DECISION AND REASONS ON PENALTY

THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

ROBERT IAN HISTED

-and-

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

HEARING DATE:

12 February 2020

PANEL:

Jacob P. Janzen (Chair)

Richard Buchwald

Lynne McCarthy (PR)

APPEARANCES:

Rocky Kravetsky for the Law Society

Philip Cramer for Robert Ian Histed

DECISION AND REASONS ON PENALTY

Introduction

1. By reasons dated 13 December 2019, this panel found Robert Ian Histed ("Mr. Histed") guilty of four counts of professional misconduct. Details of the citation and the conduct which was the subject matter of the citation are in those reasons.

2. The panel reconvened on 12 February 2020 to conduct a sentencing hearing.

3. At the sentencing hearing, counsel for the Law Society and for Mr. Histed made a joint recommendation and submission. It was their joint recommendation and submission that the panel order that:

   [1] Mr. Histed: (a) be suspended from the practice of law for a period of six months; and (b) pay to the Society $34,000 for the costs incurred by the Society in connection with any investigation or proceedings relating to the matter in respect of which Mr. Histed was found guilty.

   [2] The said suspension is to begin on a date to be set by the Chief Executive Officer of the Society ("CEO"), except that unless Mr. Histed otherwise requests or agrees the CEO shall not fix a start date that is earlier than the latest of: (a) Two months from the date upon which Mr. Histed's right to appeal to the Court of Appeal has lapsed with no appeal to that Court having been taken; (b) Two months from the date of the delivery of judgment of the Court of Appeal in any such appeal.

4. After hearing submissions and after adjourning to consider the arguments and evidence presented, the panel agreed to accept the joint recommendation. The panel so advised counsel and it made the order requested. The panel further advised counsel that brief written reasons would follow in due course. We hereby confirm the order made and provide those reasons.

Evidence and Submissions

5. The evidence consisted of two exhibits. The first exhibit was the joint recommendation itself. The second exhibit was Mr. Histed's disciplinary record. The record showed that Mr. Histed has

been found guilty and penalized on four previous occasions. He was in May 1995 formally cautioned, in June 2003 reprimanded and ordered to pay costs of $3000, in April 2005 suspended for one month and ordered to pay costs of $18,000, and in November 2006 fined $2500 and ordered to pay costs of $7500.

6. Mr. Kravetsky for the Society relied on *R. v. Anthony-Cook* (2016 SCC) to argue that a discipline panel may depart from a joint submission on sentence only if the recommendation fails the "undeniably high threshold" of the public interest test. The public interest test requires acceptance of a joint recommendation unless the joint recommendation is "so unhinged from the circumstances of the offence and the offender" that it would lead a reasonable and informed person to believe that the "proper functioning of the justice system had broken down" (para. 34). He relied on *Law Society of Manitoba v. Sullivan* (2018) as an illustration of a recent discipline panel decision which adopted the *Anthony-Cook* public interest test. He relied on *Law Society of Manitoba v. Nadeau* (2013) and *Sullivan* again as decisions which adopted from the *Ogilvie* decision from British Columbia (*Law Society of British Columbia v. Ogilvie* (1999)) the relevant factors to be considered by discipline panels in determining an appropriate penalty. He reviewed those factors as they related to Mr. Histed. He reviewed a number of other cases involving lawyers charged and found guilty of conduct not unlike Mr. Histed's. Those cases reflected penalties ranging from a two month suspension (*Ludmer*, Law Society of Upper Canada, 2013) to disbarment (*Townley-Smith*, Law Society of Upper Canada, 2012).

7. Mr. Cramer submitted that the cases referred to by Mr. Kravetsky imposing penalties harsher than the one jointly recommended involved conduct more serious than Mr. Histed's. He submitted that the disposition jointly recommended was reflective of the principle of progressive discipline. He submitted that the proposed penalty was supported both by principles of specific deterrence and of general deterrence. He pointed out that Mr. Histed's conduct was not conduct undertaken for his own personal advancement or personal benefit.

Analysis and Conclusion

8. The purpose of law society discipline proceedings is not to punish the offender and exact retribution. The purpose is to protect the public, maintain high professional standards and preserve public confidence in the legal profession (*Sullivan* para. 8, quoting from *Nadeau*).

9. We have a joint recommendation as to sentence. We accept that, where there is a joint recommendation, the public interest test as articulated in *Anthony-Cook* is the proper test to be applied by the panel. *Sullivan* is only one of numerous post *Anthony-Cook* discipline cases to have adopted the public interest test as the proper one.

10. The public interest test is, as previously noted, "an undeniably high threshold."

11. We also accept that the *Ogilvie* factors provide an appropriate framework to determine a suitable penalty where professional misconduct is admitted or proven. It is the framework used in both *Nadeau* and in *Sullivan*.

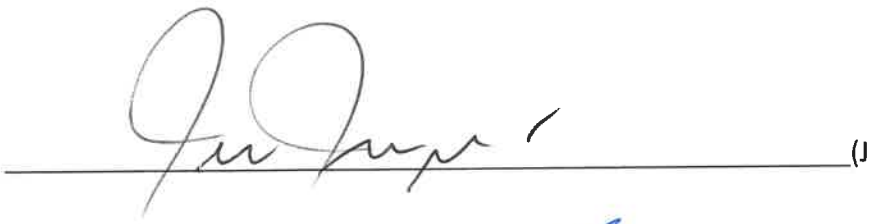
12. The *Ogilvie* factors are: (a) the nature and gravity of the conduct proven; (b) the age and experience of the respondent; (c) the previous character of the respondent, including details of prior disciplines; (d) the impact upon the victim; (e) the advantage gained or to be gained, by the respondent; (f) the number of times the offending conduct occurred; (g) whether the respondent had 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 on 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.

13. Applying the Ogilvie factors salient to this matter, Mr. Histed's transgressions were of a serious nature. He made allegations against other lawyers that were grave, that extended over a period of some years, and that were unfounded. His prior disciplinary record is unenviable. Prior sanctions already include a suspension. The conduct sanctioned in that record is not dissimilar in nature to that which is the subject of these proceedings. Of the cases presented to this panel by counsel, only one, that being *Townley-Smith*, imposed disbarment as a penalty. Townley-Smith's conduct, characterized in the decision as a "complete contempt for and a total disregard for the entire judicial process", was more extreme than Mr. Histed's.

14. It follows from the above that the disposition jointly recommended by counsel falls within the range of defensible penalties. It clearly passes the *Anthony-Cook* public interest test.

15. Mr. Histed's practice history shows that he is capable of responding positively at least for a time to disciplinary measures. We conclude by expressing the hope that the disciplinary measure imposed in this matter has a positive effect.

~~March~~ April 16th, 2020.



(Jacob P. Janzen, Chair)

(Richard Buchwald)

(Lynne McCarthy, PR)