2024 LSBC 03
Hearing File No.: HE20200017
Decision Issued: February 2, 2024
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THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

SAMUEL THEODORE GRAY COLE

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing date:	November 6, 2023
Written submissions:	November 7, 2023
Panel:	Geoffrey McDonald, Chair Ralston Alexander, KC, Lawyer Cyril Kesten, Public representative
Discipline Counsel:	Kathleen M. Bradley
Counsel for the Respondent:	Patrick Sullivan
Written reasons of the Panel by:	Geoffrey McDonald

OVERVIEW

[1] What is the appropriate disciplinary action for a lawyer who knowingly and purposely circumvents the directions of a regulator for the attempted benefit of their client? The Law Society argues that these circumstances require a twelve-month suspension on the basis that the public must be protected from the Respondent's serious ethical failures and other lawyers must know that such behaviour will receive a serious sanction. The Respondent agrees he must be suspended but seeks a two-month suspension and a $20,000 fine. The Respondent argues that the genuine efforts he has made to rehabilitate himself mitigate the sanction that must be imposed to protect the public interest. He also points to the lengthy time since his misconduct – nearly a decade. Considering all the circumstances and applying the *Ogilvie* factors, the Panel finds that the appropriate sanction that protects the public, taking into account all the circumstances of this case, is a four-month suspension and a $20,000 fine. In addition, the Panel accepts the joint submission that the Respondent pay costs in the amount of $29,842.50.

FACTS, EVIDENCE AND ASSESSMENT OF AGGRAVATING AND MITIGATING FACTORS

[2] The circumstances are set out in the Panel's facts and determination decision (*Law Society of BC v. Cole*, 2021 LSBC 40, upheld *Cole v Law Society of British Columbia*, 2023 BCCA 199). The Respondent was retained by KR in 2014 to help create a publicly traded luxury luggage company. The Respondent provided a plan involving the reverse takeover of an existing company. He then advised and assisted KR in executing that plan, including adding KR to the board of the selected company to ensure the reverse takeover occurred without difficulties. By becoming a board member KR became an insider and, pursuant to a directive issued by the securities regulator, ineligible to take part in a planned private placement. The private placement was KR's intended method of profiting from the business. The Respondent advised KR to circumvent the security regulator's directive by using his then girlfriend, AW, as a nominee taking part in the private placement on his behalf. The Respondent then facilitated AW taking part in the private placement, drafting and filing all of the required paperwork. KR provided all the funds for AW's participation and instructed the Respondent. The Respondent then implemented the reverse takeover with AW as KR's nominee in the private placement. In the course of the reverse takeover the Respondent filed materials with the securities regulator that contained false information.

[3] The Respondent's actions ultimately did not benefit his client. KR was sanctioned by a securities regulator as a direct consequence of the insider trading. KR

described in detail the significant negative impact that sanction had on him in his testimony at the facts and determination hearing ("F&D Hearing").

[4] The Respondent gave evidence at the disciplinary action hearing ("DA Hearing"). Since the F&D Hearing, the Respondent has accepted responsibility for his actions and acknowledged that his conduct was professional misconduct requiring a suspension from practice. At the DA Hearing the Respondent acknowledged that he did communicate with KR regarding the direction from the regulator that no insiders take part in the private placement. The Respondent explained that he was a junior lawyer at the time of these events and agrees in hindsight he was in over his head. He described feeling that he had to "do it all" and regrets not seeking advice from more senior counsel about how to properly conduct this file.

[5] Since these events the Respondent joined a larger firm. He is careful to restrict his practice to areas he knows well and is quick to refer clients to other lawyers in the firm for legal issues with which he is not familiar. Moreover, the Respondent has worked diligently to rehabilitate himself. He has become a mentor to many lawyers. The Respondent testified that the disciplinary process has changed how he practices and made him a better lawyer. He agreed that a suspension was necessary but was extremely concerned about the long-term effect different lengths of suspension would have on his practice and his clients.

[6] Two letters of support by senior lawyers from his firm were provided. Both lawyers attest to the Respondent's growth as a lawyer over recent years, the high level of competence he has developed, and the good, ethical character he demonstrates daily. They described how the Respondent has grown into a mature, competent, and ethical lawyer. Both lawyers emphasize their respect for the Respondent's current work and the mentoring role he has taken on in the firm.

[7] The Panel finds the following mitigating, neutral and aggravating factors:

(a) It is mitigating that the Respondent has accepted responsibility for his misconduct.

(b) The Respondent's efforts to rehabilitate himself is a mitigating circumstance.

(c) A neutral circumstance is that the Respondent was not taking part in a fraudulent scheme. KR was genuinely attempting to create a successful luxury luggage company. He had sought the Respondent's advice for that purpose and was trying to get the business off the ground. There was no attempt by anyone involved to defraud anyone.

(d) That the Respondent was a junior lawyer at the time of these events is a neutral factor. Lawyers are expected to restrict their practices to areas in which they are competent. Being a junior lawyer is an explanation but not an excuse and does not mitigate the seriousness of his conduct.

(e) The passage of ten years since these events is a neutral factor. The length of time to adjudicate the complaint neither mitigates nor aggravates the circumstances of this case. However, it is a factual circumstance of this case that the Panel must consider in the context of all the facts of the case.

(f) An aggravating factor is that the Respondent approached accomplishing the reverse takeover and the private placement with AW as a nominee without regard to his ethical obligations. The Respondent was intent on accomplishing his client's objectives at all costs. The Respondent facilitated a direct violation of the regulator's direction that no insiders take part in the private placement and in the course of doing so filed materials with the regulator that contained false information.

DISCUSSION

[8] The decision in *Law Society of BC v Ogilvie*, 1999 LSBC 17 at para. 10, provides a detailed non-exhaustive list of general factors and principles to be considered when determining an appropriate disciplinary action. These factors were summarized into four general categories in *Law Society of BC v Dent*, 2016 LSBC 5 paras. 19 to 23, as follows:

(a) nature, gravity and consequences of the conduct;

(b) character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and,

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

[9] These four generalized categories encapsulate the *Ogilvie* factors and are the normal approach when determining disciplinary action (see *Law Society of BC v Lee*, 2022 LSBC 5 para. 10, *Law Society of BC v Lessing*, 2022 LSBC 28 para. 21, and *Law Society of BC v Lau*, 2023 LSBC 15 para. 15). The Panel will use these categories when evaluating the conduct at issue and determining the appropriate sanction. The Panel will consider any aggravating or mitigating factors and review

similar disciplinary cases (*Law Society of BC v Faminoff*, 2017 LSBC 4, affirmed 2017 BCCA 373). The Panel will address the entire scope of the conduct globally and not in a piecemeal fashion (*Law Society of BC v Gellert*, 2014 LSBC 5 para. 37). Also, the Panel must determine what steps are necessary to protect the public including confidence in the legal profession (*Law Society of BC v Fogarty*, 2023 LSBC 21 para. 10). Not all the *Ogilvie* factors are applicable to every case and the Panel must prioritize protection of the public as the paramount consideration (*Fogarty*, para. 37).

[10] Integrity is at the heart of the services lawyers provide to the public. The *Code for Professional Conduct in British Columbia* (the "*Code*") defines lawyer as follows:

> A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession. (*Code*, section 2.1)

[11] Lawyers have a duty to maintain integrity of the law and are prohibited from aiding, assisting or counselling any person to break the law (*Code*, rule 2.1-1(a)). Lawyers must carry out all of their duties "honourably and with integrity" (*Code*, section 2.2). When serving their client lawyers are prohibited from unlawful acts.

> *A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law*. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. *The office of the lawyer does not permit, much less demand, for any client, violation of law* or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.
> [emphasis added]
> (*Code*, rule 2.1-3(e))

[12] The proper administration of justice requires lawyers to act with integrity. When assessing conduct, acts of gross dishonesty which demonstrate a lack of integrity by the lawyer must be viewed as extremely grave regardless of the consequences. Lawyers have a privileged position and must be held to a high ethical standard.

[13] Applying the *Ogilvie* factors as summarized in *Dent*, the Panel makes the following findings.

Nature, gravity and consequences of the conduct

[14] The Respondent's misconduct in this case is a serious breach of his ethical obligations. It is never acceptable for lawyers to contravene directions of regulators. It is never acceptable for lawyers to file materials they know contain false information. Advising and then facilitating AW's participation in the private placement as KR's nominee contrary to the directions of the regulator is a major breach.

[15] However, while this was a direct breach of a regulator's direction, no one was attempting to defraud anyone. The Respondent's scheme, though carried out unethically and without regard for his professional obligations, was an attempt to create a legitimate publicly traded business. The purpose wasn't nefarious, though the Respondent's methods of accomplishing it were severely lacking.

[16] The Respondent's conduct had serious consequences for his client. KR was sanctioned by a securities regulator severely impacting his ability to work in his chosen field for several years.

Character and professional conduct record of the respondent

[17] The Respondent does not have a professional conduct record.

[18] Two reference letters were tendered by the Respondent. While the letters are useful to the Panel in providing some insight into the Respondent's character and growth since these events, they are of limited value in assessing the appropriate disciplinary action (*Law Society of BC v Gregory*, 2022 LSBC 17 at para. 49). Lawyers often "…can adduce a wealth of glowing tributes from [their] professional brethren" (*Bolton v Law Society*, [1994] 2 All ER 486 (CA), cited in *Law Society of BC v Dindsa*, 2020 LSBC 13 at para. 40). While these reference letters should be considered, they have limited utility in determining a sanction that will maintain the public's confidence that any lawyer they consult will be a person of unquestionable integrity, probity and trustworthiness.

Acknowledgement of the misconduct and remedial action

[19] The Respondent has acknowledged his misconduct. He accepts that he committed professional misconduct when failing to meet the ethical standards expected of all lawyers. He agrees that his misconduct is serious and requires a suspension.

[20] The Respondent now practices in a very different circumstance than a decade ago. He is part of a much larger, full-service firm. The Respondent reports that he is

careful to restrict his practice to areas within his skill set and that he is quick to refer clients requiring legal services outside his normal practice. In the ten years since this misconduct, he has matured into an effective and respected lawyer. He is a part of a large and respected firm with appropriate supports to ensure he continues his practice appropriately and effectively.

[21] The Panel accepts the Respondent's assertion that he has taken appropriate steps to rehabilitate himself and understands the gravity of his conduct.

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

[22] The public must be able to rely on the integrity of lawyers to correctly carry out their duties. Lawyers have a privileged and essential role in our society and the administration of justice and for this reason they are held to a very high standard. Public confidence in the Law Society as the regulator requires a suspension. The public has every right to expect that lawyers who do not carry out their duties ethically will face serious consequences regardless of whether their ultimate goal was benign or innocuous. Lawyers must know that if they counsel and/or facilitate breaches of the law, including directives by regulatory bodies, they will lose the privilege of practicing law.

Applying the factors to this case

[23] The Law Society argues that despite the passage of time and the Respondent's efforts to rehabilitate himself a 12-month suspension is required. The Law Society fairly emphasizes that the Respondent knowingly counselled and then facilitated conduct expressly prohibited by the securities regulator. In and around this misconduct the Respondent filed materials with the regulator that he knew were manifestly false.

[24] The Respondent seeks a substantially lesser penalty, asking for a two-month suspension combined with a $20,000 fine. The Respondent provides a large number of decisions ordering sanctions which range from fines to suspensions. The Respondent argues that because of the passage of time allowing him to mature as a lawyer, his acknowledgement of his misconduct, and the nature of his current practice as part of a large firm, little deterrence is required.

[25] The parties presented a broad range of decisions with disciplinary actions varying from fines, to suspensions of various lengths, to disbarment. There was no decision that precisely fit the Respondent's circumstances. The circumstances were all

distinguishable in one way or another. Decisions where the disciplinary action came about through a joint admission of misconduct by the subject lawyer are of limited value. In those decisions the tribunal only had the option of either accepting the proposed disciplinary action or finding that it was so far outside the appropriate range that it was contrary to the public interest in the administration of justice and must be rejected. The Panel takes note of those decisions but can only give them limited weight.

[26] The imposition of a disciplinary action that includes a fine and suspension as requested by the Respondent is unusual. It should only be done where it demonstrably fits the principles underlying a disciplinary action (*Law Society of BC v Nguyen*, 2016 LSBC 21 at para. 46). Fines are a lesser form of sanction than suspensions (*Nguyen* at para. 41). There is also the concern that use of a fine, even if in combination with a shorter suspension, could be seen as allowing lawyers to "pay to practice" and thereby undermine the confidence in the legal profession.

[27] The Law Society and the Respondent discussed the issue of the effect of a suspension on the Respondent's practice. Speculation about the effect a lawyer's suspension will have on their future ability to practice is a factor and must be considered, but this is one factor and does not override the key purposes of a disciplinary action which is to protect the public and secondarily to see to a lawyer's rehabilitation (*Law Society of BC v Sas*, 2017 LSBC 8 at paras. 100 to 110). The Panel is alive to the significant hardship a lengthy suspension will have on the Respondent.

[28] A disciplinary action can protect the public in two ways. The first is by preventing a lawyer who has committed professional misconduct from practicing either for a period of time or indefinitely thereby ensuring the public's safety. The second is by providing general deterrence through a sanction that is significant enough that any lawyer who may be considering breaching their duties and obligations will not do so for fear of receiving a similar consequence. This requires "…the imposition of severe sanctions for clear, knowing breaches of ethical standards" (*Law Society of BC v McGuire*, 2006 LSBC 20 at para. 24).

[29] In this case the Respondent has taken appropriate steps to rehabilitate himself and practices in a firm with excellent practice supports. He has acknowledged his misconduct and understands its seriousness. At this stage, ten years later, the public does not need to be protected from the Respondent. What the public does need protection from is any other lawyer who might consider taking unethical and dishonest steps to accomplish their client's goals.

[30] Considering all the decisions we have been presented with, in the Panel's view the range of suspensions for a clear, knowing breach of a regulator's direction in the context of what was otherwise a legitimate attempt to create a successful business where the lawyer has acknowledged their misconduct and taken appropriate steps to rehabilitate themselves, is four to eight months. The Respondent cannot be put at the absolute bottom of this range. His misconduct was serious, he does not have the mitigation of an admission at the outset of this matter. Because of the passage of time the Panel accepts that the inclusion of a fine in the amount of $20,000 in addition to a four-month suspension will meet the public interest of general deterrence. This is one of those exceptional cases where more than one type of disciplinary action can be appropriately included to meet the public interest. The Panel emphasizes that this unusual sanction is only appropriate because of the unique facts of this case.

CONCLUSION

[31] The Panel orders that:

(a) The Respondent is suspended for four months. This suspension shall begin on March 1, 2024, or on any other date that the Law Society and the Respondent consent to in writing.

(b) The Respondent is fined $20,000. This fine is payable within six months of the end of Respondent's suspension in this matter or on any other date the Law Society and the Respondent consent to in writing.

(c) The Respondent shall pay costs in the amount of $29,842.50. These costs are payable within six months of the end of Respondent's suspension in this matter or on any other date the Law Society and the Respondent consent to in writing.