2021 LSBC 25
Decision issued: June 9, 2021
Citation issued: June 19, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

AENGUS RICHARD MARTYN FOGARTY

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Written submissions:	April 28, 2021 and May 18, 2021
Panel:	Philip Riddell, QC, Chair Brendan Matthews, Public representative Carol Roberts, Lawyer
Discipline Counsel:	Kathleen Bradley
	No one appearing on behalf of the Respondent

INTRODUCTION

[1] The Disciplinary Action phase of this hearing proceeded by way of written submissions.

[2] The Respondent participated in the Facts and Determination phase of this hearing but did not participate in the Disciplinary Action phase.

[3] In our decision on Facts and Determination, 2021 LSBC 01 ("F&D"), we found that the Law Society had proven a portion of the Citation. At paragraph 52 of F&D, we found that:

> the Law Society has proven that the Respondent committed professional misconduct by failing to cooperate with the Law Society investigation and respond to the following:

(a) June 27, 2018 requests 5(b) and 10(b) by failing to provide documents in his possession dealing with JK and requests 5(b), 7, 8 and 10(b) about his dealings with the X bond; and

(b) July 12, 2018 request 6, which was not complied with. The failure to comply with request 15 is dealt with in our finding regarding the Respondent's failure to respond to requests 5(b), 7, 8 and 10(b) of the June 27, 2018 letter.

[4] We dismissed a portion of the Citation dealing with the Respondent's failure to respond fully and substantively to certain correspondence, and with altering, deleting or destroying records, contrary to Rule 10-3 of the Law Society Rules and rule 7.1-1 of the *Code of Professional Conduct for British Columbia.* We also dismissed the portion of the Citation dealing with the Respondent misrepresenting himself as a barrister and solicitor in England.

[5] This is a case with divided success.

DISCIPLINARY ACTION

[6] The purpose of the discipline process is not to punish or exact retribution. Rather, it is to discharge the Law Society's statutory obligation as set out in s. 3 of the *Legal Profession Act* (the "*Act")* to protect the public interest in the administration of justice: *Law Society of BC v. Hill*, 2011 LSBC 16.

[7] The leading case in dealing with the principles to be upheld in applying sanctions is *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45. The panel in that case set out a list of factors to be considered in imposing sanctions. The list is neither exhaustive, nor are all the factors applicable in each case. The factors in *Ogilvie* are set out in paragraph 10:

(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 discipline;

(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 has 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.

[8] The Law Society seeks to have the Respondent disbarred on the basis of a finding of ungovernability. The Law Society provided the Respondent with notice under Rule 4-44(7) that it might raise the issue of ungovernability. In the alternative, the Law Society seeks an immediate suspension under s. 38(5) of the *Act* that will remain in effect until the Respondent has responded with full and substantive answers to the requests set out in paragraph 52 of F&D, an additional one-month suspension to be served upon completion of any other suspension, a fine of $7,000 and an order for costs in the amount of $15,954.75.

[9] We do not have the benefit of any submissions on the Disciplinary Action phase of this hearing from the Respondent.

[10] The submissions of the Law Society are based in part on the Respondent's Professional Conduct Record ("PCR"), which we admitted as an exhibit in this hearing. The PCR consists solely of three administrative suspensions imposed by the Executive Director for failing to provide substantive responses to requests, which were the subject matter of the Citation. The suspensions are as follows:

(a) July 9, 2018: suspended under Part 3 of the Rules for failing to respond to a request for information;

(b) April 1, 2019: suspended under Part 3 of the Rules for failing to respond to a request for information; and

(c) January 8, 2020: suspended under Part 3 of the Rules for failing to respond to a request for information.

All three suspensions are still in effect.

[11] The Law Society pointed out that, prior to the enactment of Rule 3-6, failure to respond allegations were dealt with by way of a summary hearing under Rule 4-33 based upon affidavit evidence. An adverse finding would generally lead to a fine or suspension until the lawyer provided a response. A failure to abide by the order might lead to a subsequent citation. Rule 4-33 allowing for summary hearings is still in effect. Rule 3-6 allows the Executive Director to administratively suspend a lawyer until the lawyer responds to requests for information to the satisfaction of the Executive Director.

[12] The Law Society submits that the rationale for Rule 3-6 is that the summary hearing procedure in Rule 4-33 "resulted in a strain in institutional resources" and that "there was also a concern that lawyers needed stricter and timelier prompts to bring their conduct in line." (Submission of the Law Society of April 21, 2021 at paragraph 82)

[13] In the past, the imposition of a suspension arose post-hearing, or in exceptional circumstances, three or more Benchers were able to suspend or impose conditions under Rule 4-23 post-citation but pre-hearing. Rule 3-10 allowed three Benchers to suspend or impose practice conditions pre-citation if it was necessary to protect the public.

[14] Rule 3-6 enables the Executive Director alone to impose a suspension, although the Discipline Committee may, in "special circumstances," review the decision of the Executive Director. (Rule 3-6(2))

[15] It is not necessary for us to decide the question of whether an administrative suspension should be considered in the same way that a suspension is imposed by a hearing panel.

[16] The Law Society relies upon the Respondent's PCR to justify a finding of ungovernability. A review of the administrative suspensions is required in light of our findings in F&D:

(a) The July 9, 2018 Rule 3-6 suspension relates to the failure to respond to the June 27, 2018 request;

(b) The April 1, 2019 Rule 3-6 suspension relates to the July 12, 2018 request; and

(c) The January 8, 2020 suspension is not related to any finding of professional misconduct.

[17] The Law Society submits that we should consider that the Respondent has been subject to three administrative suspensions. We note that the January 8, 2020 suspension was unrelated to any finding of professional misconduct and was issued after the commencement of the hearing of the Citation.

[18] The Law Society submits that we should consider the length of the administrative suspensions. The July 9, 2018 and April 1, 2019 suspensions are still in effect. The Respondent has been suspended since July 9, 2018 to the date of this decision.

[19] In considering the length of the Respondent's suspension, we also note the length of this proceeding. The Citation was issued on June 19, 2019. The hearing commenced on November 18, 2019 and the hearing of evidence completed on that day. The Law Society began its submissions on November 19, 2019 and, partially through its submissions, asked for an adjournment to consider an application to re-open. The matter was adjourned to April 2 and 3, 2020 for the Law Society to make its application and to conclude the Facts and Determination phase of this hearing. The pandemic caused those dates to be adjourned and the hearing resumed on October 19, 2020. At that time, we dismissed the Law Society's application to re-open. Written submissions were closed on November 10, 2020, and we delivered our decision on January 5, 2021. The Law Society's unsuccessful application to re-open led to a delay from November 19, 2019 to October 19, 2020 – 11 months to the day.

[20] According to the Law Society, the Respondent became a lawyer on August 5, 1987. Although the Respondent was a part-time practising member of the Law Society from January 1997 until July 2018, he had not practised law in British Columbia since early 2015. He was admitted to the roll of solicitors in England and Wales from September 1996 to October 2002. In July 1997, he was admitted to the roll of solicitors in Ireland and practised for about three months. Thereafter, the Respondent became a non-practising member.

[21] The failure of a member of the Law Society to respond to the Law Society goes to the core of the Law Society's ability to regulate it members in the public interest: *Law Society of BC v. Jessacher*, 2015 LSBC 43 at paragraph 31.

[22] The Respondent has yet to provide responses to the requests set out in paragraph 52 of F&D.

[23] There is no evidence that the Respondent has gained any advantage as a result of his conduct.

[24] The Law Society contends that the Respondent's wrongdoing has brought the investigation to a standstill. "This is highly problematic, as the investigation relates to the Respondent's involvement in a potentially fraudulent (and possibly ongoing) international scheme involving the purchase and sale of historic Chinese bonds." (Written submission of the Law Society, April 21, 2021 at paragraph 41) The difficulty with this submission is that there was no evidence before us on this point, which is not surprising given that the Citation was for the Respondent's failure to respond.

[25] The Law Society has drawn our attention to the portion of the Citation dealing with destruction of records in attempting to justify its position on disciplinary action. We cannot rely upon this in our decision on Disciplinary Action as this allegation was dismissed.

[26] The Law Society seeks a finding of ungovernability.

[27] The test for ungovernability is set out in *Law Society of BC v. McLean*, 2016 LSBC 06 at paragraphs 26 to 29:

> The panels are unanimous in that there is no set definition of ungovernability. Each case must be determined on its own facts. (see *Law Society of BC v. Hall*, 2007 LSBC 26 at para. 28). However, they do agree that a finding of ungovernability will be made where there is evidence of a consistent unwillingness to comply with the Law Society as regulator or a disregard and disrespect for the regulatory processes that govern the lawyer's conduct.
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> *Hall* and *Law Society of BC v. Welder*, 2015 LSBC 35, set out the following eight factors to be considered:
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> 1. a consistent and repetitive failure to respond to the Law Society's inquiries;
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> 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; and

8. the number of citations and conduct reviews the Respondent has acquired in his professional conduct record.

A panel may find a lawyer to be ungovernable even if not all of the factors above are present. (see *Hall*, para 28-29, and *Law Society of BC v. McLean*, 2015 LSBC 30 at para. 43).

In deciding if the Respondent's conduct meets the test of ungovernability, the panel must consider both the misconduct in the present matter and the past disciplinary history, together with a consideration of any exceptional circumstances that might attenuate such a finding.

[28] When examining the issue of ungovernability, a panel must look at the misconduct in the present matter and the past disciplinary history (*Hall*). The Respondent has no disciplinary history beyond the matter before us. There is no pattern of misconduct.

[29] We are unable to conclude, on the evidence before us, that the Respondent is ungovernable.

[30] We have examined the factors set out in *Ogilvie* and the proven elements of the Citation in determining the appropriate sanction.

[31] In light of the Respondent's continued refusal to respond, the need for general and specific deterrence, the requirement to ensure public confidence in lawyers and to uphold the public interest in the administration of justice, we order that the Respondent:

(a) is suspended under s. 38(5) of the *Act*, starting immediately and ending when the Respondent has provided, to the satisfaction of the Executive Director, full and substantive responses to the requests set out in paragraph 52 of F&D; and

(b) pay a fine of $7,000, on or before January 31, 2022.

[32] Although the Law Society sought an additional one-month suspension to be imposed following the suspension identified in (a) above, the Panel concludes that any additional suspension is not justified under the *Ogilvie* factors.

COSTS

[33] The Law Society seeks costs of $12,600 and disbursements of $3,354.75.

[34] Rule 5-11 governs the order for costs of a hearing. Rule 5-11(3) sets out that the panel must have regard to the tariff of costs in Schedule 4, subject to Rule 5-11(4). Rule 5-11(4) allows the panel to diverge from Schedule 4 if the panel considers it reasonable and appropriate to do so. Given that there was divided success at the Facts and Determination phase of the hearing, we consider it reasonable to diverge from Schedule 4. The Law Society has claimed 126 units at $100 per unit. We find in the circumstances of this hearing that the Law Society should be awarded 90 units at $100 per unit for a total of $9,000 in costs. The Law Society will recover the $3,354.75 in disbursements claimed. The Law Society will have its costs and disbursements in the amount of $12, 354.75. Given the lack of information regarding the Respondent's personal financial circumstances, he will have until January 31, 2022 to pay the award of costs.