

2022 LSBC 07
Hearing File No.: HE20200038
Decision Issued: February 2, 2022
Citation Issued: June 8, 2020
Citation amended: October 14, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

AARON MURRAY LESSING

RESPONDENT

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

Hearing date: November 24, 2021

Panel: Jacqueline G. McQueen, QC, Chair
Eric V. Gottardi, QC, Lawyer
Mark Rushton, Public representative

Discipline Counsel: Mandana Namazi

No one appearing on behalf of the Respondent:

Written reasons of the Panel by: Jacqueline G. McQueen, QC

PART I: BACKGROUND

- [1] In our Decision on Facts and Determination, 2021 LSBC 46 (“F&D Decision”), we found that the Respondent had committed professional misconduct in relation to the five allegations set out in the subject citation, each related to a discrete complaint file.
- [2] In each instance, the professional misconduct arose due to the Respondent’s failure to provide a full and substantive response to communications from the Law Society, specifically, his failure to answer all requests for documents and information set out in a series of letters issued in 2019 and 2020.
- [3] The Law Society seeks a determination that the Respondent is ungovernable.
- [4] The Law Society submits that the Respondent is ungovernable in that he has demonstrated a pattern of problematic and escalating conduct, including all but one of the factors articulated in *Law Society of BC v. Hall*, 2007 LSBC 26.
- [5] Whether or not the Respondent is determined to be ungovernable, the Law Society asserts that disbarment is the appropriate disciplinary action for the misconduct, as disbarment is necessary to protect the public and to preserve public confidence in self-regulation, while also addressing the need for specific and general deterrence.
- [6] The Law Society also seeks costs of \$4,945.67, calculated in accordance with Schedule 4 of the Law Society Tariff.
- [7] The Respondent did not appear at the hearing on Disciplinary Action, either personally or through counsel, and he did not provide written submissions.

PART 2: SUMMARY OF THE LAW – UNGOVERNABILITY

Meaning of ungovernability

- [8] Sections 38(5) and (7) of the *Legal Profession Act* (the “Act”) establish a range of disciplinary actions.
- [9] Rule 5-6.4 (formerly Rule 4-44) of the Law Society Rules (the “Rules”) specifically provides, in part, that:
- (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.

- [10] The Rules do not provide a definition of ungovernability. Various Law Society tribunal hearing panels have considered what constitutes ungovernability.
- [11] Generally speaking, a lawyer must accept that their conduct will be governed by the Law Society, they must respect and abide by the rules that govern their conduct and they must deal with the Law Society in an honest, open and forthright manner at all times (*Law Society of BC v. Spears*, 2009 LSBC 28, at paras. 7 to 9).
- [12] Ungovernability may include a pattern of pervasive, serious misconduct, illustrative of wanton disregard and disrespect for the regulatory process. In *Hall*, at paras. 27 and 28, the hearing panel identified a number of factors that may individually or collectively give rise to a finding of ungovernability when present, as follows:
- (a) a consistent and repetitive failure to respond to the Law Society's inquiries;
 - (b) an element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records;
 - (c) some element of misleading behaviour directed to a client and/or the Law Society;
 - (d) a failure or refusal to attend at the discipline hearing convened to consider the offending behaviours;
 - (e) a discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances;
 - (f) a history of breaches of undertaking without apparent regard for the consequences of such behaviour; and
 - (g) a record or history of practising law while under suspension.
- [13] The threshold to find ungovernability is high. Where the lawyer's willingness to submit to Law Society governance is inconsistent, with instances of both compliance and cooperation and non-compliance and non-cooperation, the hearing panel must consider the overall pattern of conduct and whether the conduct is worsening or becoming entrenched over time (*Law Society of BC v. Welder*, 2015 LSBC 35 ("Welder 2015"); *Law Society of BC v. Welder*, 2014 LSBC 20 ("Welder 2014"); *Law Society of BC v. McLean*, 2015 LSBC 30).

Appropriate penalty in cases of ungovernability

- [14] A determination that a lawyer is ungovernable will result in disbarment (*Welder 2015*, at paras. 21 and 22; *Hall*, at para. 29; *McLean*, at para. 52).
- [15] This conclusion on inevitable penalty has also been reached by other Canadian jurisdictions (*Law Society of Upper Canada v. Hicks* 2005 ONLSAP 0002; *Law Society of Upper Canada v. Misir*, 2005 ONLSHP 0026; *Law Society of Manitoba v. Ward*, 1996 LSDD No. 119).
- [16] The plain rationale for this penalty was articulated by the hearing panel in *Spears*, as follows:
- [7] ... 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 ...
- [8] The Law Society's mandate to regulate lawyers in the best interests of the public cannot be fulfilled if it permits lawyers who have demonstrated ungovernability to continue to practise.

Is disbarment available where the lawyer's status is former lawyer?

- [17] A hearing panel retains the jurisdiction to disbar a former lawyer for misconduct that occurred while the former lawyer was a member of the Law Society, by virtue of sections 1 and 38(4)(b)(v) of the *Act* (*McLean*, at paras. 46 to 69; *Law Society of BC v. Tak*, 2014 LSBC 57).
- [18] Disbarment of a former lawyer serves a variety of purposes, including protection of public interest, specific deterrence to the disbarred lawyer and general deterrence in the profession.

Notice

- [19] The Law Society, by letter dated August 3, 2021, notified the Respondent of its intention to seek disbarment on the basis of ungovernability, thereby satisfying the notice requirement under Rule 5-6.4(7).

ANALYSIS

- [20] The Respondent's professional conduct record ("PCR") is extensive and long-standing, including six conduct reviews, practice standards recommendations, five administrative suspensions, two Facts and Determination decisions and two Disciplinary Action decisions.
- [21] A close review of the Respondent's PCR reveals that all but one of the factors described in *Hall* are present. The sole exception: the Respondent does not have a record or history of practising while suspended. However, additional aggravating circumstances outside of those articulated in *Hall* exist. These include the Respondent's failure to comply with three court orders in a matter in which he was self-represented, and being declared in contempt of court as a consequence, together with his record or history of failing to comply with Law Society orders, directions, or recommendations.
- [22] The Hearing Panel's conclusion upon reviewing the Respondent's PCR is that the Respondent has accrued a grossly disproportionate number of complaints over his career, has failed to reform his behaviour in the face of multiple conduct reviews, steps in the progressive discipline process and remedial interventions, and has exhibited repeated instances of poor judgment, blaming others for his misconduct and disregard for his professional obligations. This amounts to a consistent unwillingness to submit to, and a wanton disregard and disrespect for, the regulatory process.
- [23] The repeated pattern of non-response addressed by the amended citation effectively frustrates the Law Society investigation process and prevents resolution of complaints. The rules requiring full and responsive answers to inquiries are foundational to the Law Society's ability to fulfill its duty to regulate in the public interest. A lawyer's repeated lack of compliance will undermine public confidence in the Law Society.
- [24] This Hearing Panel, in its analysis in the F&D Decision, specifically considered that the Respondent did meet some requests made by the Law Society and made certain, albeit incomplete, attempts to address the matters raised by the amended citation. However, in the F&D Decision and here, the Hearing Panel finds those efforts to be insufficient against the strict compliance mandated by the Rules. When considered globally, the Hearing Panel finds that the Respondent's misconduct has indeed increased, worsened and become entrenched over time.
- [25] The Hearing Panel finds that the Respondent is ungovernable.

- [26] Following consideration of the authorities on penalty, the Hearing Panel finds that a lawyer who has been found to be ungovernable cannot retain the privilege of a licence to practise law and concludes that the appropriate penalty in this matter must be, and is, disbarment.
- [27] Although the Respondent is currently a former lawyer, the Hearing Panel finds that disbarment serves a variety of purposes, including specific and general deterrence, and will meaningfully protect public interest and enhance public confidence in the disciplinary process.

PART 3: SANCTION ABSENT UNGOVERNABILITY FINDING

- [28] Although the Hearing Panel has found the Respondent to be ungovernable, and that the appropriate sanction is disbarment, in the event the Hearing Panel is found to be in error in these findings, we have determined sanction on the alternate basis advanced by the Law Society and in the absence of a finding of ungovernability.

Purpose of disciplinary proceedings

- [29] Disciplinary proceedings are convened as a mechanism to fulfill the Law Society's mandate under section 3 of the *Act* to uphold and protect public interest in the administration of justice by ensuring the independence, integrity, honour, and competence of lawyers.
- [30] The Law Society submits, and the Hearing Panel agrees, that the sanction imposed at the Disciplinary Action phase of this matter should be determined by reference to these purposes.

Factors to consider when assessing penalty

- [31] In submissions, the Law Society referred the Hearing Panel to the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 (the "*Ogilvie Factors*"), as follows:
- (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 upon 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.

[32] The Law Society also referred to *Law Society of BC v. Lessing*, 2013 LSBC 29, a decision of the review board concerning this Respondent. The review board referenced and affirmed the *Ogilvie Factors* as reflecting the objects and duties of the Law Society as set out in section 3 of the *Act*.

[33] The application and weight given to the *Ogilvie Factors* will necessarily vary in each case. The protection of the public (which includes public confidence in the disciplinary process and in lawyers) and the rehabilitation of the lawyer will play an important role in most cases. In a conflict between these two factors – protection of the public and lawyer rehabilitation – protection of the public will typically prevail.

[34] The *Ogilvie Factors* were refined to their essential elements by the hearing panel in *Law Society of BC v. Dent*, 2016 LSBC 05, as follows:

- (a) nature, gravity and consequences of 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.

[35] Of the consolidated factors articulated in *Dent*, the nature, gravity and consequences of the conduct is typically most valuable in the assessment of public interest (*Law Society of BC v. Gellert*, 2014 LSBC 05). The mandate of the Law Society as set out in section 3 of the *Act* requires that public interest be central to consideration of penalty assessment.

ANALYSIS

Nature, gravity and consequences of conduct

- [36] The Law Society submits that the nature and gravity of the misconduct is very serious and requires significant sanction.
- [37] The Hearing Panel finds that the Respondent's persistent and long-standing failure to respond to communications has compromised the Law Society's ability to properly investigate, assess and resolve complaints brought forward by members of the public.
- [38] The Law Society's inability to undertake comprehensive investigations of the alleged misconduct and to seek appropriate disciplinary action damages public confidence in the disciplinary process and the legal profession.
- [39] The Hearing Panel notes that the underlying complaints are serious, and if proven, reveal serious harm to members of the public flowing from the Respondent's repeated and escalating misconduct.
- [40] The Hearing Panel finds that the Respondent's misconduct, and the nature, gravity and consequences of the misconduct, is very serious and should attract a sanction commensurate with the harm. In this context, the sanction must instill public confidence in the regulatory process and send the message that conduct of this nature is unacceptable.

Character and professional conduct record of the respondent

- [41] The Law Society submits that the Respondent's PCR is extensive and accrued over an almost 30-year professional career. The Law Society stresses that under its model of progressive discipline, the Respondent has been provided many

opportunities to remediate his conduct, but has consistently failed to amend his conduct and practices.

[42] The Hearing Panel finds that the Respondent's PCR includes multiple instances of violations of the Rules and the *Code*, which speak directly to his character and judgment, including:

- (a) breach of undertakings/trust conditions;
- (b) failure to comply with trust accounting rules;
- (c) sharp practice;
- (d) an inappropriate relationship with a client; and
- (e) evidence of counselling a witness/former client with whom he had a potential conflict to "lose" documents to avoid or impede investigation by a regulatory body.

[43] The Respondent's PCR also includes:

- (a) five administrative suspensions;
- (b) a Practice Standards practice review where the Respondent's obligation to respond to the Law Society and other counsel was highlighted; and
- (c) two prior citations, which lead to two Facts and Determination hearings, two Disciplinary Action hearings and a review board hearing. The prior citations included findings that the Respondent, while self-representing in a matrimonial proceeding, failed to comply with three court orders and was declared to be in contempt of court. Other findings include his failure to notify the Executive Director of the Law Society with respect to multiple judgments entered against him, a pattern of seeking to delay on technical or procedural grounds and a behaviour described by the court as "arrogant indifference".

[44] The Hearing Panel considers that it is appropriate to apply progressive discipline in this case. While progressive discipline should not necessarily be applied uniformly, the Hearing Panel recognizes that consideration of a professional conduct record will, in most cases, be appropriate. Here, the Hearing Panel finds that the extent of the Respondent's PCR and the nature of the misconduct constitutes an escalating pattern of misconduct where remedial efforts have had no meaningful effect.

- [45] This escalating pattern of misconduct provides context for an assessment of public interest in the determination of penalty. The evidence relating to the Respondent's character and his significant PCR are both relevant and aggravating.

Public confidence in the legal profession

- [46] The Law Society submits that strong and appropriate disciplinary action is required to signal both the Respondent and the profession that misconduct will not be tolerated and that such action would inspire public confidence in the legal profession.
- [47] As previously noted, 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.
- [48] The Hearing Panel finds that a lawyer who will not comply with the requirements of their regulator undermines the authority of the Law Society and calls into question the ability of the Law Society to discharge its obligations under the *Act*.

Range of disciplinary action imposed in similar cases

- [49] When determining appropriate disciplinary action, a hearing panel should give consideration to the sanctions imposed in similar cases (*Ogilvie*). Whether a case is similar will require an analysis of both the characteristics of the individual before the panel and the regulatory framework then in place.
- [50] The Law Society made extensive submissions on the evolution of the rule engaged in this matter that sets out the obligation of a lawyer to cooperate in investigations and respond to inquiries.
- [51] The rule presently, and at the time the misconduct occurred, requires that lawyers fully comply and cooperate with Law Society investigations, including by providing full and substantive responses. The rule was, and is, onerous and requires strict compliance.
- [52] The cases cited by the Law Society on the range of disciplinary action include a wide range of outcomes, including suspensions ranging from one month to one year, and disbarment.
- [53] The Hearing Panel determined that cases decided under prior, more permissive iterations of the rule were not helpful.

- [54] *Law Society of BC v. Welder*, 2012 LSBC 18 (“*Welder 2012*”), considered, among other matters, a failure to respond to the Law Society under the current version of the rule. The lawyer had a lengthy professional conduct record and a prior 45-day suspension. In the context of a conditional admission of professional misconduct, the hearing panel imposed a three-month suspension.
- [55] We note that no conditional admission was made in this matter and that the Law Society was required to make its case at an undefended hearing.
- [56] Two years later, the same lawyer was the subject of *Welder 2014*. *Welder 2014* included a citation for failing to produce financial information during the course of a Law Society investigation. The hearing panel declined to find that the lawyer was ungovernable in light of evidence that he was not “consistently unwilling” to be governed. The global sanction for this and other citations was a one-year suspension.
- [57] The Law Society sought to distinguish *Welder 2012* and *Welder 2014* on the basis that the aggravating factors present in the instant case make any sanction short of disbarment inadequate.
- [58] The Law Society submits that *Hall*, where disbarment was granted despite the absence of a finding of ungovernability, was most analogous to the case at bar. The Law Society submits that in both *Hall* and the instant case, the lawyer failed to comply or respond to the Law Society, demonstrated indifference and contempt and displayed a fundamental lack of integrity. As well, each lawyer was a former lawyer at the time of the hearing, with no stated intention to return to practice.

Disposition of appropriate disciplinary action in absence of finding of ungovernability

- [59] The Respondent’s non-response and failure to cooperate in the Law Society’s investigations as described in the amended citation would not likely attract disbarment if the hearing panel’s analysis was restricted only to the range of disciplinary action imposed similar cases. A lengthy suspension would be the likely outcome.
- [60] However, a global consideration of each of the consolidated *Ogilvie Factors* leads the Hearing Panel to the conclusion that in the particular circumstances of the Respondent, disbarment is the appropriate sanction.
- [61] The escalating pattern of misconduct evident on review of the Respondent’s extensive and serious PCR demonstrates tangible risk to the public, and the public’s

confidence in the Law Society's ability to regulate lawyers, if the Respondent is permitted to return to the practice of law.

[62] The Hearing Panel finds that the nature, gravity and consequences of the misconduct are serious. Importantly, the misconduct precludes a fulsome investigation and resolution of what are, on their face, very serious complaints of misconduct. These complaints cannot be resolved on their merits in face of the Respondent's misconduct.

[63] The Hearing Panel finds that the misconduct undermines public confidence in the disciplinary process and the legal profession.

[64] Consequently, the principles of specific deterrence, general deterrence and protection of public interest require this sanction.

PART 4: COSTS

[65] The hearing panel may order costs pursuant to the provisions of section 46 of the *Act* and Rule 5-11 of the Rules.

[66] Costs calculated in accordance with the tariff will be awarded under Rule 5-11 unless it is determined that it is reasonable and appropriate not to order costs, or to order costs determined in another manner.

[67] The Law Society seeks costs in the amount of \$4,945.67, calculated in accordance with Schedule 4 of the Law Society tariff, and submits that there is no reason to deviate from the application of the tariff in this case. The Law Society requests that costs be payable on or before December 15, 2021, a date now past.

[68] The Respondent has made no submissions in this matter on costs or otherwise.

[69] The Hearing Panel has carefully considered the Law Society's submissions on costs. The Law Society sought to proceed with submissions on both Facts and Determination and Disciplinary Action on the initial hearing date. This was predicated on the Hearing Panel making a ruling on Facts and Determination immediately following the morning session. The Hearing Panel was not prepared to make an immediate ruling on Facts and Determination and, consequently, the proceeding was adjourned mid-day and a further half-day hearing on Disciplinary Action was convened on November 24, 2021. While we acknowledge that the Law Society had to prepare for the second hearing date, the bulk of these preparations were completed prior to the initial hearing date. On this basis, the Hearing Panel considers that \$3,500 is a fair and reasonable assessment of costs.

[70] In this circumstance, the Hearing Panel orders that the Respondent pay costs in the amount of \$3,500. The Respondent will have six months to pay the costs award.

PART 5: CONCLUSION

[71] The Hearing Panel orders that:

- (a) Pursuant to sections 38(6) and (7) of the *Act*, the Respondent is declared ungovernable;
- (b) In any event of the finding of ungovernability, and pursuant to sections 38(5), (6) and (7) of the *Act*, the Respondent is disbarred; and
- (c) Pursuant to Rule 5-11, the Respondent pay costs in the amount of \$3,500, payable on or before six months from the date of this decision.