

2023 LSBC 29
Hearing File No.: HE20210046
Decision Issued: July 25, 2023
Citation Issued: October 5, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

NICKOLAUS HAROLD MACDONALD WEISER

RESPONDENT

**DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION**

Hearing date: April 26, 2023

Panel: Karen Ameyaw, Chair
Paul Ruffell, Public representative

Discipline Counsel: Ilana Teicher
Appearing on his own behalf: Nickolaus Harold MacDonald Weiser

Written reasons of the Panel by: Karen Ameyaw

BACKGROUND

- [1] The facts and determination decision (the “F&D Decision”) in this matter was issued on December 7, 2022 (*Law Society of BC v. Weiser*, [2022 LSBC 50](#)). The Respondent was found to have committed professional misconduct in relation to each of the three allegations in the October 5, 2021 citation (the “Citation”), pursuant to s. 38(4) of the *Legal Profession Act* (the “Act”).
- [2] Prior to the disciplinary action hearing, the chair, Jacqueline G. McQueen, KC resigned as a member of the LSBC Tribunal due to a judicial appointment. The disciplinary action hearing proceeded with the two remaining panel members (the “Panel”) and a new chair was appointed pursuant to Rule 5-3 of the Law Society Rules (the “Rules”).

POSITION OF THE PARTIES

- [3] The Law Society submits that the appropriate disciplinary action is a suspension of three months, commencing on the first day of the first month after the disciplinary action decision is issued or such other date as the Panel may order.
- [4] The Law Society also seeks costs of \$13,212.50, payable within 30 days of the issuance of the disciplinary action decision or such other date as the Panel may order or the parties may agree to in writing.
- [5] The Respondent represented himself during both the facts and determination hearing (the “F&D Hearing”) and this hearing. The Respondent made oral submissions and did not provide any supporting materials during the disciplinary action phase of the hearing.
- [6] The Respondent opposes the sanction of a suspension of any length but agrees to an order requiring a payment of costs.

ANALYSIS

General principles with respect to disciplinary action

- [7] Disciplinary proceedings address the Law Society’s mandate set out in section 3 of the *Act* to uphold and protect the public interest in the administration of justice.
- [8] The non-exhaustive factors to be considered for sanction, set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 and noted by the panel in *Law Society of BC v. Lessing*, [2013 LSBC 29](#), reflect the objects and duties of the Law Society’s mandate.

- [9] Numerous panels have adopted the “consolidated *Ogilvie* factors” summarized by the panel in *Law Society of BC v. Dent*, [2016 LSBC 05](#), as a framework to assess and determine the appropriate disciplinary action. The factors were consolidated 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.
- [10] In *Law Society of BC v. Gellert*, [2014 LSBC 05](#), the panel held that a result that furthers the objective of protecting the public is best achieved by considering the “entire scope of the misconduct in issue and not to each particular wrongdoing viewed piecemeal.” This Panel will be guided by this global approach to determine the appropriate disciplinary action.

Nature, gravity and consequences of the misconduct

- [11] In *Gellert*, at para. 39, the panel held that the nature and gravity of the misconduct will almost always be an important factor as it stands as a “benchmark” in assessing how to best protect the public and preserve its confidence in the profession.
- [12] The F&D Decision sets out the facts and circumstances that led to the Panel finding that the Respondent committed professional misconduct in relation to allegation 1 (engaging in the practice of law while suspended) at paras. 45 to 50 and allegations 2 and 3 (failure to provide full and substantive responses to questions and/or statements contained in correspondence from the Law Society within designated timeframes, or to produce copies of files as requested) at paras. 59 to 63.
- [13] In relation to allegation 1, the conduct that led to the Panel finding that the Respondent practised law while suspended in the F&D Decision is set out below:
- a. The Respondent continued to represent to the public and his clients that he was a lawyer entitled to practise while suspended.
 - b. The Respondent admitted the following activities during the suspension period:

(i) Provision of various legal services and supervised staff related to a lease assignment, including directly and through his staff, representing that he was qualified or entitled to practise law. The Respondent asserted that he completed work on this matter during the suspension period to avoid harm or loss to his client. The Respondent did not alert the Law Society of time-sensitive work required on this matter.

(ii) Provision of legal services and supervised staff related to the drawing and execution of a will, including directly or through his staff, representing that he was qualified or entitled to practise law. The Respondent asserted that he met with the client to discuss and execute the will in advance of the client's travel.

(iii) Provision of various legal services and supervised staff related to a property conveyance, including directly or through his staff, representing that he was qualified or entitled to practise law.

(iv) Issuing three trust cheques.

[14] Practising law while under a suspension is misconduct of a serious nature (*Law Society of BC v. Pyper*, [2016 LSBC 1](#) at para. 65). The panel in *Law Society of BC v. Coutlee*, [2010 LSBC 27](#), addressed the serious nature of this type of misconduct at para. 14:

Regarding the nature and gravity of the conduct proven, the blatant disregard of a restriction on practice imposed by a hearing panel must be regarded as misconduct of a most serious nature. It goes to the heart of the ability of the Law Society to impose and enforce discipline on lawyers. *The passage of time between the imposition of the restriction and the breach is in no way a mitigating factor.*

[emphasis added]

[15] The Respondent's conduct conveyed a lack of concern for his professional obligations and respect for the Law Society's regulatory role. The Panel agrees with the Law Society's submission that in the absence of compliance, regulation becomes ineffective, and the public suffers harm. A significant suspension would have a specific and general deterrence impact.

[16] In relation to allegations 2 and 3, the conduct that led to the Panel finding that the Respondent failed to respond, or failed to provide complete responses, to requests by the deadlines imposed by the Law Society in the F&D Decision is set out below:

- a. The Respondent failed to respond to a request for responses to questions and/or statements by August 28, 2020, despite email and telephone follow-up. A partial response was received following an initial notice of suspension sent on September 28, 2020. Following a second notice of suspension, the requests were answered on October 26, 2020.
- b. The Respondent failed to respond to a request for responses to questions and/or statements by March 4, 2021, despite email and telephone follow-up, and acknowledgement of receipt of materials. A notice of suspension was sent on March 8, 2021 advising that the Respondent would be suspended effective March 19, 2021 failing response, and Law Society staff subsequently left two voice messages for the Respondent by way of follow-up. The Respondent was advised of his suspension on March 19, 2021. A partial response was received by the Law Society from the Respondent that day, but was incomplete. The Respondent provided a full response on March 24, 2021 and the suspension was lifted.
- c. The Respondent failed to respond to a request to produce copies of files related to an investigation file on or before April 23, 2021, despite email follow-up. A notice of suspension was sent to the Respondent on April 26, 2021 advising that the Respondent would be suspended on May 5, 2021 if he did not comply with the request. On May 5, 2021, Law Society staff telephoned the Respondent and advised him that he was suspended. A notice of suspension letter was sent on May 5, 2021. The Respondent provided a response on May 12, 2021 and the suspension was lifted.

[17] It has been held consistently by panels that the failure to respond to Law Society communications is serious misconduct. In *Law Society of BC v. Dobbin*, 1999 LSBC 27, the majority of a review board addressed this type of misconduct at paras. 20 and 25:

... If the Law Society can not count on prompt, candid, and complete replies by members to its communications it will be unable to uphold and protect the public interest, which is the Law Society's paramount duty. The duty to reply to communications from the Law Society is at the heart of the Law Society's regulation of the practice of law and it is essential to the Law Society's mandate to uphold and protect the interests of its members. If members could ignore communications from the Law Society, the profession would not be governed but would be in a state of anarchy.

... There is no doubt whatever that a persistent, intransigent failure to respond to Law Society communications brings the legal profession into disrepute.

[18] The Law Society's ability to regulate lawyers and protect the public and properly investigate, assess and resolve complaints requires the cooperation of lawyers with investigations and provide complete, accurate and timely information (*Law Society of BC v. Di Bella*, [2021 LSBC 52](#) at para. 37; *Law Society of BC v. Lessing*, [2022 LSBC 7](#) at para. 37).

[19] The panel in [Lessing](#) held at para. 47:

... the Law Society's inability to undertake comprehensive investigations of alleged misconduct and to seek appropriate disciplinary action damages public confidence in the disciplinary process and the legal profession.

[20] In the F&D Decision, this Panel determined that the Respondent's conduct that included: (a) repeated failures to provide complete and timely responses to Law Society requests in two separate investigations over approximately ten months; and (b) failure to provide full and substantive responses within designated timeframes or to produce copies of requested files, was at odds with his clear professional obligations.

[21] The nature, gravity and consequences of the Respondent's misconduct cannot be understated. In *Law Society of Upper Canada v. Baker*, [2006 ONLSHP 21](#), the panel stated at paras. 6 and 7 that when a lawyer fails to respond promptly and completely, it leads to investigative delay, and diminished respect for the legal profession and self-governance at a cost of time and Law Society resources funded by the legal profession.

The character and professional conduct record of the Respondent

[22] The Respondent has practised law in British Columbia for approximately 36 years and was admitted as a member of the Law Society of British Columbia in May 1984.

[23] The Respondent's professional conduct record (PCR) consists of the following:

- (a) a conduct review authorized April 5, 2018 for, amongst other things, failing to respond promptly and completely to communications from the Law Society;

- (b) a practice standards recommendation (January 27, 2022 to April 4, 2023);
- (c) five administrative suspensions (March 19 to 24, 2021, May 5 to 12, 2021, October 12 to 15, 2021, March 23 to 28, 2022, and June 3 to 6, 2022); and
- (a) a practice standards order (December 2022).

[24] A review of the Respondent's PCR reveals a repetitive pattern of conduct including failures to respond promptly to requests for information or to produce documents requested by the Law Society. The Respondent received five administrative suspensions over a 15-month period in 2021 and 2022 for failures to respond to the Law Society. The Respondent's conduct during the administrative suspension in 2021 led to the Citation that resulted in this Panel finding the Respondent had committed professional misconduct.

[25] The repetitive nature of the conduct shown throughout the Respondent's PCR and the events that gave rise to the Citation cannot be overlooked. The Panel finds the Respondent's PCR a significant and a highly aggravating factor.

Acknowledgement of the misconduct and remedial action

[26] The Respondent's oral submissions before the Panel in this hearing included: (1) that he was not able to consistently access encrypted communications from the Law Society and requested other means of communication including directing the communications to his assistant; and (2) that he was unaware of the content of his PCR raising questions about notice and service.

[27] The Respondent first raised the encrypted communication matter at the F&D Hearing as cited at para. 14 of the F&D Decision. At that time, the Panel found that on the available evidence there was effective communication between the Law Society and the Respondent (see para. 15). Despite the passage of time between the F&D Hearing and this hearing, the Respondent failed to introduce any evidence for the Panel's consideration. As a result, the Panel sees no reason to depart from the deemed admissions in the Notice to Admit (NTA). There is no evidence before the Panel to substantiate this claim as evidence of mitigation.

[28] The Respondent's submission that he was unaware of the content of his PCR is not a result of notice or service. The Panel finds that effective notice and service by the Law Society to the Respondent occurred.

- [29] The Respondent did not provide evidence of any remedial actions at present or in the future to address the matters that gave rise to the Citation. The Panel is particularly concerned at the absence of evidence of remedial actions in light of the numerous examples of delays and non-responsiveness demonstrated by the Respondent in his PCR.
- [30] While the Respondent may have acknowledged the facts underlying his misconduct in the NTA, the Law Society's case was proven by way of admissions that were deemed admissions due to the Respondent's failure to reply to the Law Society's NTA.
- [31] The Respondent's submissions before this Panel cannot be characterized as acknowledging the misconduct or taking responsibility for his conduct. The Panel finds this *Ogilvie* factor as an aggravating factor.

Public confidence in the legal profession and the disciplinary process

- [32] The public must have confidence in the disciplinary process and the panel in *Dent* at para. 39 held that "similar cases" is the primary factor for consideration.
- [33] In [Coutlee](#), the panel held at para. 20:

... There is a significant need to protect the public interest when restrictions on practice are imposed, and lawyers must be clear that breaches of those prohibitions will be treated seriously.

- [34] The panel in *Law Society of BC v. Hall*, [2003 LSBC 11](#), acknowledged the "importance of the obligation to respond and the need to ensure that Law Society resources are not wasted calling on lawyers to do what they know they must do without prompting." The panel explained at para. 2:

... Otherwise the Society cannot effectively discharge its responsibility of protecting the public interest in the administration of justice. It is simple: lawyers neither have the freedom not to respond nor the freedom to respond according to a schedule that suits them.

- [35] In *Law Society of BC v. Pyper*, [2017 LSBC 35](#) the panel stated at para. 32:

The disciplinary action we impose must have sufficient, specific and general deterrent value to maintain public confidence in the integrity of the legal profession. A strong message must be sent to the profession and to the public that this conduct will not be tolerated.

[36] The Law Society submits that in similar “failure to respond to the Law Society and practising while suspended” cases the disciplinary action resulted in suspensions ranging from one month (*Coutlee*), two months (*Pyper*), and three months (*Law Society of BC v. Hopkinson*, [2020 LSBC 54](#)).

[37] The Panel’s role to uphold and protect the public interest takes precedence over reducing a sanction based on the impact on the Respondent or their personal circumstances. The Panel accepts the Law Society’s submission that the Respondent be suspended for a period of three months.

COSTS

[38] The Panel agrees that the Law Society is entitled to its costs. Item 15 of the draft bill of costs and the court reporter fees will however be reduced to \$4,500 and \$984.38 respectively as the disciplinary action hearing took only half a day and not the full day claimed.

ORDERS

[39] The Panel makes the following orders:

- (a) the Respondent is suspended from the practice of law for a period of three months, commencing on September 25, 2023 or as otherwise agreed to between the parties; and
- (b) the Respondent must pay costs of \$11,384.38 to the Law Society on or before August 1, 2023 or as otherwise agreed to between the parties.