a sexual nature

[49] Conduct that relates to a person's sex is "of a sexual nature". Sexual harassment includes a broad range of conduct, including conduct that is physical or verbal, overt or subtle, or arises from one incident or a number of incidents: *Hodgson*, at

para. 29; *Dutton v. British Columbia (Human Rights Tribunal)*, 2001 BCSC 1256, at para. 69.

[50] Sexual harassment includes "any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity": *Dutton*, at para. 68.

[51] In *Janzen*, at p. 30, the Supreme Court of Canada adopted the following list of concrete examples of sexual harassment:

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

[52] In *Janzen*, at p. 33, the Supreme Court of Canada also explained that sexual harassment is ultimately about 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.

Acceptance of facts and admission of professional misconduct

[53] The parties jointly submit that the Panel accept the two agreed statements of facts and the Respondent's admissions that his conduct amounted to professional misconduct or, alternatively, conduct unbecoming a lawyer. The parties jointly submit that the evidence supports a finding that the Respondent's conduct at the Firm constitutes sexual harassment and the creation of a toxic work environment since his conduct occurred at the workplace or at work sanctioned events such as the Firm's Christmas party.

[54] We note that the cases have varied on how sexual harassment has been characterized due to whether admissions were made jointly or the specific wording

of the code. We note that the cases characterizing sexual harassment as conduct unbecoming have largely been the result of joint admissions. The majority of cases show that sexual harassment at the workplace or involving clients has been characterized as professional misconduct, or a breach of an express law society code specifically prohibiting sexual harassment by lawyers.

[55] The parties submit that this case is similar to *Butterfield* in which the lawyer made a conditional admission of professional misconduct. After canvassing the cases, we are satisfied that the Respondent's conduct in these circumstances is properly characterized as professional misconduct, given the fact that the Respondent's conduct occurred over a lengthy period of time, at the workplace or work-related events, and involved an employer-employee relationship with the complainants.

[56] We accordingly accept the two agreed statements of facts and the Respondent's admissions of professional misconduct. We find that the Respondent's conduct is a marked departure from that conduct the Law Society expects of lawyers.

Conduct that is unwelcome

[57] The jurisprudence establishes that conduct amounting to sexual harassment must be objectively unwelcome: *Dutton*.

[58] In *Dutton*, at para. 70, the Supreme Court of British Columbia approved an objective test that asks: "…taking into account all the circumstances, would a reasonable person know that the conduct in question was not welcomed by the complainant?" Boyd J. also explained:

> … 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.

[59] Similarly, in *J.B. v. Russell*, 2020 HRTO 462, at para. 120, the Tribunal explained:

> The issue in this case is whether the respondent knew, or ought reasonably to have known that his actions were unwelcome. A determination of whether a respondent ought to have known conduct to be unwelcome is an objective test … The specific issue in this case is whether a reasonable person, considering the point of view of the applicant as well as that of the respondent, and considering the power imbalance between them, would have considered the breast exam to be unwelcome.

[60] Recently, in *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158, at para. 82, the Tribunal clarified that a complainant is not required to prove that a reasonable person would know that the impugned conduct was not welcomed. The Tribunal explained:

> The requirement that the complainant establish that the alleged harasser knew or ought to have known that the conduct was 'unwelcome' has been widely criticized for the inappropriate burden it places on complainants, predominantly women, to avoid harassment and protest harassing conduct. The individual and transactional focus of the test also minimizes the systemic nature of sexual harassment and gender-based discrimination in the workplace, as with other contexts. Moreover … this element of sexual harassment law has further provided an entry point for gender-based myths and stereotypes to influence the legal analysis.

[61] In *Ms. K*, the Tribunal noted at para. 83 that there have been increasing calls to re-visit the "unwelcomeness" component of the *Janzen* test. The Tribunal followed the authorities post Dutton explaining at para. 95 that "unwelcomeness" can be proven by a complainant establishing that the sexualized conduct alleged had an adverse impact on them.

[62] Further, in *The Employee v. The University and another (No. 2)*, 2020 BCHRT 12, at paras. 177 to 181, the Tribunal held that the following three "myths and stereotypes" must not be considered when analyzing whether alleged sexual harassment is unwelcome: (i) lack of protest; (ii) delay in reporting; and (iii) participation in prior behaviour. As a result, in that case, the fact that a professor and the student complainant continued to work together productively for three months after the incident of sexual harassment was not determinative.

[63] In *Wollstonecroft v. Crellin et al*, 2000 BCHRT 37, at paras. 22, 71 and 72, a supervisor worked together on a project with a master's student. During the first three weeks of the project, the supervisor told the student of his wife's infidelities, including descriptions of the sexual nature of those infidelities. He also described his own sexual needs and a sexual encounter he had with a friend. The Tribunal

found, at para. 71, that discussion of sexual topics is sexual conduct within the meaning of the *Human Rights Code.*

[64] In *Wollstonecroft*, at para. 73, the Tribunal explained that the student was not required to demonstrate that she overtly protested the conduct. The Tribunal found that the supervisor's conduct constituted sexual harassment and therefore sex discrimination within the meaning of the *Human Rights Code*. The Tribunal explained at para. 84:

> Mr. Crellin did not proposition Ms. Wollstonecroft or make inappropriate advances to her. He engaged Ms. Wollstonecroft in intimate and explicit discussions related to his sexuality and that of his wife. The *Code* does not prohibit such conversation between a supervisor and an employee if the discussion is welcomed by the employee. Ms. Wollstonecroft did not welcome the conduct. However, based on her reaction, I do not think her objection was extreme. She made no complaint about the conversation at the time. Indeed she did not raise her allegations until over two months later …

Results in adverse consequences for the complainant

[65] The third element of the test for sexual harassment is conduct that results in adverse consequences for the complainant. As explained in *Janzen*, at p. 30, unwelcome conduct is conduct that "detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment." In *Byelkova v. Fraser Health Authority*, 2021 BCSC 1312, at paras. 29, 30, 58 and 71, the court explained that it is uncontroversial in law that alleged conduct in itself can reach the level of sexual harassment to constitute an adverse treatment. A party targeting a complainant for termination is another example of adverse consequences, and sexual harassment leading to termination is a more serious adverse treatment than sexual harassment unaccompanied by termination: *Byelkova*, at paras. 62 and 67.

Law Society cases regarding sexual harassment

[66] To date, the only reported disciplinary case in British Columbia addressing the issue of sexual harassment is *Law Society of BC v. Butterfield*, 2017 LSBC 02. In that case, the lawyer made a conditional admission of professional misconduct that he sexually harassed a law student and a paralegal at his firm. He made comments of a sexual nature to a law student in front of the paralegal, including suggestions that the law student should show more cleavage and wear shorter skirts. He also touched the student's lower back. He also made other comments that were found to

have created a hostile work environment. The panel explained, at para. 25, that "unwanted sexual conduct detrimentally affecting the workplace environment contributes to creating a hostile work environment that adversely affects other employees who are not the direct subject of the unwanted conduct." Additionally, the panel held that the lawyer knew or reasonably ought to have known that his conduct would cause both the student and the paralegal to be humiliated or intimidated.

[67] The panel accepted the lawyer's conditional admission of sexual harassment as professional misconduct and imposed the recommended fine of $10,000, an order of costs and a condition that the lawyer complete a sensitivity training course. The panel noted, at para. 39, the principal-student relationship between the lawyer and the student and explained that the power dynamic in an office dominated by a sole practitioner is a relevant factor in assessing the appropriateness of the recommended disciplinary action. Additionally, the panel noted, at para. 43, that a more severe discipline would not enhance specific deterrence of the lawyer.

[68] The panel found that the proposed disciplinary action protected the public and reflected the lawyer's rehabilitation. Those facts included the lawyer's apology to the student and the fact that his comments and conduct of a sexual nature stopped on the day the student told him his conduct was unwanted. The lawyer made changes to his office policies regarding dress code, sexual harassment, and harassment and bullying to prevent the repetition of any such conduct. The lawyer also took part in a five-hour sensitivity training course and wrote a statement admitting contrition and self-awareness, and cooperated in developing an agreed statement of facts and proposed disciplinary action.

[69] In *Law Society of Saskatchewan v. Hale*, 2021 SKLSS 5, the lawyer entered a guilty plea to the allegation that he did, in the course of his professional practice, sexually harass his client and thus was guilty of conduct unbecoming a lawyer. The parties made joint submissions on an agreed statement of facts and sanction. Some of the lawyer's conduct included sexually harassing his client when he met her for the first time at the courthouse. He moved closer to his client, said that he was "not expecting someone like her" and began running his hands up and down her thighs.

[70] In *Hale*, the Saskatchewan Code of Professional Conduct provided as follows at paras. 11 to 13:

"RULE

> The Lawyer should assist in maintaining the integrity of the profession and should participate in its activities."

The commentary to the Rule in Chapter 15 further states:

> "4. A lawyer in his or her professional capacity shall not discriminate on the grounds of race, creed, colour, national origin, disability, age, religion, sex, sexual orientation, marital or family status in the employment of lawyers, articled students or support staff or in any relations between the lawyer and members of the profession or any other person.
>
> Sexual harassment is a form of discrimination and may broadly be 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'. The lack of an intent to produce feelings of harassment in the complainant is irrelevant."

Under "Notes" in relation to the above paragraph, the following statement is included:

> "6. Per the Supreme Court of Canada in *Janzen v. Platty [sic] Enterprises Ltd.,* 1989 CanLII 97 (SCC), [1989] 1 SCR 1252 at page 1284. The Chief Justice also said:
>
> "Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands. (at p. 1281).
>
> Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands … Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour". (at p. 1282)"

[71] In *Hale*, the panel considered, at para. 23, aggravating factors such as the prolonged impact on the victim along with the clear physical violation of her sexual integrity. The mitigating factors included the lawyer's lack of prior discipline history, his cooperation regarding the agreed statement of facts and his guilty plea. The panel ordered a total suspension of six months and costs in the amount of $2,000.

[72] In *Law Society of Alberta v. Plantje*, 2007 LSA 22, the lawyer admitted that he sexually harassed two female staff and engaged in improper sexual conduct with one female staff of the firm in which he was practising. The parties made joint submissions on the facts and sanction and agreed that his conduct was deserving of sanction. The lawyer was suspended for 30 days with a mandatory referral to a practice review committee if he were to be reinstated to active practice, for engaging in improper sexual conduct with female staff at his place of employment. The lawyer admitted to his estranged wife that he had engaged in inappropriate behaviour with two support staff. He made inappropriate sexual comments, including explicit conversations about sexual activity with one staff member. With another staff member, he made inappropriate explicit sexual comments and then engaged in sexual activity with the staff member at the office and elsewhere. The lawyer admitted his guilt and acknowledged that his conduct was conduct deserving of sanction. The lawyer had no prior discipline record and was no longer practising law. He was also seeing a registered psychologist to gain insight into his behaviour.

[73] In *Law Society of Manitoba v. Davis*, 2001 LSDD No. 29, the lawyer admitted that he sexually harassed his client by making unwelcome comments and overtures of a sexual nature. The parties made joint submissions on facts and sanction. The lawyer's conduct included the lawyer attempting to kiss or actually kissing his client on various occasions despite her resistance. The lawyer also attended at the client's home to present her with a gift, which she refused. The panel concluded that sexual harassment is a serious type of professional misconduct that amounts to a breach of trust that undermines the lawyer-client relationship.

[74] In *Davis*, the Manitoba Code of Professional Conduct prohibited a lawyer from harassing, either sexually or otherwise, other lawyers, employees, clients or other persons in a professional context. The commentaries to the Code also provided:

> 3. Sexual harassment means one or a series of incidents involving unwelcome sexual advances, requests for sexual favors [sic], or other verbal or physical conduct of a sexual nature:

> (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group;
>
> …
>
> 4. Types of behaviour that constitute sexual harassment may include, but are not limited to:
>
> (h) unwelcome sexual flirtations, advances, propositions;
>
> (k) unwanted touching.

[75] In *Davis*, the panel did not specifically address whether the lawyer's conduct amounted to professional misconduct or conduct unbecoming as it found that the lawyer had breached the Code of Professional Conduct and was guilty of sexual harassment. The panel ordered the lawyer to be suspended for 45 days and pay costs in the amount of $1,000. The panel found that the lawyer did sexually harass his client contrary to the Code of Professional Conduct. Additionally, the panel found that the member could reasonably have expected that his conduct caused discomfort to his client because his client explicitly and consistently resisted the lawyer's advances. Further, the panel found that the lawyer's course of conduct involved several incidents spanning a period of about six months.

[76] In *Zuker (Re)*, 1999 CanLII 18536 (ON LST), the lawyer was found guilty of professional misconduct for sexually harassing his client by making unwelcome comments and overtures of a sexual nature to her. The lawyer denied any misconduct at the hearing. In regard to the lawyer's testimony, the panel found that on a number of occasions: the lawyer greeted the client in an inappropriately physical manner when she entered and left his office by approaching her closely and placing his hands on her shoulders; he tried to kiss and hug her; he asked about her personal relationships; he made sexually suggestive remarks; and he inappropriately commented on her appearance. The lawyer had previously been found guilty of engaging or attempting to engage in sexual activity with clients.

[77] In *Zuker (Re)*, the majority decision ordered that the lawyer be suspended for six months, with terms that he submit to a supervisory plan, which included sensitivity training and a requirement that the lawyer not be in the unaccompanied presence of any female clients, and that he pay costs of $2,500. The minority decision would have disbarred the lawyer. The commentary to Rule 27 defined sexual harassment as "one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature, when such

conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group." Commentary 2 provided examples of sexually harassing behaviour such as: sexually suggestive or obscene comments or gestures, unwelcome inquiries about a person's sex life, unwelcome sexual flirtations, advances, propositions, requests for sexual favours and unwanted touching.

[78] In *Bondzi-Simpson (Re),* 1999 CanLII 18462 (ON LST), the lawyer was found guilty of professional misconduct for making inappropriate sexual advances, engaging in inappropriate touching and making attempts to discuss inappropriate sexual matters with his client. The lawyer did not attend his hearing nor address the allegations as he advised the panel that he could not afford to return to Canada and was denied travel expenses as requested.

[79] The panel proceeded without the lawyer and found that the lawyer's conduct included asking the client for referrals and introductions to women on more than one occasion. When the client produced no friends, the lawyer suggested that perhaps after her case concluded, they could become friends, which he said meant "getting close". The client confronted him that such conduct would mean cheating on their spouses. The lawyer persisted and made explicit sexual comments. On another occasion, he attempted to kiss her, had a condom in his hand and said "let's do it now". The panel ordered that the lawyer be suspended for a period of 18 months and that the suspension continue until such time as the lawyer satisfied the Law Society that he suffered from no underlying psychiatric problems that would put the public at risk. In deciding the appropriate sanction, the panel noted that the lawyer had no previous discipline history. However, the panel underscored the importance of underscoring the seriousness of the offence and that the sanction would be understood by the public to be significant.

[80] In *Bondzi-Simpson (Re),* Ontario Rule 27 provided:

> Rule 27
>
> > Sexual harassment of a colleague, of staff, of clients, or of other persons, in a professional context, is professional misconduct.
> >
> > Commentary
> >
> > 1. Sexual harassment is defined as one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature,

> (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group; or
>
> (ii) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services; or
>
> (iii) when submission to such conduct is made implicitly or explicitly a condition of employment; or
>
> (iv) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of promotion, raise in salary, job security and benefits affecting the employee); or
>
> (v) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile or offensive work environment.

[emphasis in original]

Cases on racial discrimination

[81] The test for racial discrimination requires that complainants show a characteristic that is protected under human rights codes, such as race, and that they experienced an adverse impact and that race was a factor in that adverse impact. Once a *prima facie* case has been established, the burden shifts to the lawyer to justify the conduct and if it cannot be justified, discrimination will be found to occur: *Moore v. British Columbia (Education),* 2012 SCC 61, at para. 33.

[82] In *Radek v. Henderson Development (Canada*) *and Securiguard Services (No. 3),* 2005 BCHRT 302, at para. 482, the Tribunal summarized the applicable principles regarding racial discrimination:

> (a) The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
>
> (b) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;

(c) The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;

(d) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and

(e) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

[emphasis in original]

[83] The Panel was advised that to date, there are no reported law society decisions in Canada involving allegations of racial discrimination made by an employee against an employer.

SUMMARY OF JOINT SUBMISSIONS ON A GLOBAL DISCIPLINARY ACTION

[84] In regard to disciplinary action, the Respondent consents to the following global sanction:

(a) A four and one-half month suspension, commencing on the first day of the first month following release of the panel's decision; and

(b) Practice conditions:

(i) Following the conclusion of his suspension, the Respondent cannot practise unless he (in the event he becomes a sole practitioner), or the firm with which he practises, abides by the following conditions:

1. has a policy in place acceptable to the Law Society regarding sexual harassment and discriminatory behaviour, and

2. retains an external lawyer acceptable to the Law Society whose role it is to receive and investigate any complaints against the Respondent related to sexual harassment or discriminatory behaviour as that lawyer deems appropriate and to report to the Law Society any complaints of such conduct the lawyer deems to be substantiated following their investigation.

Victim impact statements

[85] Several victim impact statements were provided to the Panel documenting the impact of the Respondent's conduct and in some instances, the prolonged adverse effects the conduct has had on the complainants and witnesses.

[86] This summary is taken from the joint submissions:

(a) AB, Citation 1: The Respondent's behaviour made her feel very uncomfortable. She tried to assert boundaries with the Respondent but her boundaries were routinely disrespected. At the same time, she often felt like she could not tell the Respondent "no" as he was her boss. She felt anxious and stressed out having to attend the office every day. She constantly felt like she had to be on high alert as she kept anticipating the Respondent would continue to make comments or engage in further conduct that would make her feel uncomfortable, or worse. At times, she would try and change her appearance (e.g. what clothing she wore and how she did her makeup) with the hope that the Respondent would stop his inappropriate behaviour towards her.

Towards the spring and summer of 2019, AB began to feel progressively more unsafe coming into work. She started to feel unsafe because the Respondent's behaviour had progressed from making comments to actually physically touching her. She was particularly distressed when the Respondent came into her office and massaged her shoulder. She felt so uncomfortable and anxious that she froze; her body felt hot and her palms were sweaty. She was ashamed that in the moment she could not speak up for herself and tell the Respondent to stop.

Since leaving the Firm, AB continues to suffer from stress and anxiety related to the Respondent's conduct, which has had a lasting impact on her. She continues to try to manage and cope with her ongoing anxiety for having had to endure this type of treatment from the Respondent.

(b) Witness 2, Citation 1: Witness 2 felt uncomfortable when the Respondent made comments of a sexual nature or involving race. She felt particularly uncomfortable when the Respondent touched her. She tried to brush off or ignore his behaviour as this was her first law office job, and she was not sure if this was a customary part of working in a law firm setting.

Further, Witness 2 felt that she had to change who she was in terms of the clothes she wore and the things she said in order to avoid being judged by the Respondent for being of South Asian descent. She understood that the Respondent attached a stigma to persons of South Asian descent that she did not want to be associated with and could change if possible.

(c) Employee A, Citation 2: Employee A felt uncomfortable with the Respondent's comments of a sexual nature or involving race. She started to feel progressively uncomfortable when the Respondent began to direct sexual comments to her, such as they would have dated had the Respondent been younger and when he propositioned her for sex. Those comments made employee A feel extremely uncomfortable and very anxious about having to work in an environment where this was a regular occurrence.

The Respondent's conduct has had a profound and lasting impact on her. The stress and anxiety employee A experienced as a result of the Respondent's behaviour has had physical manifestations, including hair loss and other health issues that she wishes to keep private. Additionally, between September and December 2020, employee A had to go on medical leave due to panic attacks she was experiencing at night, which caused so much loss of sleep that she was basically unable to function. Her health issues only started to improve after she left the Firm. She continues to see a counsellor to try and help her deal with strategies for overcoming her ongoing anxiety and anger for having to endure the Respondent's behaviour and to watching others go through the same thing.

(d) Witness 1, Citation 2: Witness 1 felt uncomfortable with the Respondent's comments of a sexual nature or regarding race. She did not agree with his comments and tried to ignore them to focus on work. However, she found that difficult to do.

When the Respondent tried to kiss her at the work Christmas party in 2018, Witness 1 felt extremely uncomfortable, anxious and stressed. Further, when the Respondent kissed her on the neck at the office, she felt disgusted as though she had a pit in her stomach. She tried to brush off his behaviour and forget about the incident but was unable to do so.

The Respondent's conduct has had a lasting impact on her. Witness 1 continues to experience bouts of angst and stress when she thinks about

the Respondent's inappropriate conduct, and that she did not do more to address it. Her regret for not doing more to address the Respondent's conduct has negatively impacted her self-esteem. She is currently in counselling to try and cope with the effects of the Respondent's conduct.

DISCUSSION

B. Whether the Panel should accept or reject the proposed global disciplinary sanction

Principles governing sanctions

[87] The Panel must consider whether the proposed global disciplinary sanction meets the Law Society's governing mandate "to uphold and protect the public interest in the administration of justice" in accordance with s. 3 of the *Act*.

[88] As discussed earlier, the Panel must not diverge from the joint submissions on disciplinary action unless we find that the proposed disciplinary action is contrary to the public interest in the administration of justice. As explained in *R. v. Anthony-Cook*, Rule 5-6.5(3)(b), a public interest test imposes a high threshold before joint submissions on sentencing can be rejected by a Court. Based on the wording of Rule 5-6.5(3)(b) and the Court's discussion of the public interest test in *R. v. Anthony-Cook*, we accept that a similarly high threshold must be met before joint submissions can be rejected by the Panel.

[89] In considering whether to accept the joint submissions regarding the two agreed statements of fact and the proposed disciplinary action meet the public interest test, we have considered the non-exhaustive list of factors set out in *Law Society of BC v. Oglivie*, 1999 LSBC 17 as follows:

(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 upon 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.

[90] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the review panel reaffirmed the *Ogilvie* factors and noted that the factors reflect the objects and duties of the Law Society set out in s. 3 of the *Act*. The review panel placed particular emphasis on public protection, including public confidence in the profession generally.

[91] In *Law Society of BC v. Dent*, 2016 LSBC 05, the panel determined that it would be appropriate to consolidate the *Ogilvie* factors from 13 to four general factors:

(a) nature, gravity and consequences of conduct;

(b) the respondent's character and professional conduct record;

(c) the respondent's acknowledgement of the misconduct and remedial action; and

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

[92] The panel in *Dent* provided a succinct rationale for the consolidation of the *Ogilvie* factors as follows at paras. 16 to 18:

> It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the

> disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.
>
> There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons, if those secondary factors tip the scales one way or the other. However, in most cases, the panel will determine the appropriate disciplinary action on the basis of the primary factors without recourse to secondary factors.
>
> In addition, it is time to consolidate the *Ogilvie* factors, ('consolidated *Ogilvie* factors'). It is also important to remember that the *Ogilvie* factors are non-exhaustive in nature. Their scope is only limited by the possible frailties that a lawyer may exhibit and the ability of counsel to put an imaginative spin on it.

[93] Accordingly, the Panel has applied the consolidated *Oglivie* factors as set out in *Dent* to this case.

Nature, gravity and consequences of conduct

[94] Sexual harassment is serious professional misconduct. Rule 6.3-3 clearly provides that a lawyer must not sexually harass any person and rule 6.3-5 provides that a lawyer must not discriminate against any person. These are clear prohibitions that underscore the gravity of these offences.

[95] In the circumstances of this case, the Respondent engaged in sexual harassment and racial discrimination over the course of several years. One of the aggravating factors is that the Respondent continued to engage in the misconduct despite the commencement of the investigation and the issuance of Citation 1. By that time, the Respondent knew or ought to have known of his alleged misconduct yet he persisted in his misconduct. In fact, the Respondent made representations to the Law Society that as a result of the first investigation, the Respondent went through a period of considerable self-reflection and made significant changes to his way of interacting with men and women within the Firm.

[96] Despite those representations, the Respondent continued his misconduct but largely in private and away from others. Those circumstances underscore the Respondent's deliberate decision to continue with his misconduct even after making those representations that the first investigation had opened his eyes and he was a changed man.

The respondent's character and professional conduct record

[97] The Respondent is 66 years old and has practised law in British Columbia since 1992. At the time of the misconduct, the Respondent was called to the BC Bar for approximately 26 years.

[98] The Respondent's professional conduct record is as follows:

(a) December 2002 to February 2005: The Respondent complied with and was relieved of three practice terms conditions related to his insolvency.

(b) February 1996 Conduct Review: Discussion of the Respondent's conduct in engaging in a sexual relationship with a client for a second time. The Subcommittee's view was that his behaviour was serious in the extreme. The Respondent offered assurance that his conduct would not happen again. No further action was taken.

[99] The Panel was provided with several character reference letters separate and apart from the joint submissions.

[100] The following is a brief summary of the character reference letters:

(a) Letter dated April 4, 2022 by Carly Dreyer. Carly Dreyer is the Respondent's step-daughter. She is a recent law graduate and is currently employed by the Firm. She was previously employed at the firm from April 2015 to August 2019 and from September 2021 to present. She described the composition of the Firm as being unusual and a factor that had a significant influence on the nature and tone within the office. She explained that the Respondent's banter and jokes occurred typically in a public setting in front of multiple staff members and were not directed at any particular person or race. She also explained that by September 2021, the dynamic in the Firm had changed due to the implementation of an anti-harassment policy. She wrote that "[a]ny hugging or other physical contact or joking that might upset the sensibilities of others is <u>strongly</u> discouraged" (emphasis in original). She also described the Respondent's many hours of helping and mentoring young lawyers or teaching assistants and that he has been exceedingly generous with his time with others to develop their potential.

(b) Letter dated April 5, 2022 by Joan M. Dreyer. Joan Dreyer is the Respondent's spouse and mother to Carly Dreyer. Her letter

acknowledged that the Respondent "has shown poor judgment in some of his conduct, he is far from the reprehensible person that the "Me Too" movement seeks to address." She provided her own view (which the Panel does not share or adopt) that the Respondent was "reflective of a different generation of men." She described the firm they tried to build, which was fueled largely by their decision to giving a colleague, SA a second chance at practising law after his difficulties with the Law Society. She described a rapid expansion of the Firm in 2017 to accommodate SA, which led to hiring of additional lawyers. Joan Dreyer admitted that neither she nor the Respondent were experienced in hiring lawyers and staff but described a relaxed environment where everyone was treated as an equal.

She provided more background to demonstrate that the Respondent is not racist, including:

(i) the Respondent's own children, through their mother, have First Nation's heritage;

(ii) Carly Dreyer's husband is of South Asian descent and "well-loved" by the Respondent;

(iii) Joan Dreyer's brother, adopted at age 2, is Metis as is his daughter;

(iv) Joan Dreyer's step-brother is Metis as is his daughter;

(v) one of the Respondent's best friends is a First Nations elder; and

(vi) many of the lawyers and staff members hired at the Firm are people of different ethnic backgrounds and colour.

Joan Dreyer provided her own perspective that the Respondent's hugging and kissing was done "to lift someone's spirits or just communicate warmth" and her own view that not all recipients found his conduct offensive. She described the Firm losing most of its original staff members due to the Law Society investigation, that the Respondent has been vilified as a person and that the process that occurred over two and one-half years has been exhausting. She also described the Respondent as making frequent apologies for having let her down and

repeated comments about his naiveté and the impact his actions have had on others.

(c) Letter dated April 4, 2022 from SA. SA practised at the Firm from December 2019 to April 2020. SA described the Respondent as "honest and caring" and that their interactions left a lasting impression on him. SA described difficulties in finding employment due to his own issues with the Law Society and his struggle to obtain re-employment in law. SA contacted the Respondent and asked whether he would consider taking him on. The Respondent agreed to be SA's supervisor and SA felt no judgment for the first time in many months.

SA explained that the Respondent took a chance on him when others would not and that the Respondent saved his career and made him a better person. SA also described a change in the Respondent's conduct after Citation 1 in that he brought in a professional to train all staff on workplace conduct, implemented a work-place manual and made efforts to change the firm culture

The respondent's acknowledgement of the misconduct and remedial action

[101] The Respondent acknowledged the misconduct by making admissions of facts in the agreed statements of facts and agreed to proceed by joint submissions. Those processes have spared the complainants and witnesses from needing to testify and the burden of participating further in this proceeding.

[102] In the joint submissions, the Respondent has admitted that his conduct constitutes either professional misconduct or conduct unbecoming a lawyer.

[103] The Respondent also provided a letter to the Panel dated April 5, 2022, which expressed contrition, including as follows:

> I am truly sorry for the embarrassment I have brought on the profession, my firm, my partner, and my wife. If I had it to do all over again, I would do things much differently.
>
> It was never my intention to cause anybody discomfort. However, I recognize that my conduct did cause people discomfort and for this I am truly sorry.

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

[104] Misconduct relating to sexual harassment and racial discrimination by lawyers are serious matters that require the panel to give the greatest weight to public interest and the maintenance of public confidence in the legal profession and the disciplinary process.

[105] In *Ogilvie*, the panel explained at para. 19:

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

[106] The Law Society submits that there is a strong public interest in the matters before the Hearing Panel and a strong sanction is needed to protect public interest and to ensure the public's confidence in the integrity of the profession. The Law Society has a very strong public interest in deterring the kind of misconduct that the Respondent engaged in. The circumstances require a sanction that is in keeping with society's evolving views of the proven misconduct.

[107] The Law Society relies on the *Butterfield* case as an example of the need to provide a more serious sanction than that imposed on the lawyer in that case, who was fined $10,000 plus costs. In that case, the lawyer ceased from engaging in further improper conduct while the Respondent in this case did not, and he also has a history of prior related misconduct, namely sexual relationships with clients in the course of his professional duties.

[108] In *Hale*, the lawyer was found guilty of conduct unbecoming when he sexually harassed his client. The panel cited *Butterfield* noting that "while the jurisprudence is intended to act as a measuring stick for the appropriateness of the proposed penalty, it is important to emphasize that the way in which the public and the regulatory bodies have perceived matters of sexual harassment in the past may no longer be consistent or may be less relevant in the modern context of accountability."

[109] In *Adams v. Law Society of Alberta*, 2000 ABCA 240, at para. 27, the panel also addressed the growing recognition of sexual harassment as a societal concern and explained "we observe that in the past, there has sometimes been a tendency to minimize and excuse misconduct of a sexual nature between the members of some

professions and their clients" and upheld the review panel's disposition that disbarment was an appropriate sanction in that case.

[110] In May 2019, the International Bar Association released its report on Bullying and Sexual Harassment in the Legal Profession, which provided confirmation that bullying and sexual harassment are rife within the profession. The report stated, at page 100, that "bullying and sexual harassment have absolutely no place in the profession" and, at pages 5 and 7, that the legal profession must make sure its own house is in order and that "addressing the widespread bullying and sexual harassment among us is an important step in safeguarding the long-term vitality of this essential profession."

[111] The Bar Tribunals and Adjudication Service in the United Kingdom also published a report called "Sanctions Guidance" on January 1, 2022 in which it explained at section 5.7:

> Numerous studies have shown that incidents of sexual misconduct, discrimination, harassment and bullying are prevalent in the professions, including the Bar. Such behaviour seriously undermines public trust and confidence in the Bar and has a negative impact on diversity, recruitment, and retention at the Bar. It is therefore important that misconduct of these types is marked by serious sanctions to maintain public confidence, act as a deterrent and encourage the reporting of such misconduct.

[112] The Law Society submits that society's values and the public's perception regarding sexual harassment have evolved considerably in the intervening five years, as seen most acutely in the "MeToo movement", and the corresponding ripple of expectations regarding accountability and consequences for such conduct.

[113] The Law Society further submits that there is growing recognition that sexual misconduct inflicts harm on public interest, as well as the integrity and reputation of the legal profession. The Law Society submits that the Respondent's conduct has harmed the reputation of the profession and must be strongly denounced. The proposed suspension will serve to protect public interest, to act as a general deterrent against this type of behaviour and to safeguard the integrity and reputation of the legal profession. We agree with the Law Society on all of these points.

Mitigating factors

[114] The joint submissions identified several mitigating factors. They are:

(a) the Respondent's cooperation during the investigations;

(b) the admissions in the two agreed statements of facts; and

(c) the Respondent's consent to the proposed sanction.

Aggravating factors

[115] The joint submissions identified several aggravating factors. They are:

(a) the occurrence of the misconduct over an extended period of time;

(b) the misconduct involved both unwanted comments and touching of a sexual nature, which the Respondent continued to engage in even after the commencement of the regulatory proceeding and was thus aware of the inappropriateness of his misconduct;

(c) the conduct occurred in the presence of numerous other witnesses;

(d) the Respondent was in a position of power relative to the complainants and witnesses, as set out in the victim impact statements;

(e) the Respondent engaged in the misconduct referred to in Citation 2, despite the commencement of the investigation and the issuance of Citation 1, and he knew or ought to have understood the need to change his way of interacting with men and women within the Firm; and

(f) as set out in the 1996 Conduct Review, the Respondent has a previous history of relevant misconduct when he engaged in sexual relationships with clients in the course of his professional duties.

CONCLUSION

[116] We accept the joint submissions regarding the two agreed statements of fact and admissions of professional misconduct. As discussed, we find that the Respondent's conduct amounts to professional misconduct as it rises to the level of conduct that constitutes a marked departure from that conduct the Law Society expects of lawyers.

[117] We find that the Respondent's conduct in sexual harassment and the creation of a toxic workplace amounts to professional misconduct. The Respondent made remarks and engaged in conduct of a sexual nature at the Firm and also made

remarks of a racist or discriminatory nature to several employees, which constitutes a marked departure from that conduct the Law Society expects of lawyers.

[118] We also accept the parties' proposed global disciplinary sanction. Pursuant to Rule 5-6.5 we find that the proposed global disciplinary sanction of a four and one-half month suspension and practice conditions meets the public interest in the administration of justice. In other words, the proposed sanction does not bring the administration of justice into disrepute nor is it contrary to the public interest.

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

[120] We find that the proposed sanction of a four and one-half month suspension and practice conditionsfall within the range of sanctions previously imposed by other law societies for similar misconduct.

[121] The Panel makes the following orders:

(a) The Respondent is suspended for four and one-half months, commencing on the first day of the first month following release of the Panel's decision unless otherwise agreed to in writing by the parties; and

(b) On the conclusion of his suspension, the following practice conditions are imposed:

(i) The Respondent cannot practise unless he, or the firm with which he practises, abides by the following conditions:

1. The Respondent or the firm with which he practises has a policy in place acceptable to the Law Society regarding sexual harassment and discriminatory behaviour, and

2. The Respondent or the firm with which he practises retains an external lawyer acceptable to the Law Society whose role it is to receive and investigate any complaints against the Respondent related to sexual harassment or discriminatory behaviour as that external lawyer deems appropriate and to report to the Law Society any complaints of such conduct the eternal lawyer deems to be substantiated following their investigation.

To be clear, this process does not preclude any affected person from making complaints directly to the Law Society.

[122] The Panel further orders that the Respondent pay costs to the Law Society in the amount of $3,500, payable on or before three full months from the date of this decision.

ORDER ON COSTS

[123] The Law Society seeks costs against the Respondent in the amount of $3,500 for both Citation 1 and Citation 2. The Respondent has agreed to pay that amount.

[124] The amount sought is consistent with the tariff for hearings under Schedule 4. The Law Society submits that the Panel consider the complexity of the matter, the number and nature of allegations, the time at which the Respondent elected to make admissions relative to the scheduled hearing and the amount of pre-hearing preparation required. We have done so, and find that a costs award of $3,500 is appropriate.

[125] The Law Society submits that costs be made payable on or before three months from the date of the pronouncement of the hearing panel's decision, or such other date as the hearing panel may order. The Respondent has no objections.

[126] The Panel further orders that the Respondent pay costs to the Law Society in the amount of $3,500, payable on or before three full months from the date of this decision.

NON-DISCLOSURE ORDER

[127] The parties seek an order under Rule 5-8(2) of the Rules that portions of the transcripts and exhibits which disclose complainant and witness names and any identifying information about the complainants and witnesses not be disclosed to members of the public.

[128] Rule 5-9(1) allows any person to obtain a copy of a transcript of a hearing that is open to the public. Rule 5-9(2) allows any person to obtain a copy of an exhibit entered in evidence when a hearing is open to the public, subject to a solicitor-client privilege. Rule 5-9 is subject to any orders made under Rule 5-8(2).

[129] In order to prevent the disclosure of sensitive and confidential information to the public, the Law Society seeks an order under Rule 5-8(2) excluding those portions

of the transcripts and exhibits that disclose complainant and witness names and any identifying information about the complainants and witnesses. If a member of the public requests copies of the exhibits or transcripts in these proceedings, those exhibits and transcripts should be redacted to remove any identifying information about the complainants and witnesses and before being provided to the public

[130] Given the sensitive and personal nature of the allegations, without express consent from the complainants and witnesses, we make an order under Rule 5-8(2) and Rule 5-9(1) as requested to protect the identity of the complainants and witnesses.