2019 LSBC 21
Decision issued: June 14, 2019
Citation issued: February 11, 2015

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

GERHARDUS ALBERTUS PYPER

RESPONDENT

DECISION OF THE HEARING PANEL
ON DISCIPLINARY ACTION

Hearing date:	May 1, 2019
Panel:	Joost Blom, QC, Chair Robert Smith, Public representative
Discipline Counsel:	Kieron G. Grady
No-one appearing on behalf of the Respondent	

BACKGROUND

[1] In our decision on Facts and Determination ("F&D"), 2018 LSBC 28, we found that the Law Society had shown that the Respondent had committed professional misconduct in failing to provide an adequate quality of service for his client and in failing to recommend to the client that the client should obtain independent legal advice after the Respondent had committed a professional error. We also found that, in relation to his obligations of service to the client, the Law Society had shown that the Respondent had performed his duties as a lawyer incompetently. These are our reasons on the Disciplinary Action ("DA") to be taken.

[2] The Respondent is a former member of the Law Society. He did not appear at the F&D hearing or at the DA hearing, although he had represented himself at earlier hearings on preliminary motions in this matter.

PROCEEDING IN THE ABSENCE OF THE RESPONDENT

[3] The Law Society submitted that the hearing should proceed in the Respondent's absence, as authorized by section 42(2) of the *Legal Profession Act*. That section permits a hearing panel, if the respondent fails to attend at a hearing, to proceed in the absence of the respondent if the panel is satisfied that the respondent has been served with the notice of hearing.

[4] Discipline counsel put in evidence an affidavit of service by Sharen L. Wesnoski, of the Law Society, stating that she had sent a Notice of Hearing by electronic mail to the Respondent's last known electronic mail address on March 20, 2019. The Panel was satisfied that the Notice of Hearing was properly served as provided by Law Society Rule 10-1(1)(c), which states that a notice or other document may be served by, *inter alia*, "electronic mail to [the Respondent's] last known electronic mail address," and Rule 10-1(7), which states that a document sent by electronic mail is "deemed to be served on the next business day after it is sent."

[5] On the proper approach to deciding whether to proceed in the absence of the Respondent, discipline counsel cited instances in which panels had so decided, including *Law Society of BC v Tak*, 2014 LSBC 27; *Law Society of BC v Gellert*, 2013 LSBC 22; *Law Society of BC v Power*, 2009 LSBC 23; *Law Society of BC v Basi*, 2005 LSBC 41; *Law Society of BC v McLean*, 2015 LSBC 06 ("*McLean* #1"); and *Law Society of BC v Jessacher*, 2015 LSBC 43.

[6] The hearing panels in these cases considered a variety of factors. These included whether the respondent was provided with notice of the hearing date and was cautioned that the hearing might proceed in his or her absence; whether the panel adjourned in case attendance was prevented merely by delay; whether the respondent provided any explanation for non-attendance; whether the respondent had admitted the underlying misconduct; and whether the respondent was a former member of the Law Society.

[7] Discipline counsel submitted that, in the present proceeding, the most weight should be given to whether the Respondent had been provided with notice of the hearing date (he had, as noted above), whether he had been cautioned that the hearing might proceed in his absence (the Notice of Hearing so stated), whether the Panel waited for 15 minutes in case the Respondent was merely delayed (we had done so), and whether the Respondent had provided any explanation for his non-attendance. The Respondent had indicated, before the F&D hearing in this matter, that he was elsewhere — apparently out of the country — and that he could not afford to fly back without financial assistance from the Law Society. The Law

Society declined to provide such assistance. The Respondent did not appear at the F&D hearing and has not been heard from since then.

[8] The Panel concluded that, in light of all the factors considered in the cases cited in para. [5], it should proceed with the hearing notwithstanding the Respondent's absence.

DISCIPLINARY ACTION PROPOSED

[9] Discipline counsel asked this Panel to decide that the Respondent was ungovernable by the Law Society and that, if the Panel so decided, the appropriate disciplinary action was disbarment.

[10] Ungovernability is dealt with in Rule 4-44 of the Law Society Rules, which states, so far as material:

Disciplinary action

4-44 (1) Following a determination under Rule 4-43 *[Submissions and determination]* adverse to the respondent, the panel must

(a) invite the respondent and discipline counsel to make submissions as to disciplinary action,

(b) take one or more of the actions referred to in section 38 (5) to (7) *[Discipline hearings]*,

(c) include in its decision under this rule

(i) any order, declaration or imposition of conditions under section 38(7), and

(ii) any order under Rule 5-11 *[Costs of hearings]* on the costs of the hearing, including any order respecting time to pay,

(d) prepare a written record, with reasons, of its action taken under subrule (b) and any action taken under subrule (c),

(e) if it imposes a fine, set the date by which payment to the Society must be completed, and

(f) if it imposes conditions on the respondent's practice, set the date by which the conditions must be fulfilled.

...

(5) The panel may consider the professional conduct record of the respondent in determining a disciplinary action under this rule.

(6) Regardless of the nature of the allegation in the citation, the panel may take disciplinary action based on the ungovernability of the respondent by the Society.

(7) The panel must not take disciplinary action under subrule (6) unless the respondent has been given at least 30 days notice that ungovernability may be raised as an issue at the hearing on disciplinary action.

[11] Discipline counsel put in evidence a letter that he had sent by electronic mail on January 22, 2019 to the Respondent at his last known email address. The letter advised the Respondent that, at the disciplinary action hearing, the Law Society would seek a finding of ungovernability with resulting disbarment. Based on Rules 10-1(1)(c) and 10-1(7), referred to above at para. [4], the Respondent was given more than 30 days' notice that ungovernability might be raised as an issue at the hearing, thus satisfying Rule 4-44(7).

ISSUES

[12] The two issues we discuss are:

(a) Has the Law Society shown that Respondent is ungovernable? We conclude that it has.

(b) Should the Respondent be disbarred? We conclude that he should.

PROFESSIONAL CONDUCT RECORD

[13] Rule 4-44(5) permits us to review the Respondent's Professional Conduct Record ("PCR") in determining the disciplinary action in this matter, and discipline counsel submitted the PCR as evidence.

[14] The Respondent was called and admitted as a member of the Law Society on September 9, 2002. He had been called to the bar in South Africa in 1990 and in Namibia in 1993. For about the first six years after his call, he practised with a small law firm in Surrey, BC. From January 2009 to October 7, 2014, he practised through Gerhard Pyper Law Corporation, doing business as Pyper Law Group. He owned and was responsible for the operation of Pyper Law Group between August 2011 and April 2014. The Respondent ceased to be a member of the Law Society in January 2015.

[15] In the order in which they will be discussed, the PCR includes the following. For convenience, we include the proceedings in the present matter, which are not yet

part of the PCR because they are not concluded, as (g). The sequence is not chronological. In particular, the three citations were all issued at more or less the same time in early 2015, but the hearings have involved three separate panels conducting proceedings in parallel over a period of years, with the present matter (referred to below as Citation 3) being the last to conclude:

(a) Recommendations from the Practice Standards Committee made on December 6, 2012, April 10, 2014, and January 28, 2016;

(b) A conduct review held in November 2012;

(c) An order made by three Benchers on March 20, 2014, imposing interim restrictions and conditions on the Respondent's practice. The order was modified by further orders on May 23 and September 10, 2014;

(d) A citation ("Citation 1") issued on March 23, 2015 for practising law while suspended, followed by a hearing panel's F&D decision *Law Society of BC v. Pyper*, 2016 LSBC 01, followed by a decision of the Court of Appeal dismissing the Respondent's appeal from the F&D decision (2017 BCCA 113), and the panel's DA decision, *Law Society of BC v. Pyper*, 2017 LSBC 35;

(e) An injunction issued by the Supreme Court of British Columbia on July 7, 2017, prohibiting the Respondent from practising law;

(f) Another citation ("Citation 2") issued on March 23, 2015 for failing to respond to communications from a service provider, followed by a hearing panel's F&D decision, *Law Society of BC v. Pyper*, 2018 LSBC 10 and DA decision in *Law Society of BC v. Pyper*, 2019 LSBC 01; and

(g) A third citation ("Citation 3"), the subject of the present proceeding, was issued on February 11, 2015, alleging a failure to provide an adequate quality of service for a client and a failure to recommend that the client obtain independent legal advice. This was followed by our F&D decision, referred to in para. 1.

[16] The Law Society relied upon the PCR and the misconduct found in the present matter as supporting a finding of ungovernability.

Recommendations from Practice Standards

[17] The Practice Standards Committee adopted recommendations focused on reducing the Respondent's file load and ensuring retainer agreements and client instructions

were better documented (December 6, 2012). It subsequently adopted further recommendations designed to ensure succession of the Respondent's files and to reduce his file load (April 10, 2014). It also made a recommendation related to client identification and verification (January 28, 2016). Among the December 2012 recommendations were ones made with respect to keeping the client informed of the strengths and weaknesses of the case, chances of success, steps taken, and documenting those discussions. Discipline counsel noted that the professional misconduct in the present matter (Citation 3) consisted in part of a failure to keep the client properly informed of the status of his case, and there was no evidence that the Respondent had taken any of the steps recommended to him in December 2012.

Conduct Review

[18] The conduct review that the Respondent attended in November 2012 was ordered to discuss his conduct in breaching client confidentiality by providing opposing counsel with affidavits and exhibits detailing communications between the Respondent and his client without first having obtained the consent of the client to do so.

[19] Discipline counsel noted that the Respondent's first position was that there had been a "serious misunderstanding" and that he had not breached any Law Society Rules or disclosed any confidential client information to opposing counsel. He later conceded at the conduct review that he had breached rules in the *Professional Conduct Handbook* then in force. Discipline counsel submitted that the theme of never, in the first instance at least, admitting any wrongdoing, even in the face of evidence to the contrary, would become recurring.

Imposition of interim restrictions and conditions on the Respondent's practice

[20] On March 20, 2014, three Benchers imposed a number of interim restrictions and conditions on the Respondent's practice, including a requirement that he eliminate trust shortages and enter into a trust supervision agreement (*Law Society of BC v. Pyper*, 2014 LSBC 23). On May 23, 2014, the Benchers ordered, (*Law Society of BC v. Pyper*, 2014 LSBC 33) that the Respondent be suspended, primarily because he had not satisfied the Benchers that he had eliminated his trust shortages as required. On September 10, 2014, the Benchers cancelled the suspension but imposed new interim practice restrictions, including that he not operate, or be a signatory to, any trust accounts.

[21] The Benchers noted at para. 70, that "conduct pertaining to misuse of trust funds, even where the origins are a mistake, are grave. His clients whose funds are held in

trust are collectively short of funds. Mr. Pyper continues to submit that no one, including none of his clients for whom he holds funds in the two pooled accounts, have been harmed." They continued at para. 71, "We disagree. As we held in [2014 LSBC 23], Mr. Pyper seriously misapprehends the nature of trust funds and his role as trustee of those funds."

[22] The interim order of September 10, 2014 was rescinded by order made September 1, 2015 on the basis that the Respondent was now a former member and that the matter would be put in his file and referred to for consideration upon an application for reinstatement, if any.

Citation 1

[23] The hearing panel found that the Respondent had committed professional misconduct by practising law while suspended. The suspension was the one ordered by three Benchers on May 23, 2014 (see above, para. 20). The Respondent had, on May 26, 2014, signed and caused to be sent a letter to opposing counsel on a matter. On June 13, 2014 he signed and caused to be sent a second letter to a regulatory body on behalf of the same client. The Respondent disputed both allegations of misconduct, arguing that, with respect to the first letter, it had been dictated before he was suspended but only signed afterwards, and, with respect to the second letter, it did not constitute the practice of law because he had removed the designation "Barrister and Solicitor" from his letterhead. He further argued that, because at the time he signed the second letter, his secretary's salary was being paid by the Law Society as a result of the custodianship during his suspension, the letter was therefore typed and sent by someone who was not his employee.

[24] The hearing panel rejected these arguments and determined that the Respondent's conduct did constitute the practice of law and amounted to professional misconduct.

[25] At the commencement of the F&D hearing on citation 1, the Respondent brought an application to have the citation dismissed on the basis that the panel lacked jurisdiction to hear the matter. The panel noted at para. 3 that "it became clear that part of what he wanted to argue was that the order suspending him was the result of a process that was unfair, including bias of the prior panel and, as a consequence, this panel lacked jurisdiction to enforce the suspension order." The panel dismissed this application (para. 13) on the basis that the Respondent had failed to appeal or take a review of the earlier decision.

[26] The Respondent also argued at the hearing that there was an institutional bias on the part of the Law Society against him and the citation should be dismissed on that basis. The panel addressed this allegation fully at paras. 35-52 and dismissed it, stating at para. 52 that there was no evidence of bias or malice by any Law Society staff against the Respondent.

[27] The Respondent appealed the F&D decision to the Court of Appeal, which dismissed the appeal, *Law Society of BC v. Pyper*, 2017 BCCA 113. The Court found that the hearing panel was not personally or institutionally biased, that the panel had jurisdiction to make its findings, and that the panel did not err in determining that the Respondent's actions constituted the "practice of law".

[28] At the hearing of the appeal, the Respondent raised a new argument in response to the allegation that he practised law while suspended. He argued that, because the two letters he wrote were directed to an action that had been commenced in Ontario and no complaint had been lodged in Ontario, the Law Society lacked jurisdiction. The Court determined at para. 34 that there was no merit to this submission.

[29] As a result of his unsuccessful appeal, costs were ordered payable by the Respondent to the Law Society. A Certificate of Costs in the amount of $5,201.99 was issued. This has not been paid.

[30] Once the appeal was dismissed, the hearing panel proceeded with the DA hearing on August 11, 2017. The panel noted in its decision at para. 3 that, while the Respondent gave evidence at the hearing, the majority of his testimony concerned his view that the Law Society had treated him unfairly, all of which had been previously considered by the panel.

[31] The panel further noted at para. 30 that the Respondent's admission at the hearing that he would not sign the two letters in the same circumstances was his first acknowledgement of wrongdoing.

[32] When determining the appropriate DA, the panel considered the nature, gravity and consequences of the conduct, the character and professional conduct record of the Respondent, whether there was any acknowledgement of the conduct and remedial action and, finally, public confidence in the legal profession including public confidence in the disciplinary process. The panel stated that, in its view, the latter consideration was the most important factor.

[33] The panel stated that, under the circumstances, a two-month suspension was appropriate but, given that the Respondent was not a member and was not currently

seeking readmission, the suspension would commence the date on which he is readmitted to the Law Society (at para. 40).

[34] The panel ordered costs in the amount of $10,484.16 payable on or before April 1, 2018. The Respondent has, to date, not paid these costs.

Injunction prohibiting the Respondent from practising law

[35] Pursuant to sections 15 and 85 of the *Legal Profession Act*, the Law Society sought an injunction prohibiting the Respondent from practising law. The Respondent appeared on his own behalf to oppose the order sought. He argued (*Law Society of BC v. Pyper*, 2017 BCSC 1197 at para. 6) that, by reason of institutional bias and discrimination, the Court had no jurisdiction to hear the application. He further argued that the Law Society had no jurisdiction to bring the application because it did not have clean hands. He also argued that the proposed terms of the injunction were too broad and sought to adjourn the application to allow him time to bring a constitutional challenge.

[36] On July 7, 2017, the Supreme Court of British Columbia issued an injunction against the Respondent, prohibiting him from practising law. The court noted that, as of January 1, 2015 the Respondent ceased to be a member in good standing of the Law Society and on January 29, 2015 he became a former member. The Court further noted that "[a]s a former member, Mr. Pyper, like any other non-member, is prohibited from practising law" (at para. 1).

[37] The facts are set out in paras. 2 and 3 of the decision:

> Since September 2016, Mr. Pyper has been a director and shareholder of two companies, Seattle Environmental Consulting Ltd ("Seattle") and ESS Environmental Ltd ("ESS"). These are former clients of his that he had represented in ongoing disputes involving WorkSafe BC. Seattle and ESS are involved in the asbestos inspection and abatement field. Their principles [sic] are Mike Singh and Shawn Singh.
>
> On a number of occasions beginning in November 2016, Mr. Pyper has appeared, or has attempted to appear, in court to speak on behalf of those entities. On all but two occasions, he has been denied an audience in that capacity by both the Court of Appeal and this Court.

[38] The Court noted at para. 28 that "Mr. Pyper has taken all of this very personally. Before me, he frequently referred to his dismay that the judges should hate him so, and his inability to understand their hostility towards him."

[39] Except for narrowing the scope of the injunction to address the Respondent's argument that the injunction sought was too broad (paras. 56-58), the court dismissed the Respondent's arguments and granted the injunction to the Law Society.

Citation 2

[40] On March 15, 2018, a hearing panel found that the Respondent had committed professional misconduct by failing to respond to several communications from a service provider. A second allegation that the Respondent failed to pay invoices received from the same service provider was dismissed.

[41] The panel in its decision reviewed the "lengthy history" of the matter, referring to two previously scheduled hearing dates. On the second scheduled hearing date of January 25, 2016, the panel heard a motion brought by the Respondent to dismiss based on the same arguments the Respondent had raised in the hearing on Citation 1 (i.e., lack of jurisdiction and bias). As the Citation 1 panel had done, the Citation 2 panel decided to adjourn the hearing generally pending the outcome of the appeal from the earlier hearing to the Court of Appeal. Once the Respondent's appeal was dismissed, the panel proceeded with the F&D hearing on Citation 2. The Respondent's preliminary applications were dismissed, with the panel finding that the Respondent's motion was an abuse of process and an inappropriate attempt to re-litigate the matters he had brought in respect of Citation 1, now determined and dismissed by the Court of Appeal.

[42] The panel found that the Respondent had failed to respond to four letters from a third party and offered no explanation for his failure to do so. The panel determined that, in the circumstances, his conduct amounted to professional misconduct.

[43] The panel dismissed the allegation that the Respondent had failed to pay a third-party debt to a service provider, noting that there was some uncertainty as to his access to his accounts during the applicable time period owing to the custodianship of his practice by the Law Society at the time.

[44] The DA hearing in relation to Citation 2 took place on November 22, 2018. The Respondent did not attend the hearing, and the panel proceeded in his absence after satisfying itself that the Respondent had had notice of the hearing. The panel issued its DA decision on January 15, 2019.

[45] When considering a selection of the *Ogilvie* factors (from *Law Society of BC v. Ogilvie*, 1999 LSBC 17), the panel noted at para. 18, in relation to "Character and

Professional Conduct Record", that the Respondent's PCR was "*relevant, significant and troubling in its extent.*" [emphasis added] The panel agreed (at para. 19) with Law Society counsel's submissions that the PCR was an aggravating factor because it demonstrated the Respondent's "*ongoing unwillingness to address his failures to meet the minimum accepted standards of legal practice*." [emphasis added]

[46] When considering "acknowledgement of the misconduct", the panel had this to say at para. 22 and 23:

> The Panel considered whether there were any mitigating or aggravating factors in this case that may affect our determination of an appropriate disposition of the discipline phase of this matter. We find there are no mitigating factors; however, there was an aggravating factor of concern to us. During the Facts and Determination hearing Mr. Pyper accused the Law Society of institutional bias and having "dirty hands" in the course of the prosecution of the citation issued against him. These remarks were baseless and insulting to Law Society counsel (not Ms. Bradley) with the result that this Panel informed Law Society counsel at the conclusion of the hearing that we found no substance in these accusations.
>
> The allegation of bad faith conduct inherent in Mr. Pyper's unwavering assertion that the Law Society had "dirty hands" in its dealings with him in the Facts and Determination hearing leads us to conclude that *rehabilitation and remediation will be unlikely in Mr. Pyper's case.*
>
> [emphasis added]

[47] The Law Society sought a suspension of two to three months. The panel imposed a suspension of three months to commence immediately following the two-month suspension ordered in 2017 LSBC 35 (see above, para. 33).

[48] The panel, at para. 25, again referred to the Respondent's "significant and repeated professional conduct issues" and (at para. 26) stated that, "given Mr. Pyper's significant PCR and *his apparent refusal or inability historically to modify his conduct to meet appropriate professional standards*" [emphasis added], it felt compelled to impose a condition that, if he ever seeks reinstatement he only be allowed to practise law in a setting and capacity approved by the Practice Standards Committee and on such conditions as that Committee might fix.

Citation 3 (the present proceeding)

[49] The allegations in Citation 3 concerned the Respondent's mishandling of a civil claim for assault and battery. We found that the Respondent failed to take adequate steps to obtain service of the Notice of Civil Claim (NOCC) on the defendant, with the result that the time for service expired and a later attempt at service was invalid. Rather than seek to remedy the service, the Respondent improperly applied for and obtained default judgment against the defendant. When he eventually did take steps to address the fact that the NOCC had expired before service, he personally applied to court for renewal of the NOCC. The judge refused to hear the application because the Respondent's own neglect to serve in a timely manner was at issue in the application. The Respondent failed throughout to keep his client properly informed about the case.

[50] We found professional misconduct in two respects: that the Respondent had failed to provide an adequate level of service to his client and that the Respondent had failed to advise his client to obtain independent legal advice after it became clear that the Respondent's own fault had led to the expiry of the NOCC. Relevant in the present context is that, when the client did consult another lawyer, who wrote to the Respondent about the "missed limitation period", the Respondent denied, incorrectly, that he had missed a limitation period and asserted, incorrectly, that the time limit could be extended without difficulty. Eventually, of course, he had to concede that he had committed a professional mistake that jeopardized his client's claim. Here again we have the pattern, when the Respondent has been confronted with an error he has committed, of an initial denial that there was any error and then a retreat from this position only when the denial becomes impossible to maintain.

ANALYSIS

The ungovernability standard

[51] Law Society Rule 4-44(6), quoted above in para. 10, authorizes a hearing panel to take disciplinary action "based on the ungovernability of the respondent by the Society." The term "ungovernability" is not defined in the Rule but has been interpreted in a number of cases.

[52] *Law Society of BC v. Hall*, 2007 LSBC 26, was a case that involved 11 findings of misconduct described as "pervasive, extremely serious and, in the case of the failure to maintain proper books and records, extended over a period of years" (at para. 2). The hearing panel found that the evidence showed a pattern of conduct so

fundamentally dishonest that no remedy short of disbarment could properly protect the public (at para. 17). While it was therefore not necessary to address ungovernability, the hearing panel took the opportunity to do so. It drew on precedents from other provinces. At para. 23 the panel quoted *Law Society of Upper Canada v. Hicks*, [2005] LSDD No. 6, at para. 46:

> The Law Society exists to govern the profession in the public interest. If lawyers will not abide by the authority of the Law Society, and demonstrate that they abide by that authority, the Law Society cannot fulfil its mandate. That is the essence of what governability means.

The panel in *Hall* also referred to *Law Society of Manitoba v. Ward*, [1996] LSDD No. 119, where the disciplinary panel described the respondent as having engaged in a "cumulative ongoing set of behaviours and patterns which demonstrate that the member refuses to be governed."

[53] The panel in *Hall* went on to summarize the position as follows, at paras. 27 and 28:

> The foregoing cases suggest that the relevant factors upon which a finding of ungovernability might be made will include some or all of the following:
>
> 1. A consistent and repetitive failure to respond to the Law Society's inquiries.
>
> 2. An element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records.
>
> 3. Some element of misleading behaviour directed to a client and/or the Law Society.
>
> 4. A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours.
>
> 5. A discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances.
>
> 6. A history of breaches of undertaking without apparent regard for the consequences of such behaviour.
>
> 7. A record or history of practising law while under suspension.

> It is the view of this Panel that it will not be necessary for Panels in the future to establish that all of these indicia of ungovernability are present in order to make such a finding. These indications, like the penalty guidelines found in the *Law Society of BC v. Ogilvie*, will have a fact-specific impact in each separate case that is considered. It will be for the Benchers to determine the appropriate treatment of the indicia described herein, including their usefulness in the discipline process and the manner, if at all, that they will be applied. We do not foreclose the possibility that a finding of ungovernability can be made if all that was present was a repeated failure of the lawyer to respond to inquiries from the Law Society, if that failure is illustrative of a wanton disregard and disrespect of the lawyer for the regulatory processes that govern his or her conduct.

[54] *Law Society of BC v. Spears*, 2009 LSBC 28, involved a lawyer's attempt to avoid a restriction on his practice by concealing his non-compliance with the restriction. The panel accepted a conditional admission and proposed disciplinary action of an eight-month suspension and practice conditions. It added that it wanted "to convey to the Respondent that this is very likely to be his last opportunity to display the sort of conduct expected of and required of all lawyers" (para. 10). It said:

> [7] The Panel is very concerned that the Respondent has in the past demonstrated an unwillingness to comply with conditions imposed upon him by the Law Society. It is a fundamental requirement of anyone who wishes to have the privilege of practising law that that person accept that their conduct will be governed by the Law Society and that they must respect and abide by the rules that govern their conduct. If a lawyer *demonstrates that he or she is consistently unwilling or unable to fulfill these basic requirements of the privilege to practise, that lawyer can be characterized as "ungovernable"* and cannot be permitted to continue to practise.
>
> [emphasis added]

[55] A finding of ungovernability was made in *Law Society of British Columbia v. Welder*, 2015 LSBC 35. There, the respondent had an extensive discipline history consisting of six prior citations, six conduct reviews and a practice standards referral over the period 1991 to 2014. Three of the prior matters related directly to a failure to comply with the Law Society as regulator: a conduct review for breach of undertaking to the Law Society, a citation for failure to produce financial documents in the course of a Law Society investigation and a citation for failure to comply with ongoing reporting obligations imposed by a review panel. The subject

matter of the citation being heard related to Mr. Welder acting for a firm involved in a Ponzi scheme and not advising investors that he was not protecting their interests. The panel determined that Mr. Welder was ungovernable and made, among others, the observations that the lawyer had repeated previous mistakes and that his responses to the Law Society had escalated and showed an unwillingness to comply with basic requirements of the Law Society.

[56] A year earlier, in *Law Society of BC v. Welder*, 2014 LSBC 20, a proceeding on a different citation, the panel with "great hesitation" had declined to make a finding of ungovernability, primarily on the basis that the respondent was not consistently unwilling to be governed by the Law Society. He attended the conduct reviews and cooperated with the citation hearing processes and showed some willingness to address underlying psychological issues that impinged on his ability to practise in a reasonable and professional manner. On that prior occasion, he was suspended for one year with conditions.

[57] Two separate panels each found the same respondent ungovernable in *Law Society of BC v. McLean*, 2015 LSBC 30, and *McLean* #1, and each ordered disbarment. In the earlier decision the panel noted that Mr. McLean's PCR reflected one conduct review, a referral to Practice Standards, two administrative suspensions, an order imposing conditions and limitations on his practice, and three citations. That panel also addressed the jurisdiction of the Law Society to disbar a former member, a point discussed below. By the time of the hearing of *McLean* #1, the panel noted that Mr. McLean had 20 separate findings of professional misconduct. At para. 32, the panel stated that "the Respondent had demonstrated both a consistent unwillingness to be regulated and a disregard, disrespect and disdain of the governing process."

Application of the ungovernability standard to the Respondent

[58] We begin by reviewing the seven factors referred to in *Hall* (see above, para. 53).

[59] Factor 1, a consistent, repetitive failure to respond to inquiries from the Law Society, is not present here.

[60] Factor 2, an element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records, is clearly present. Trust account shortages were the subject of the interim order by a panel of Benchers on March 20, 2014. The two further orders that modified this order on May 23 and September 10, 2014 stemmed from the Respondent's inability or unwillingness to rectify the shortages in a timely manner.

[61] Factor 3, an element of misleading behaviour direct to a client or the Law Society, is also arguably present. In the present proceeding (Citation 3) the Respondent had missed the limitation period for serving a NOCC but, rather than admitting this to the client, wrote to the client suggesting that, as he had not heard from him, he would be closing the file. Citation 1 involved writing letters as a lawyer while suspended, which could also be considered misleading in that the recipients would not necessarily know that they were receiving letters from a lawyer suspended from the practice of law.

[62] Factor 4, a failure or refusal to attend at the discipline hearing convened to consider the offending behaviours is present. Until the F&D hearing of this matter (Citation 3) in July 2018, the Respondent actively participated in all hearings and, indeed, opposed all disciplinary attempts vigorously. However, he did not attend the last three hearings: the F&D hearing in this matter, the DA hearing on November 22, 2018 in relation to Citation 2, or the DA hearing in the present matter on May 1, 2019. It appears he is out of the country and, for whatever reason or reasons, has decided not to participate any further in the process. However, he has not attempted to make any written submissions, leaving aside an unsuccessful motion, arguing undue delay, made by emailed letter prior to this Panel's F&D hearing in July 2018.

[63] Factor 5, the PCR does disclose a discipline history involving allegations of professional misconduct (and other failures to meet appropriate standards of practice) over a period of time and involving a series of different circumstances. The Respondent was called to the BC Bar in 2002. The PCR deals with events from 2012 to 2017. It includes recommendations made to the Respondent by Practice Standards in 2012, 2014 and 2016; a conduct review in 2012 dealing with client confidentiality; the imposition in 2014 by three Benchers of interim restrictions on the Respondent's practice; Citation 1 (issued in 2015), in which he was found to have practised law while suspended; a Supreme Court injunction in 2017 against practising law, given that he had ceased to be a member of the Law Society in 2015 but was continuing to try to represent clients; Citation 2 (issued in 2015), in which he was found to have failed to respond to service providers; and (in the present proceeding) Citation 3 (issued in 2015), in which we have found that he failed to provide an adequate quality of service to a client and failed to advise a client to take independent professional advice.

[64] Factor 6, a disciplinary history of breaches of undertaking, is not present in this case.

[65] Factor 7, a record or history of practising law while under suspension, is present. The Respondent has a history of practising while suspended and attempting to practise while a former member.

[66] No single, authoritative definition of ungovernability emerges from the cases, but the central idea is clear. The Law Society must show a persistent and pervasive unwillingness or inability on the part of the lawyer to comply with the obligations that apply to members of the Law Society, so that decisive disciplinary action is the only feasible means by which the public can be protected from future misconduct.

[67] We conclude that the Respondent has been shown to be ungovernable. His failures to adhere to his professional obligations extend over a range of matters and over a period of years. His principal response throughout the proceedings on the three citations has been, not a recognition of his wrongdoing, but attempts to deny wrongdoing coupled with repeated arguments that the disciplinary proceedings were unfair and that the Law Society acted without jurisdiction and was biased against him. The evidence before us offers no realistic hope that the Respondent can or will effectively come to terms with his professional obligations. We agree with the panel in the proceeding on Citation 2 that "rehabilitation and remediation will be unlikely" in the Respondent's case.

Appropriate disciplinary action

[68] The Law Society, in arguing that disbarment was the appropriate disciplinary action, relied on the fact that it was the order made in each of the cases in which a finding of ungovernability was made: *Welder* and the two *McLean* cases. It submitted that the public will not have confidence in a self-regulating profession if its ungovernable members are permitted to continue to practise or, in the cases of former members, if a clear declaration is not made that the ungovernable member is disentitled to practise law.

[69] We agree. Leaving aside unforeseeable, exceptional circumstances, a finding that a lawyer is ungovernable is simply inconsistent with the lawyer's continuing in practice or, in the case of a former lawyer, having a right to return to practice. Disbarment is the only logical response.

Authority to disbar a former member of the Law Society

[70] That raises the point, which discipline counsel addressed, whether a former member can be disbarred. The *Legal Profession Act* implies that the Law Society can disbar a former member. Section 38(4)(b)(v) gives a hearing panel the

jurisdiction to make a finding of professional misconduct against a former member based on conduct that would, if the respondent were a member, have constituted professional misconduct. Once an adverse determination is made under section 38(4), the panel *must* impose one of the sanctions set out in section 38(5), which includes to "disbar the respondent" (s. 38(5)(e)). Those provisions are in Part 4 of the *Act*, on Discipline, and the definition (in section 1) of "lawyer" includes, for the purposes of Part 4, a former member of the Law Society.

[71] Orders of disbarment against a former member were made in *Tak* for misconduct; in *Gellert*, for misappropriation of funds; and in the two *McLean* cases, in which the former member was found to be ungovernable.

[72] It would be strange if a former member, who can be the subject of other orders like suspension (to take effect, should they return to practice), could not be the subject of a disbarment order, which responds to even more serious forms of misconduct. As a panel noted in *Power*, at para. 45, "Although it may appear odd that a Panel may suspend or disbar a non-member, the *Act* requires that it be done if that is the appropriate penalty." The panel added at para. 46:

> When imposing a penalty appropriate to the circumstances, a panel sends an important message to lawyers as well as to the public that such conduct is deserving of that kind of penalty. Such orders also have a practical effect. If a lawyer who has been disbarred applies for reinstatement a credentials hearing must be held (Rule 2-52(6)). A lawyer who is suspended or who has been disbarred may not perform legal services, even for free, for anyone (*Legal Profession Act*, s. 15(3)).

[73] We conclude that there is authority under the *Legal Profession Act* to disbar a former member of the Law Society.

Effect of order of disbarment on orders already made

[74] The other orders that disciplinary panels have already made with respect to the Respondent remain in place. The effect of our order of disbarment on these other orders is a matter to be decided if and when the issue arises.

COSTS

[75] The Law Society submitted a draft bill of costs for this proceeding according to the tariff in Schedule 4 of the Law Society Rules, totalling $14,027.42.

[76] According to Law Society Rule 5-11(3), a panel "must have regard to the tariff of costs in Schedule 4 to these Rules in calculating the costs payable by" a respondent. According to Rule 5-11(4), a panel can depart from the tariff if, in the panel's judgment, it is "reasonable and appropriate" to award no costs or costs in an amount other than that permitted by the tariff.

[77] We see no reason to depart from the tariff amounts.

ORDER

[78] We order that:

(a) the Respondent be disbarred; and

(b) the Respondent pay costs of this proceeding in the amount of $14,027.42.