

2022 LSBC 36  
Hearing File No.: HE20210048  
Decision Issued: October 5, 2022  
Citation Issued: October 5, 2021  
Citation Amended: May 20, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL  
HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**ROBERT PHILLIP CHERNIACK**

RESPONDENT

**DECISION OF THE HEARING PANEL**

Written materials:	June 2, 2022
Further submissions:	September 14, 2022
Panel:	Kimberly Henders Miller, Chair Laura Nashman, Public representative Gurminder Sandhu, Bencher
Discipline Counsel:	Tara J.M. McPhail
Counsel for the Respondent:	Howard A. Mickelson, KC
Written reasons of the Panel by:	Kimberly Henders Miller

**OVERVIEW**

- [1] This matter relates to the Respondent's conduct in communicating with a member of the public on February 26, 2021.

- [2] Under Rule 5-6.5 of the Law Society Rules (the “Rules”), the Respondent and the Law Society of British Columbia jointly submitted to the Panel the Respondent’s admission of a discipline violation, and consent to a specified disciplinary action, relating to the Respondent’s conduct.
- [3] The Panel accepts the admission of the discipline violation and agrees with the disciplinary action proposed jointly by the Law Society and the Respondent. The Panel orders that the Respondent receive a reprimand.

## **PROCEDURAL BACKGROUND**

- [4] On or about February 28, 2021, the Law Society received a complaint from SN regarding the Respondent’s conduct in sending an email (the “Communication”) to SN on or about February 26, 2021. Following the Law Society’s investigation, the matter was referred to the Discipline Committee.
- [5] On September 23, 2021, the Discipline Committee authorized a citation against the Respondent, which was issued on October 5, 2021 and amended on May 20, 2022 (the “Citation”). The Citation alleges that the Respondent sent the Communication to SN, which contained discourteous and offensive remarks directed to SN, contrary to one or more of rule 2.2-1 and section 6.3 of the *Code of Professional Conduct for British Columbia* (the “BC Code”), thus constituting conduct unbecoming the profession, pursuant to s. 38(4) of the *Legal Profession Act*, 1998 SBC c. 9 (the “Act”). The Respondent admits being properly served with the Citation.
- [6] By letter dated June 1, 2022, the Respondent admitted the substance of the allegation and further admitted that the allegation amounts to conduct unbecoming the profession.

## **ISSUES**

- [7] The Panel considered the following issues:
- (a) whether it is appropriate for this Panel to proceed with the matter on the written record;
  - (b) whether the actions of the Respondent constitute conduct unbecoming the profession; and
  - (c) the parties’ request that this matter proceed by way of a hearing on the written record, pursuant to the Practice Direction issued April 6, 2018.

[8] The Panel also considered the Respondent's application pursuant to Rule 5-8. This application was subsequently withdrawn.

### **HEARING IN WRITING**

[9] The parties requested that this matter proceed by way of a hearing on the written record, pursuant to the Practice Direction issued April 6, 2018.

[10] To proceed with a hearing in writing, the panel must be satisfied that, on the basis of the materials filed, it can make a determination under s. 38(4) of the *Act* as to whether there was a discipline violation, and if so, the appropriate disciplinary action under s. 38(5) of the *Act*.

[11] In this case, the written record includes an initial joint submission and an agreed statement of facts, with supporting documentation.

[12] By order of June 6, 2022, the Panel found that the materials filed provide a comprehensive record, which appeared sufficient to allow it to make this determination. However, on considering the matter, the Panel requested further submissions. The parties filed joint further submissions.

### **FACTS**

[13] The Respondent was called and admitted as a member of the Law Society on August 30, 1991. Since 1998, the Respondent has been a sole practitioner in Vancouver, British Columbia, practising primarily in the area of corporate law.

[14] In September 2020, the Respondent was involved in a motor vehicle accident. As a result of the accident, and an underlying medical condition, the Respondent suffers from chronic pain. The Respondent occasionally takes medication to manage the pain.

[15] The Respondent is a supporter of B'nai Brith. The national chapter of this organization self-describes itself as Canada's "oldest independent Jewish Human Rights organization ... a principled grassroots voice, dedicated to eradicating racism, antisemitism and hatred in all its forms ...": <https://www.bnaibrith.ca/who-we-are/>.

[16] Concern about antisemitism has been a significant feature of the Respondent's family life as their grandmother lost her entire family in the Holocaust. The Respondent fears an increase in antisemitism in recent years. The Panel recognizes

that this familial history is tragic and significant, and provides important context to the unfolding of events.

- [17] SN is a lecturer in the Social Justice Education Department of the University of Toronto. SN also serves on the Executive Committee of Independent Jewish Voices Canada, which describes itself as a “grassroots organization grounded in Jewish tradition that opposes all forms of racism and advocates for justice and peace for all in Israel-Palestine”: <https://www.ijvcanada.org/about-ijv/>.
- [18] SN was a participant in an online public forum hosted by Carleton University, titled “Challenging the Narrative: Is Anti-Zionism Anti-Semitic?” Remarks made by SN during the forum were reproduced in a B’nai Brith press release, which was reviewed by the Respondent on or about February 26, 2021 (the “Release”). Prior to reviewing the Release, the Respondent did not know SN and had never communicated with SN. The Respondent was offended by the remarks.
- [19] Prior to reviewing the Release, the Respondent consumed ten milligrams of oxycodone. The Respondent had last taken this medication on October 20, 2020. The Respondent’s physician describes this medication as a potent narcotic analgesic, which has common side effects of sedation, which may affect cognitive function and judgment, and can result in short term memory loss, particularly with infrequent use.
- [20] In response to the Release, the Respondent located SN’s email address and sent SN the Communication. The contents of the Communication were offensive, discriminatory and profane. The Communication was not sent by the Respondent in the capacity of a lawyer, nor did the Respondent self-identify as a lawyer.
- [21] After receiving the Communication, SN identified the Respondent as a lawyer. SN made a complaint to the Law Society on or about February 28, 2021.
- [22] An investigating lawyer at the Law Society contacted the Respondent about the complaint on April 22, 2021. Prior to their conversation, the Respondent did not recall SN or sending the Communication, but during the conversation, the Respondent recalled sending the Communication and recalled its content. The Respondent expressed regret for the words.
- [23] On the same day, following the contact from the Law Society, the Respondent sent another email to SN apologizing for the Communication and expressing regret and shame for the language used, which the Respondent characterized as “nasty, vicious and uncalled for.” The Respondent admitted insulting, swearing at and using a homophobic slur against SN, and expressed horror to have used “such

callous, crude, and hateful language” towards SN. The Respondent indicated that at the time of the Communication, the Respondent’s thinking was clouded by the use of painkillers. The Respondent asked for forgiveness and an opportunity to apologize directly to SN by phone or online.

- [24] Following contact from the Law Society investigator, and on the Respondent’s own initiative, the Respondent began attending a series of counselling sessions with the Lawyers Assistance Program.

## ANALYSIS

### **Whether the Respondent’s actions constitute conduct unbecoming**

- [25] The Law Society bears the onus of proving on a balance of probabilities that the conduct of the Respondent constitutes conduct unbecoming the profession: *Foo v. Law Society of British Columbia*, 2017 BCCA 151.

- [26] Conduct unbecoming the profession is defined in s. 1 of the *Act* as follows:

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

- (a) to be contrary to the best interest of the public or of the legal profession, or
- (b) to harm the standing of the legal profession.

### **Rule 2.2-1 of the *BC Code***

- [27] Rule 2.2-1 of the *BC Code*, titled “Integrity”, states:

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.

- [28] The Commentary to rule 2.2-1 of the *BC Code*, which characterizes integrity as a fundamental quality of a lawyer, makes it clear that a lawyer’s conduct is measured both within and without the scope of practice:

[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.

[29] In *Law Society of BC v. Watt*, 2001 LSBC 16, the review panel expanded on this principal at para. 20:

The Benchers discipline Members for some 'off-the-job' conduct because lawyers hold positions of trust, confidence, and responsibility giving rise to many benefits but imposing obligations not shared with most other citizens ... If a lawyer acts in an improper way, in private or public life, there may be a loss of public confidence in the lawyer, in the legal profession generally, and in the self-regulation of the legal profession if the conduct is not properly penalized in its professional aspect. It is possible that conduct unbecoming may lead to controversy about the legal profession and lawyers, which may disrupt the proper functioning of lawyers in British Columbia as they relate to clients, interested third parties (such as witnesses, police officers, and service providers), other lawyers (within and without this jurisdiction), the judiciary, the press, and, put generally, anyone who may be expected to rely on lawyers behaving in a dependable, upright way. The behavior of lawyers must satisfy the reasonable expectations which the British Columbia public holds of them. By their behavior, lawyers must maintain the confidence and respect of the public; lawyers must lead by example ...

[30] It is clear that the Respondent's conduct was contrary to the best interests of SN. Moreover, the type of language employed by the Respondent in the Communication is an affront to a civil society, and thus is contrary to public interest generally.

[31] Conduct of this nature causes direct harm to the standing of the legal profession through an erosion of public confidence in legal professionals. The Respondent's conduct in this matter is a striking example of public response to a lawyer who engages in highly inappropriate and harmful conduct. When SN learned of the Respondent's professional status, SN immediately initiated a complaint based on the view that the behaviour was not "appropriate for a lawyer."

### **Rule 6.3 of the *BC Code***

[32] Rule 6.3 of the *BC Code*, titled “Harassment and discrimination”, states:

**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.

[33] The Commentary to rule 6.3 of the *BC Code* 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.

[34] The joint submission before the Panel is that while communications between individuals are not governed directly by the *Human Rights Code*, RSBC 1996 c. 210, this does not exempt lawyers from honouring the stated purpose of the legislation, which includes:

3(b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights.

[35] The Panel finds that it need not resort to the Commentary to find that the Respondent has acted contrary to rule 6.3 of the *BC Code*. In accordance with rule 6.3-1 of the *BC Code*, the principles of human rights laws apply to the interpretation of the rule. These principles are manifest in the stated purpose of those laws. By using homophobic and racist words, the Respondent discriminated against SN, contrary to rule 6.3-5. The Respondent’s actions undermine the ideals set out in 3(b) of the *Human Rights Code*.

### **Whether the proposed penalty is appropriate**

[36] The sanctions that may be imposed pursuant to s. 38(5) and (7) of the *Act* range from a reprimand to disbarment. A panel’s decision on sanction is guided by the overarching duty in s. 3 of the *Act* to uphold and protect public interest in the administration of justice.

- [37] In determining the appropriate sanction, a panel must consider the case-specific mitigating and aggravating factors. Many of these factors were enumerated in the leading case of *Law Society of BC v. Ogilvie*, 1999 LSBC 17. More recently, in *Law Society of BC v. Dent*, 2016 LSBC 05, the *Ogilvie* factors were conveniently condensed into four broad categories:
- (a) nature, gravity and consequences of conduct;
  - (b) character and professional conduct record of the respondent;
  - (c) acknowledgment of the misconduct and remedial action; and
  - (d) public confidence in the legal profession including public confidence in the disciplinary process.
- [38] Rule 5-6.5 allows a respondent to admit an allegation and consent to disciplinary action by way of joint submissions. A panel hearing a matter pursuant to this rule is prohibited from diverging from the joint submissions on disciplinary action unless it finds that the proposed sanction is contrary to public interest in the administration of justice: Rule 5-6.5(3).
- [39] The Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43, set out the principles which underpin the desire for deference being given to joint submissions. These principles include certainty for the parties negating the negative aspects involved in requiring witnesses to testify and creating efficiencies in the system: *Law Society of Upper Canada v. Archambault*, 2017 ONLSTH 86, at para. 15.
- [40] In prior cases involving inappropriate communications, the disciplinary action imposed is generally a small to medium fine: *Law Society of BC v. Israels*, 1994 LSDD No. 194; *Law Society of BC v. Harding*, 2013 LSBC 25; *Law Society of BC v. Lang*, 2022 LSBC 04.
- [41] The Panel notes that none of the authorities provided involve communications by a lawyer that were made completely outside the scope of the profession, and none involve a violation of rule 6.3 of the *BC Code*. The cases provided, where the conduct unbecoming the profession occurs outside of the scope of the profession, generally involve offences under provincial or federal legislation: *Law Society of BC v. Berge*, 2005 LSBC 28; *Watt*.

### **Nature, gravity, and consequences of conduct**

- [42] The Communication was offensive, discriminatory and profane. In a society that embraces ideals such as promoting “a climate of understanding and mutual respect



where all are equal in dignity and rights”, the Communication was a grave affront. It is perplexing that someone who is sensitive to intolerant views based on family history engaged in using language that is insulting, hurtful and discriminatory.

- [43] The Respondent opposes the position attributed to SN in the Release and considers the words attributed to SN to be antisemitic. This was likely to invoke a reaction, given the Respondent’s background. The Panel accepts that the Respondent consumed a narcotic analgesic drug to treat pain prior to reviewing the words of SN. While these factors do not excuse the actions the Respondent took, they do help to explain what was a substantial and seemingly uncharacteristic lapse in judgment.
- [44] The affect that receiving the Communication had on SN is implicit, as demonstrated by SN’s subsequent investigation into the Respondent’s identity and complaint to the Law Society.
- [45] Unlike other cases, the Panel recognizes that the Respondent did not send the Communication as a lawyer or in conjunction with legal activities. This does not excuse the conduct, but puts it in a different category from other cases.

#### **Character and professional conduct record of the respondent**

- [46] The Respondent has enjoyed a lengthy career of over 30 years, primarily as a sole practitioner in the area of corporate law.
- [47] The Respondent does not have a professional conduct record.
- [48] The Respondent provided two letters of reference, which describe the Respondent as “kind and caring” and also “culturally sensitive” with many years of legal service relating to the economic development of Indigenous communities. Again, the fact that the Respondent has a history of working with marginalized communities, yet acted in a discriminatory manner, is all the more perplexing.

#### **Acknowledgment of the misconduct and remedial action**

- [49] The Respondent admits the conduct and jointly submits that it amounts to conduct unbecoming the profession.
- [50] From the moment the Respondent was contacted about SN’s complaint and attention was drawn to the Communication, the Respondent has expressed regret, remorse and shame. Moreover, even though the Respondent may feel that opposition to SN’s remarks has some underlying justification, the Respondent has

accepted responsibility and acknowledged that the words used were, in the Respondent's words, "utterly inexcusable".

- [51] The Respondent expressed this remorse in writing to the Law Society and in an apology email to SN. In response to the situation, the Respondent also initiated, counselling sessions with the Lawyer's Assistance Program.

### **Public confidence in the legal profession**

- [52] As noted previously, the complaint was pursued on the basis that the conduct was "not behaviour that is appropriate for a lawyer." SN's objection demonstrates both that the public expects a certain standard of conduct by lawyers and that the Respondent failed to meet that standard. Such conduct is damaging to the perception of the legal profession generally, and as a result, is damaging to public confidence in the administration of justice. As a self-regulating body, it is incumbent on the Law Society to try to repair this damage by investigating and sanctioning lawyers who contribute to it.
- [53] Accordingly, the sanction imposed in this case should be commensurate with the range of prior cases involving conduct unbecoming through communications. It should also take into consideration the larger context of the circumstances, including that the background of the Respondent, and that the Respondent was not acting in a professional capacity when the Communication was sent.
- [54] The parties initially proposed that a fine of \$6,000 would be appropriate. The Panel was asked to consider, as an alternative, that this fine be paid to the Canadian Centre for Diversity and Inclusion (the "CCDI") instead of the Law Society.
- [55] The CCDI works with many bodies, including the Law Society, in furtherance of its mission:

.... to help those we work with be inclusive, free of prejudice and discrimination, and to generate awareness, dialogue and action helping people to recognize diversity as an asset and not an obstacle.

<https://ccdi.ca/our-story/>

- [56] The Panel asked for further submissions on whether a fine could be paid to a third party, or alternatively, if the parties wished to revise their joint position to include another sanction to which the Panel could give effect.

- [57] The parties ultimately jointly proposed that a reprimand with an order to pay \$6,000 to the CCDI would be appropriate. Alternatively, the parties submitted that if this was not deemed appropriate, that the Panel should consider a fine of \$6,000.
- [58] The Panel finds that a reprimand with an order to pay \$6,000 to the CCDI is appropriate. Having this sanction imposed in these unique circumstances will impact the Respondent sufficiently to address the need for general deterrence. It is an acknowledgement to SN and the greater public that the Law Society is responsive when a lawyer engages in discriminatory communications that are contrary to the best interests of that public.
- [59] The Respondent's actions, after being made aware of the complaint, demonstrate a consistent willingness to make amends. Although unique, the proposed sanction will allow the Respondent to make a vastly more meaningful reparation by contributing to a body that will promote the values that were denigrated by the Respondent's singular action, and have also been significant values throughout the Respondent's own life.

#### **CONCLUSION ON CONDUCT AND DISCIPLINARY ACTION**

- [60] Based on the forgoing, and pursuant to Rule 5-6.5(2), the Panel accepts the agreed statement of facts and the Respondent's admission of a discipline violation. Pursuant to s. 38(4)(b) of the *Act*, the Panel finds that in sending the Communication to SN, the Respondent committed conduct unbecoming the profession.
- [61] Pursuant to s. 38(5)(a) and (7) of the *Act*, and based on a consideration of the unique circumstances, the relevant mitigating and aggravating factors, and the range of sanctions imposed previously, this Panel finds that a reprimand with an order to pay \$6,000 to the CCDI is a fair, meaningful and appropriate disciplinary action. The Panel does not find that the proposed sanction is contrary to public interest in the administration of justice. The Panel accepts the joint submission of the Law Society and the Respondent on the proposed sanction.

#### **COSTS**

- [62] The Law Society is not seeking costs and no order for costs is made.

#### **ORDER**

- [63] The Hearing Panel orders that:

- (a) pursuant to ss. 38(5)(a) of the *Act*, the Respondent is reprimanded;  
and
- (b) pursuant to ss. 38(7) of the *Act*, the Respondent is to pay to the CCDI the amount of \$6,000, with \$3,000 being payable by December 31, 2022, and the remaining \$3,000 being payable by December 31, 2023.