2022 LSBC 19
Hearing File No.: HE20200098
Decision Issued: June 27, 2022
Citation Issued: December 1, 2020
Citation Amended: September 28, 2021
Citation Further Amended: November 19, 2021

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**

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| Hearing date: | April 14, 2022 |
| Panel: | Jennifer Chow, QC, Chair<br>Nan Bennett, Public representative<br>Sandra Weafer, Lawyer |
| Discipline Counsel: | Ilana Teicher |

No-one appearing on behalf of the Respondent

Written reasons of the Panel by: Jennifer Chow, QC

## OVERVIEW

[1] In our Decision on Facts and Determination issued January 13, 2022 (2022 LSBC 02) (the "F&D Decision"), the Panel found that the Respondent had committed professional misconduct in failing to provide the quality of service expected of a competent lawyer while serving as executor of WD's estate. In particular, the Respondent failed to take appropriate and timely steps to probate WD's will and administer the estate, failed to respond to communications from the beneficiaries and a bank while serving as executor, and failed to renounce his executorship in the circumstances.

[2] Shortly after our F&D Decision was issued, another hearing panel found the Respondent to be ungovernable. On February 2, 2022, in *Law Society of BC v. Lessing*, 2022 LSBC 07 ("*Lessing 2022 DA*"), the Respondent was disbarred. Before that decision, the Respondent was a former member of the Law Society for non-payment of his membership fees commencing January 1, 2021.

[3] The Law Society seeks to have the Respondent declared to be ungovernable and disbarred a second time, on the basis that a second disbarment would be in the public's interest and would enhance the public's confidence in the disciplinary process by underscoring the seriousness of the Respondent's misconduct. The current misconduct was not addressed in *Lessing 2022 DA.*

[4] Based on all of the circumstances, including the current misconduct and the pattern of misconduct exhibited in the Respondent's professional conduct record ("PCR"), we declare the Respondent to be ungovernable. Accordingly, we order the Respondent to be disbarred a second time.

## THE RESPONDENT'S ABSENCE

[5] The Respondent did not attend the start of this hearing on disciplinary action (or the hearing on facts and determination). After adjourning for more than 15 minutes, the Panel granted the Law Society's application to proceed in the absence of the Respondent, pursuant to s. 42(2) of the *Legal Profession Act* (the "*Act*"). Other panels have proceeded in the absence of the respondents: (*Law Society of BC v. Fogarty*, 2021 LSBC 25; *Law Society of BC v. Hopkinson*, 2020 LSBC 17; *Law Society of BC v. McKinley*, 2019 LSBC 20; *Law Society of BC v. Tak*, 2014 LSBC 57; and *Law Society of BC v. Gellert*, 2013 LSBC 22).

[6] In deciding to proceed in the Respondent's absence, the Panel considered the Law Society's affidavit evidence as follows:

(a) the Respondent was served with notice of the date of this hearing;

(b) in the citation, the Notice of Hearing and a follow-up email, the Respondent was cautioned in writing that the hearing may proceed in his absence;

(c) there was no explanation provided by the Respondent for his non-attendance and in fact, the Respondent did not contact the Law Society at any time between November 2020 and the date of this hearing;

(d) the Respondent is a former member of the Law Society; and

(e) while the Respondent has not admitted the underlying misconduct, the Panel found in the F&D Decision that the Respondent committed professional misconduct.

[7] There was some timing overlap between the F&D Decision and *Lessing 2022 DA* when the Respondent was ordered disbarred. We are satisfied that the current misconduct was not addressed by the panel in *Lessing 2022 DA*.

[8] The Respondent ceased being a member of the Law Society on January 1, 2021.

## THE PANEL'S KEY FINDINGS ON FACTS

### Allegation 1 – Failure to provide the quality of service expected of a competent lawyer

[9] In the F&D Decision, we found at paras. 83 and 84 that the Respondent failed to live up to the standards required of lawyers the *Code of Professional Conduct for British Columbia*. The Panel found that over the course of more than three and a half years from WD's death to the Respondent's suspension in December 2019, the Respondent took little to no steps to apply for probate of WD's estate. Rather than ensuring he was promptly and diligently fulfilling his role as executor and trustee of his former client's estate, the Respondent became the direct cause of the delay in obtaining probate and administering WD's estate. For years, the beneficiaries wrote to the Respondent, his assistant or his associate asking about WD's estate, to no avail.

[10] An aggravating factor in this case is the Respondent's failure to fulfill his duties as executor even after he became aware of MG's complaint to the Law Society. Instead of promptly addressing MG's concerns, the Respondent continued to prolong the delay. Instead of taking action to apply for probate and administer

WD's estate, the Respondent chose to do nothing. He could have hired counsel, stepped down as executor as requested by the beneficiaries, or responded to communications from the beneficiaries. Eventually, the Respondent stopped communicating with the Law Society as well.

**Allegation 2 – Failure to respond to communications from a bank**

[11] In the F&D Decision, we found at para. 86 that the Respondent failed to fulfill his executor's duties when he failed to sign mortgage renewal documents as WD's executor. The Respondent made no attempts to respond to the bank's, MG's or her mother LD's communications. Instead, LD was forced to hire a notary to remove WD's name from title so that she could renew the mortgage.

**Allegations 1 and 2**

[12] In the F&D Decision, at para. 96, we found the Respondent's conduct regarding both allegations in the citation to be egregious in that he failed to provide a quality of service expected of a competent lawyer. Instead of providing assistance to others, the Respondent's failure to fulfill his duties as executor prolonged the financial and psychological stress on the beneficiaries and LD.

## THE RESPONDENT'S BACKGROUND AND PROFESSIONAL CONDUCT RECORD

[13] The Respondent was called to the Bar and admitted as a member of the Law Society of British Columbia on May 17, 1991. His membership was administratively suspended between December 2, 2019 and January 1, 2021. Effective January 1, 2021, the Respondent became a former member of the Law Society for non-payment of fees.

[14] Rule 4-35(4) provides that:

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

[15] The Respondent's PCR is lengthy and contains six conduct review reports, a set of recommendations made by the Practice Standards Committee, five administrative suspensions, three facts and determination decisions and two disciplinary action decisions arising from a total of four citations. A summary is set out as follows:

(a) **Conduct Review report dated November 1999**: The misconduct concerned a transaction where the Respondent "accepted and acted on a trust condition imposed by another lawyer and thereafter remitted funds subject to the undertaking with additional trust conditions engrafted thereon." The Conduct Review Subcommittee "impressed upon the Member the necessity for scrupulously adhering to undertakings."

(b) **Practice Standards Committee recommendations (July 2003 to June 2004)**: The Practice Standards Committee conducted a Practice Review. Some of the recommendations addressed staff and delegation, communications and collegiality, undertakings, practice debts and failure to separate his personal from his professional life. The Respondent's file was closed in July 2004 after a favourable Progress Report. The Practice Standards Report included comments such as:

> The Law Society too, has had problems in trying to get you to respond to letters in a timely manner. We therefore recommend that you consider your ethical responsibility to respond to other lawyers and the Law Society, as well as your desire to avoid unnecessary complaints, and try to respond to all communications in a timely manner.

(c) **Conduct Review report dated October 2003**: The Respondent breached an undertaking regarding a trust cheque that was deposited before a judgment was discharged. The Respondent placed some responsibility for his misconduct on his former assistant. However, the Conduct Review report stated that "it was an error" for the Respondent "to not monitor this situation more effectively."

(d) **Conduct Review report dated November 9, 2005**: The Respondent engaged in sharp practice when he took default proceedings without inquiry and warning. The Conduct Review report stated that:

> … in his fourteen years at the bar, [the Respondent] has … received a disproportionate number of complaints.
>
> This complaint did not arise as a result of [the Respondent's] ignorance of the Rules …
>
> … the terms of the order [the respondent] had entered by default were relatively draconian. The order … has now been set aside …

> The Subcommittee emphasized … that given the number of complaints he has received and having regard to his professional conduct record generally, any future action taken by the Discipline Committee would likely be more severe than that he has received to date.

(e) **Administrative suspension from April 8 to 12, 2010**: There was an administrative error on the Respondent's part in failing to record his 2009 Continuing Professional Development courses. He was suspended for a short time until this error was rectified.

(f) **Conduct Review report dated April 7, 2011**: The Respondent commenced a romantic relationship with his client's former spouse in the middle of matrimonial proceedings. An associate at the Respondent's firm took conduct over the file. The Respondent attended a meeting between his client and his client's former spouse which surprised his client who was asked by the former spouse not to bring a lawyer. The Respondent married the former spouse. The Respondent undertook among other things, to seek peer advice from colleagues and to retain counsel to handle all future Law Society communications. In particular, the report stated:

> The Subcommittee made it very clear to the Member its view that he has failed to respond to prior remedial and disciplinary action by the Law Society. The Subcommittee explained this concern to the Member and also explained the concept of progressive discipline. The Member appreciated the Subcommittee's candour, recognized that he was a 'frequent flyer' and expressed a resolve to undertake fundamental reform of his conduct.

(g) **Two citations authorized on March 3, 2011 and July 14, 2011**: These two citations were later joined. The first citation concerned the Respondent's failure to notify the Executive Director of the Law Society in writing about ten unsatisfied monetary judgments or provide proposals for satisfying those judgments. The second citation concerned the Respondent's self-representation in matrimonial proceedings in the Supreme Court of BC where he was declared to be in contempt of court for failing to comply with three court orders. The citations resulted in a facts and determination decision (*Law Society of BC v. Lessing*, 2012 LSBC 19) where the panel noted and paras. 59 and 61:

> … His explanation for not notifying the Executive Director of these judgments is not credible, and we do not accept it.
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> …
>
> We find that the Respondent was aware at the time the Seventh Judgment and Eighth Judgment were entered that he had an obligation to notify the Executive Director of them if he was unable to satisfy them within seven days and that his failure to do so constitutes a blatant disregard of his professional obligations.

In relation to the first citation, the hearing panel ordered that the Respondent pay a fine of $2,000. In relation to the second citation, the hearing panel took into consideration medical evidence before them in mitigating the sanction imposed. Ultimately, the panel ordered the lawyer to pay a $12,000 fine: (*Law Society of BC v. Lessing*, 2012 LSBC 29).

On review of these decisions, the review board found that:

> [6] … His behaviour does not inspire public confidence in the legal profession.
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> …
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> [15] In this case his mental health issue should be taken into account, or in other words, mitigate the disciplinary action usually imposed. If the mental health issue were not a factor, this Review Panel would impose more severe disciplinary action. In other words, a longer suspension would have been imposed.
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> …
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> [36] The Review Panel cannot accept that his clinical depression somehow affected the Respondent's failure to report the Seventh and Eighth judgments … The Seventh and Eight [sic] Judgments came into existence in December of 2010 and February of 2011. This is well outside the period of clinical depression.
>
> …

> [104] … The Review Panel holds that the hearing panel erred in not putting more weight or significance on the professional conduct record when determining the quality and quantity of the disciplinary action. The hearing panel seems to have dismissed its importance out of hand. The conduct record is an aggravating factor.
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> …
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> [116] The failure of repeated conduct reviews to reform the Respondent's behaviour speaks to a need for a sanction that will deter future misconduct by the Respondent ...
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> …
>
> [126] … These are not isolated incidents. They are part of a pattern … The decision of Madam Justice Gropper is filled with references to the Respondent not responding to correspondence, delaying matters and bringing up technical or procedural arguments …
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> …
>
> [128] … His behaviour in delaying and setting aside judgment [sic] from 2001 to 2004 is remarkably similar to his delay in obeying court orders in the TL matter. Most lawyers, if their behaviour was called "arrogant indifference" by a judge, would have done some serious soul-searching and changed their ways. Unfortunately, the Respondent did not. (see *Law Society of BC v. Lessing*, 2013 LSBC 29)

(h) **Conduct Review report dated May 31, 2013**: The Respondent's misconduct occurred while as a co-managing partner of the firm, he permitted 256 trust cheques totalling around $1.564 million to be signed only by non-lawyers, contrary to the Rules. The report stated that:

> The Member acknowledged that his reliance upon his book-keeper, to the extent that he did not properly review the trust accounting rules, led to this breach. He acknowledged that he should have taken additional steps to familiarize himself with the trust accounting rules at the time he assumed responsibility of the trust accounts.

(i) **Conduct Review report dated April 6, 2018**: This matter concerned the Respondent's conduct while acting for a client in an acrimonious family law matter and in particular in communicating to NK, a witness, that he should "lose" documents having the potential to impede an investigation by the BC Gaming Policy and Enforcement Branch. The report also pointed out the potential conflict of interest in which the Respondent had placed himself. NK was a former client. If NK had, in fact, "lost" his files as apparently suggested by the text message, NK could have found himself in serious difficulties with his own professional organization. The report stated that:

> The Subcommittee was particularly concerned about the actions of the [Respondent] since his significant professional conduct record, particularly the finding of contempt, suggests a pattern of unprofessional and dishonourable behavior towards tribunals, which is exceedingly serious.
>
> …
>
> The Subcommittee expressed concern that [the Respondent] has not fully responded to prior remedial and disciplinary actions by the Law Society. The Subcommittee explained this concern to the [Respondent], and also explained the concept of progressive discipline, and that the [Respondent] should be aware that if he fails to improve his conduct, a citation may be issued in respect of any further misconduct.

(j) **Administrative suspension effective from December 2, 2019 to present**: This suspension relates to one of the files at issue in a citation authorized on May 27, 2020 for repeatedly failing to respond to the Law Society in an investigation. The suspension was ordered pursuant to Rule 3-6 and is administrative and not disciplinary in nature.

(k) **Administrative suspension effective from December 11, 2019 to present**: This suspension relates to one of the five files at issue in a citation authorized on May 27, 2020 for repeatedly failing to respond to the Law Society in an investigation. The suspension was ordered pursuant to Rule 3-6 and is administrative and not disciplinary in nature.

(l) **Administrative suspension effective from December 17, 2019 to present**: This suspension relates to one of the five files at issue in a citation authorized on May 27, 2020 for repeatedly failing to respond to

the Law Society in an investigation. The suspension was ordered pursuant to Rule 3-6 and is administrative and not disciplinary in nature.

(m) **Administrative suspension effective from August 14, 2020 to present**: This suspension relates to one of the five files at issue in a citation authorized on May 27, 2020 for repeatedly failing to respond to the Law Society in an investigation. The suspension was ordered pursuant to Rule 3-6 and is administrative and not disciplinary in nature.

(n) **Citation authorized on May 27, 2020**: This citation concerned 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 over five different investigations.

In the facts and determination decision, the panel held that:

> [72] On the whole, the Respondent's failure to respond to the Law Society about this investigation was persistent and unexplained and therefore constituted professional misconduct.
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> …
>
> [83] In the absence of any information excusing his conduct, the Respondent's failure to respond was persistent and therefore constituted professional misconduct
>
> …
>
> [90] Despite the difficulties in the Respondent's life, legitimate inquiries were made into the Respondent's practice and he did not assist in those inquiries. He has had two years to respond and has neither done so nor explained why he could not. (see *Law Society of BC v. Lessing*, 2021 LSBC 46 ("*Lessing 2021*")

In the disciplinary action decision, the panel held that:

> [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 [sic] similar cases. A lengthy suspension would be the likely outcome.
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> …
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> [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.

At para. 71, the Respondent was declared to be ungovernable and ordered disbarred: (*Lessing 2022 DA*).

(o) **Citation authorized on May 27, 2020**: This citation concerned the Respondent's breach of client confidentiality on three separate occasions involving three different clients by forwarding emails to his then spouse containing personal and confidential information and documents in relation to his family proceedings against his then spouse. The Respondent swore and filed an affidavit containing statements about her lawyer for which he had no factual basis.

In the facts and determination decision, the panel held that:

> [59] Given the reference line "Bedtime reading", and multiple instances of sending emails and affidavits or reading client files to PS, the Respondent's actions are not accidental. Rather, the Respondent's actions and possibly, motivations, are deeply concerning and a flagrant violation of the most private and personal confidences shared with him in his

capacity as a lawyer for his clients. We note that his clients were vulnerable and going through very difficult personal experiences. The Respondent's actions grossly betrayed the competence and compassion and respect required of him.

…

[65] With respect to the Respondent's disclosure of confidential client information in each of the allegations, we prefer the evidence of PS that the Respondent disclosed, intentionally for warped or callous purposes, the exceedingly sensitive, personal and confidential information of his clients. While no known harm resulted to the clients in question, we find the Respondent's disclosure of confidential client information to harm the reputation of lawyers and the legal profession as a whole. Such intentional disclosures erode the public confidence in lawyers, and are plainly a marked departure from the standard expected of the profession. We find this professional misconduct to be serious and reprehensible.

…

[76] When we apply these standards to the conduct of the Respondent, we are deeply concerned and find professional misconduct in the Respondent's actions respecting the affidavit. When the Respondent impugned the integrity of opposing counsel, without any factual or good faith basis in the affidavit, we find that to be professional misconduct. When the Respondent relied upon his affidavit in open court to challenge the integrity of counsel for PS, we find professional misconduct. When the Respondent used his firm's resources and acted in his professional capacity as a lawyer to prepare, swear and file the affidavit (despite having legal counsel), we find his conduct to be abusive of the legal system and his position as lawyer and we conclude, without reservation, that it constitutes professional misconduct. (see *Law Society of BC v. Lessing*, 2022 LSBC 06 (*"Lessing 2022 F&D"*)

**ISSUES**

[16] The three key issues before the Panel are as follows:

(a) Does the Panel have the jurisdiction to issue an order against a former member?

(b) Is the Respondent ungovernable?

(c) If so, should the Respondent be disbarred?

**THE PANEL'S JURISDICTION AGAINST FORMER MEMBERS**

[17] Based on the *Act*, the Rules and the jurisprudence, it is clear that the Panel possesses the jurisdiction to make an order, including an order of disbarment, against a former member of the Law Society.

[18] In regard to the *Act*, s. 1 defines "lawyer" to include a "former member" for the purposes of Parts 4 (Discipline), 5 (Hearings and Appeals), 6 (Custodianships) and 10 (General). Additionally, s. 1 defines "disbar" as "to declare that a lawyer or former lawyer is unsuitable to practise law and to terminate the lawyer's membership in the society."

[19] Additionally, s. 38(4)(b)(v), which is found in Part 4 (Discipline) of the *Act*, provides a hearing panel with the jurisdiction to make a finding of professional misconduct against a former member based on conduct that would, if the respondent were a member, constitute professional misconduct. Once an adverse determination is made under s. 38(4), the panel must impose one or more of the sanctions set out in s. 38(5). In addition, pursuant to s. 38(7) of the *Act*, the panel "may make any other orders and declarations and impose any conditions or limitations it considers appropriate."

[20] Rule 4-1(2) also provides that the Discipline rules apply to a "former lawyer".

[21] The cases have also interpreted the *Act* and the Rules as providing panels with the jurisdiction to make determinations against former lawyers. The key reasoning is that the primary purpose of disciplinary proceedings is to protect the public and maintain its confidence in the legal profession: (*Law Society of BC v. Gellert*, 2014 LSBC 05, at para. 36).

[22] As discussed by the panel in *Law Society of BC v. McKinley*, 2020 LSBC 08, at para. 18, the two most important factors from the leading sanctions case of *Law*

*Society of BC v. Ogilvie*, 1999 LSBC 17 are: (i) the need to ensure the public's confidence in the integrity of the profession; and (ii) the possibility of remediating or rehabilitating the lawyer. Where there is a conflict between those two factors, protection of the public should take priority over the lawyer's rehabilitation.

[23] The cases also demonstrate that where former members have been found to have committed professional misconduct, the panels also have the jurisdiction to order those former members disbarred: (*Tak*; *Law Society of BC v. Mansfield*, 2018 LSBC 30; *Law Society of BC v. Mansfield*, 2019 LSBC 27; and *McKinley*.

[24] The panel in *Law Society of BC v. McLean*, 2016 LSBC 06 ("*McLean 2016*") also confirmed its jurisdiction to hear a citation involving a former member when the panel was dealing with conduct that occurred when the lawyer was a member of the Law Society. The panel explained at paras. 48 and 49:

> In other words, non-membership at the time of a citation hearing does not protect a person from a review of conduct that is alleged to be professional misconduct or a breach of the Act, Rules or the *BC Code* arising from when the person was a member.
>
> Accordingly, this Panel finds that it has jurisdiction to make a determination of ungovernability and to impose the appropriate disciplinary action. In this case, it is disbarment.

[25] In *Law Society of BC v. Power*, 2009 LSBC 23, the panel disbarred a former lawyer and explained at paras. 45 and 46:

> 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.
>
> 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)).

[26] There appears to be only one previous situation where a former member was declared ungovernable twice and disbarred twice, namely, Kevin McLean. Steven Mansfield consented to being disbarred twice regarding different misconduct.

## IS THE RESPONDENT UNGOVERNABLE?

### The Law Society's position on ungovernability

[27] The primary purpose of disciplinary proceedings is to fulfill the Law Society's mandate, set out in s. 3 of the *Act*, namely, to uphold and protect the public interest in the administration of justice by ensuring the independence, integrity, honour and competence of lawyers.

[28] The Law Society submits that based on the Respondent's serious misconduct and his significant PCR, he should be declared to be ungovernable. Further, an order of disbarment based on ungovernability would align with the Law Society's overarching mandate to protect the public and uphold public confidence in the Law Society's regulation of lawyers.

[29] The Law Society seeks a second order that the Respondent be disbarred. On February 2, 2022, the panel found the Respondent to be ungovernable and he was disbarred: (*Lessing 2022 DA)*. In that case, the Respondent was found to have failed to provide a full and substantive response to Law Society communications, specifically, he failed to answer all requests for documents and information set out in letters issued in 2019 and 2020.

[30] The Law Society submits that the Respondent's serious and extensive PCR, covering a wide range of misconduct over decades, demonstrates a clear pattern of disregard for his professional obligations to the public and the profession. The Law Society submits that a professional conduct record is a highly aggravating factor and warrants the strongest kind of message of deterrence to the legal profession. A declaration of ungovernability underscores that such misconduct will not be tolerated and is irreconcilable with the Law Society's overarching duty to uphold and protect the public interest in the administration of justice.

## DISCUSSION ON UNGOVERNABILITY

### Statutory framework

[31] Sub-sections 38(5) and (7) of the *Act* permit the hearing panel to provide for a range of penalties in disciplinary matters. The disciplinary action ranges from a reprimand, fines, practice conditions, a suspension or disbarment.

[32] Rule 5-6.4 is also applicable:

> 5-6.4 (1) Following a determination under Rule 5-6.3 *[Submissions and determination]* adverse to the respondent, the panel must
>
> (a) invite the parties 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]*,
>
> …
>
> (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.

[33] On February 17, 2022, the Law Society sent a letter to the Respondent notifying him that the Law Society intended to seek his disbarment on the basis of ungovernability at the disciplinary action phase of this hearing. We find that the 30-day notice required by Rule 5-6.4(7) has been met.

[34] The term "ungovernability" is not defined in the Rules and thus, there is no set definition. Each case is to be decided on its own facts.

[35] Lawyers in British Columbia hold the privilege of practising law in a self-governing profession. Lawyers hold themselves and each other to the highest standards of ethics and competence to protect the public interest and ensure public confidence in the regulation of lawyers.

[36] Lawyers who refuse to be governed by the Law Society should not be surprised if they lose their privileges to practise law. The cases on ungovernability set out that a finding of ungovernability will be made where evidence exists of a consistent unwillingness to comply with the Law Society as regulator, or a wanton disregard and disrespect for the regulatory processes that govern the lawyer's conduct.

[37] The threshold for a finding of ungovernability is high. The Law Society bears the onus of proving that the Respondent is ungovernable. In deciding whether a lawyer is ungovernable, a 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: (*McLean 2016*, at para. 29).

[38] Where a lawyer's willingness to submit to Law Society governance is inconsistent, with instances of both compliance, non-compliance, cooperation 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. McLean*, 2015 LSBC 30 ("*McLean 2015*"); *Law Society of BC v. Welder*, 2015 LSBC 35 ("*Welder 2015*"); and *Law Society of BC v. Welder*, 2014 LSBC 20 ("*Welder 2014"*).

**The cases on ungovernability**

**Pre *McLean 2015***

[39] The case law shows that until *McLean 2015*, no lawyer in British Columbia was ordered disbarred on the basis of ungovernability. For example, in *Law Society of BC v. Hall*, 2007 LSBC 26, at para. 2, a lawyer who engaged in misconduct that was "pervasive, extremely serious and, in the case of the failure to maintain proper books and records, extended over a period of years", was disbarred based on the particular misconduct rather than ungovernability. Before declining to make such a finding, the panel in *Hall* discussed the relevant factors regarding ungovernability at paras. 27 to 29:

> 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 accounting 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*, [1999] LSBC 17, 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.
>
> It is our view that the Respondent's behaviour engages each of the above indicia of ungovernability nonetheless. As a result, had we been required to do so, this Panel would have no hesitation in finding that the Respondent is ungovernable and must be disbarred …

[40] The case of *Law Society of BC v. Spears,* 2009 LSBC 28 is often cited regarding the issue of ungovernability because the panel's reasoning aptly sums up the concerns. At paras. 7 to 9, a hearing panel considered five admitted allegations of professional misconduct arising from a lawyer's attempt to avoid a practice restriction by concealing his non-compliance. The hearing panel accepted the lawyer's conditional admission and proposed disciplinary action and ordered an eight-month suspension and practice conditions. The panel stated:

> 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.
>
> 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.
>
> All lawyers are expected to deal with the Law Society in an honest, open and forthright manner at all times. The Respondent has failed to do that. He has thereby put at serious risk his opportunity to have the privilege of practising.

*[41]* In *Welder 2014*, the lawyer was found to have acted in a conflict of interest when he acted for a client in a foreclosure proceeding against a former client. The Law Society sought to have the lawyer declared ungovernable based not only on a finding of professional misconduct but on the totality of the lawyer's professional conduct record. The panel reviewed the lawyer's professional conduct record, which included six conduct reviews, six citations and a practice standards referral.

[42] The panel in *Welder 2014* declined to find the lawyer to be ungovernable and instead suspended him for one year with practice conditions. The panel found that, although the lawyer met many of the factors that supported a finding of ungovernability, it found that mitigating factors buttressed such a finding. The panel explained at paras. 21 and 23:

> The following mitigating factors are of particular significance:
>
> (a) Although the Respondent was not exonerated on each conduct review, no further action was taken in any of the six conduct reviews and the one practice standards review that comprise part of the conduct record;
>
> (b) The Respondent's acknowledgments and admissions of improper conduct in respect of several of the matters set out in the record (conduct review #1, citation #1, citation #2, citation #3, citation #4, conduct review #4, conduct review #5 and citation #6);

> (c) The Respondent's noted co-operation with the Law Society in numerous of the matters set out in the record (citation #3, conduct review #3 and conduct review #4); and
>
> (d) An indication in 2008 of 'underlying psychological issues impinging on the Respondent's ability to practise in a reasonable and professional manner" and, more significantly, his voluntary attendance at counselling to address those issues.
>
> …
>
> On the basis of those mitigating factors, this Panel has, with great hesitation, come to the conclusion the Respondent's conduct falls just short of the conduct of the respondents in *Hicks* and *Ward* and does not warrant a finding that the Respondent is ungovernable.

***McLean 2015***

[43] In the seminal case of *McLean 2015*, the panel found a lawyer to be ungovernable based on the serious misconduct and the lawyer's professional conduct record which was "extensive, serious and took place within five years of his call. His conduct engages many of the indicia regarding ungovernability … "

[44] The citation issued against the lawyer alleged extensive misconduct, including threatening execution against an unrepresented opposing party's assets based on a bill of costs that the lawyer knew or ought to have known was paid; representing himself in a defamation action he commenced against the opposing party; and failing to notify the Executive Director of the Law Society regarding unsatisfied monetary judgments such as an order for special costs. The lawyer's professional conduct record included a conduct review, a Practice Standards Committee referral, two administrative suspensions of membership, a Law Society order imposing conditions and limitations on the lawyer's practice, and two citations.

[45] In *Law Society of BC v. McLean*, 2015 LCBC 09, the citation set out seven allegations of misconduct, including failing to provide full and substantive responses promptly or at all to the Law Society, failing to comply with a Benchers' order placing interim conditions and limitations on the lawyer's practice, and failing to complete the Small Firm Course contrary to the Rules, the lawyer's undertaking and a Law Society Order.

[46] Finally, in *McLean 2015*, the panel found the lawyer's professional conduct record to be "extensive, serious and took place within five years of his call." The panel also found no evidence of mitigating circumstances, a lack of appearance or cooperation by the lawyer regarding the allegations and the lawyer's conduct met many of the factors indicating ungovernability. The panel explained at para. 51:

> This Panel finds the Respondent's conduct demonstrates a persistent and wanton disregard for the Law Society's regulatory process and determines him to be ungovernable. In the circumstances, including consideration of the protection of the public interest and the public's confidence in the discipline process and in the profession generally, this Panel further determines that the appropriate disciplinary action is disbarment.

[47] The next decision on ungovernability was published approximately two weeks after *McLean 2015*. In *Welder 2015*, the lawyer was also found to be ungovernable and disbarred based on the serious misconduct and his professional conduct record. The lawyer's misconduct occurred when he was acting for a company and continued to receive monies from several sources despite a cease-trading order prohibiting further investments in the company. The monies were transferred to the company in violation of the cease-trading order and not returned to the investors. The lawyer also did not advise the investors that he was not protecting their interests as required by the *Professional Conduct Handbook* in effect at the time. The hearing panel explained at para. 23 that "if a lawyer repeatedly conducts himself in a manner that obstructs the ability of the Law Society to govern that lawyer, then that lawyer is ungovernable." The panel considered the seriousness of the misconduct and the lawyer's extensive professional conduct record, which included six conduct reviews, six citations and a Practice Standards Committee referral.

[48] In finding the lawyer to be ungovernable, the panel in *Welder 2015* considered: the failure by the lawyer to demonstrate that he was reformed and deserving of a less severe penalty; repetition regarding the same mistakes such as acting in a conflict of interest; and the lawyer's lack of cooperation and unwillingness to respond to the Law Society. The panel explained at para. 32:

> Finally, this Panel will add to the list as set out in *Hall* and put forward an eighth category for consideration: the number of citations and conduct reviews the Respondent has acquired in his professional conduct record. There comes a point where a lawyer has been found to have misconducted himself too many times to warrant another chance. As with any privilege, a licence to drive a motor vehicle for example, too many

> infractions will eventually mean that you will lose your privilege because it is no longer safe or prudent to allow you to continue to practise. This Panel is certain that, if the Respondent were permitted to return to practise, it is not a matter of 'if' but 'when' the Respondent will commit a further deed of professional misconduct.

[49] In *McLean 2016*, the panel considered again whether the former member of the Law Society should be declared ungovernable for a second time. The citation contained ten allegations of misconduct, ranging from sending correspondence to a self-represented litigant on five separate occasions, threatening to take execution proceedings while he knew or ought to have known that he could not until the bill of costs had been taxed, unilaterally setting dates for a hearing when he knew of the self-represented litigant's suitable dates, sending correspondence to the self-represented litigant conveying false information, failing to respond to the self-represented litigant on four occasions to set a hearing date, misrepresenting to the court that he had not responded to the self-represented litigant because the litigant had retained counsel and then failing to correct the court's misunderstanding, failing to respond to opposing counsel on 14 occasions, unilaterally filing a notice of trial, failing to file documents as agreed, failing to attend scheduled court appearances, failing to provide requested information to the court, failing to report an unsatisfied judgment to the Law Society, offering to settle his defamation action if the complainant withdrew his complaint to the Law Society and failing to respond to the Law Society by its deadlines or at all.

[50] In *McLean 2016*, the panel explained its finding on ungovernability at para. 30:

> This Panel finds the Respondent ungovernable for the reasons set out below.
>
> (a) Consistent and repetitive failure to respond to the Law Society's inquiries — Five such findings have now been made against the Respondent by different panels … ;
>
> (b) Neglect of duties with respect to trust account reporting and records — Three separate findings of professional misconduct have been made, and the Respondent has been administratively suspended for failure to produce his records in a compliance audit. Further findings of professional misconduct were made concerning his failure to produce his laptop and related passwords to access his accounts and emails, his failure to comply with a Benchers'

order relating to operation of his trust account, and his failure to report an unsatisfied judgment;

(c) Some element of misleading behaviour directed to a client or the Law Society — There is evidence that the Respondent attempts to avoid or evade service of documents from the Law Society. This is particularly set out in paragraph 3 of the affidavit of Carrie Lee Godfrey dated November 6, 2015, where she deposed that, when she tried to hand him the documents, he refused to take them; when she touched him with the documents and told him he had been served, he ran away from her;

(d) A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours — Twelve hearing dates have been scheduled to hear the various citations against the Respondent between July 29, 2014 and September 17, 2015. He did not attend any of these dates, and while he provided an explanation of his absence for five of these dates, he did not provide support for his reasons for three of those five dates, although ordered or invited to do so. This hearing on disciplinary action is the 13th date where the Respondent has failed to respond or attend;

(e) A discipline history of allegations of professional misconduct over time, in different circumstances — The Respondent was called in 2010. There have now been over 20 findings of professional misconduct made against the Respondent over a four-year period, including failing to respond to communications from opposing counsel, failing to comply with specific rules, failing to comply with specific Benchers' orders and, finally, the findings of professional misconduct in the within matter;

(f) A history of breaches of undertaking without apparent regard for the consequences of such behaviour — There is one finding of professional misconduct in failing to complete the small firm practice course in the face of his various obligations to do so, including *his undertaking to the Law Society* dated September 18, 2013;

> (g) A record or history of practising while under suspension — The Respondent was not found to have practised while under suspension, but following a citation issued on October 21, 2014, he was found to have committed professional misconduct by practising without a practice supervisor, in breach of a Benchers' order, pursuant to Rule 3-7.1 …
>
> (h) The number of citations and conduct reviews the Respondent has acquired in his PCR — The Respondent has one conduct review and five citations in his PCR. He has 20 specific findings of professional misconduct. Ten findings arise in the within matter.
>
> [emphasis in original]

[51] In *Law Society of BC v. Pyper*, 2019 LSBC 21, a lawyer was found to have provided an inadequate quality of service for his client and in failing to recommend that the client obtain independent legal advice after the lawyer had committed a professional error. The lawyer was no longer a member of the Law Society and did not appear at his Law Society hearings. The lawyer's professional conduct record showed: Practice Standards Committee recommendations, a conduct review, an order imposing interim practice restrictions and conditions which was modified twice; three citations; and an injunction issued by the Supreme Court of BC prohibiting the lawyer from practising law.

[52] At paras. 59 to 66, the panel in *Pyper* declared the lawyer to be ungovernable based on the factors set out in the case of *Hall* :

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

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.

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.

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

> 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.
>
> 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.

[53] In *Fogarty*, at para. 28, the panel declined to find a former member to be ungovernable on the basis that there was no pattern of misconduct. The panel ordered the lawyer be suspended until such time as he provided responses to the Law Society's requests and ordered that he pay a fine of $7,500. The panel explained at para. 21 that "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 its members in the public interest." The lawyer was found to have committed professional misconduct by failing to cooperate with the Law Society investigation and respond to various requests to provide documents and answer particular questions. The lawyer's professional conduct record consisted of three administrative suspensions, two of which were imposed for failing to provide substantive responses to the Law Society's requests that were the subject matter of the citation.

**Second finding of ungovernability**

[54] In *Lessing 2022 DA*, the panel found at para. 25 that the Respondent was ungovernable based on his repeated pattern of non-responsiveness which frustrated the Law Society's investigation process and prevented resolution of complaints. The panel explained at para. 24 that the Respondent's global misconduct had increased, worsened and become entrenched over time. The panel also found at para. 22 that although the Respondent did meet some requests made by the Law Society and had made certain attempts to address the matters raised, his efforts were found to be insufficient given the strict compliance required by the Rules. At para. 20, the panel considered the Respondent's PCR, which was "extensive and long-standing, including six conduct reviews, practice standards recommendations, five administrative suspensions, two Facts and Determination decisions and two Disciplinary Action decisions."

[55] In *Lessing 2022 DA*, at para. 11, the panel explained the foundational principle that a lawyer must accept the Law Society as the regulator of a lawyer's conduct and thus abide by the rules that governs a lawyer's conduct and deal with the Law Society in an honest, open and forthright manner at all times. In particular, the panel stated at paras. 21 and 22:

> 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.
>
> 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.

[56] The Law Society submits that a second finding of ungovernability is appropriate. We note that allegations before this Panel have not been addressed by the other *Lessing* panel. In January 2022, the F&D decision was issued. Several weeks later in February, 2022, the second panel issued its decision on disciplinary action, and disbarred the Respondent based on ungovernability.

[57] While we have some doubt that a second finding of ungovernability is strictly necessary, we accept that in the current circumstances, a second finding may be practical in the event the Respondent decides to pursue an appeal or review of *Lessing 2022 DA*. For our purposes, we have assumed that public confidence may be further enhanced by a second finding of ungovernability.

[58] We note that in the *McLean 2015* and *McLean 2016* cases, two different panels found the lawyer to be ungovernable and both disbarred twice based on different allegations of serious misconduct before them and their review of the lawyer's professional conduct record. The Law Society submits that since November 2021,

when two separate panels were addressing citations involving the Respondent, the Respondent failed to fully participate in these proceedings and the new findings of professional misconduct made by this Panel "justify" a further consideration of a finding of ungovernability.

[59] In this case, the Law Society submits that this is a clear case of ungovernability based on the following factors, most of which fit within the *Hall* factors:

(a) A consistent and repetitive failure to respond to the Law Society's inquiries;

The Respondent now has five separate findings of professional misconduct for failing to respond to communications from the Law Society in the course of investigations into five separate complaints including this complaint: (*Lessing* 2021).

(b) An element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records;

The Respondent's PCR shows that he permitted 256 trust cheques totalling $1,564,635.71 to be signed only by non-lawyers.

(c) Some element of misleading behaviour directed to a client or the Law Society;

The Law Society submits that the Respondent's PCR shows that the Respondent's explanations for some of his misconduct were not credible. The Respondent's PCR also shows some elements of misleading behaviour where he was found to encourage a potential witness in a regulatory and potentially criminal investigation to suppress evidence.

In *Lessing 2022 F&D*, the panel found that the Respondent's statements in a response to the Law Society were "untruthful, or at least misleading." The panel found the Respondent guilty of professional misconduct when he prepared, swore and relied on an affidavit in his own divorce proceedings containing statements made about his ex-spouse's lawyer for which he had no factual basis. The panel found the Respondent's affidavit to be dishonest and to demonstrate a lack of integrity, courtesy and civility.

(d) A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours;

The Respondent did not attend the hearing on Facts and Determination nor Disciplinary Action in this matter. There is no evidence before the Panel that the Respondent offered any sort of excuse or explanation for the Respondent's non-attendance.

We note that the Respondent did not attend other disciplinary hearings: (*Lessing 2022 DA*; *Lessing 2022 F&D*; *Lessing 2021*).

(e) A discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances; and

The Law Society submits that over the course of approximately 30 years, the Respondent has steadily accrued a very serious and concerning PCR consisting of: six conduct reviews, Practice Standards recommendations, five administrative suspensions, three facts and determination decisions and two disciplinary action decisions (concerning a total of four citations).

(f) A history of breaches of undertakings without apparent regard for the consequences of such behaviour;

The Respondent's PCR shows a significant disciplinary history involving breaches of undertakings which were the subject matters of the Practice Standards Committee and two separate conduct reviews.

[60] The Law Society further submits that the Panel ought to consider a seventh factor in this case, namely, a record or history of failing to comply with Law Society orders, directions or recommendations.

(g) A record or history of failing to comply with Law Society orders, directions, or recommendations;

The Respondent's history of failing to comply with orders or directions issued by the Law Society is not a factor specified in the *Hall* decision. However, the *Hall* factors are not exhaustive.

The Law Society submits that the various levels of intervention set out in the Respondent's PCR highlight the fact that the Law Society's repeated efforts to provide guidance and directions to the Respondent to avoid re-occurrence of misconduct appears to have had little, if any effect, on the Respondent.

> The PCR demonstrates that at the Respondent's first conduct review, the Subcommittee impressed on the Respondent the necessity to scrupulously adhere to undertakings. However, he found himself before the Practice Standards Committee to address various issues including his non-compliance with undertakings.
>
> The Law Society submits that the Respondent has routinely demonstrated that he is either unwilling or unable to comply with the Law Society's recommendations.

[61] Based on the foregoing, the Law Society submits that a finding of ungovernability is appropriate in these circumstances. The Law Society submits that the Respondent has demonstrated both a consistent unwillingness to comply with, and a wanton disregard and disrespect for, the regulatory processes that govern him.

[62] The Panel has considered the Law Society's submissions, the serious misconduct regarding the Respondent's failure to provide the quality of service expected of a competent lawyer regarding his duties as executor of WD's estate, the Respondent's PCR and the case law on ungovernability.

**DECISION ON UNGOVERNABILITY**

[63] We find the Respondent to be ungovernable by the Law Society in that the Respondent has demonstrated both a consistent unwillingness to comply with, and a wanton disregard and disrespect for, the regulatory processes that govern him.

[64] In support of our finding, the Panel has considered the seriousness of the misconduct and the Respondent's PCR. The finding of ungovernability is based on our consideration of the *Hall* factors, including the additional factor requested by the Law Society. In summary, the Panel finds that the Respondent's PCR demonstrates the following:

(a) a consistent and repetitive failure to respond to Law Society 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 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 undertakings without apparent regard for the consequences of such behaviour; and

(g) a record or history of failing to comply with Law Society orders, directions or recommendations

## SHOULD THE RESPONDENT BE DISBARRED?

### The Law Society's position and discussion on disbarment

[65] A panel's determination that a lawyer is ungovernable will result in disbarment as it is the only disciplinary action that will effectively protect the public: (*McLean 2015*, at para. 52; *McLean 2016*, at para. 31; *Welder 2015*, at paras. 21 and 22; *Hall*, at para. 29; *Law Society of Upper Canada v. Hicks*, 2005 ONLSAP 2; *Law Society of Upper Canada v. Misir*, 2005 ONLSHP 26; and *Law Society of Manitoba v. Ward*, 1996 LSDD No. 119).

[66] The Law Society submits 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 case of former members, if a clear declaration is not made that the ungovernable member is not suited to the practice of law.

[67] As stated by the hearing panel in the leading decision on sanction in *Ogilvie*, at para. 19:

> The public must have confidence in the ability of the Law Society to regulate and supervise the conduct of its members. It is only by the maintenance of such confidence in the integrity of the profession that the self-regulatory role of the Law Society can be justified and maintained.

[68] The Law Society submits that the Law Society's role as a self-regulator will be undermined if it permits ungovernable lawyers to remain in practice. The Law Society submits that the Respondent ought to be disbarred in order to preserve public confidence in the Law Society's ability to self-regulate and to deter other lawyers from disregarding the regulatory processes.

**DECISION ON DISBARMENT**

[69] As we have found the Respondent to be ungovernable, we also order that the Respondent be disbarred.

[70] Based on the cases, the Panel agrees 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 case of former members, if a clear declaration is not made that the ungovernable member is not suited to the practice of law.

[71] We find that that the Respondent has breached his ethical and legal obligations to cooperate with the Law Society. As lawyers have the privilege of practising law in a self-governing profession, the Respondent's repeated failure to cooperate with the Law Society poses a danger to the public and to the legal profession. We find that it would not be in the public interest to permit the Respondent to practise law. In the circumstances of this misconduct and the Respondent's PCR, the Respondent has demonstrated both a consistent unwillingness and a wanton disregard and disrespect for the regulatory processes that govern him.

[72] We note that this is a second finding that the Respondent is ungovernable based on the current misconduct and a consideration of the Respondent's PCR to date. Regardless of the panel's finding of ungovernability in *Lessing 2022 DA*, this Panel has determined the Respondent to be ungovernable based on our own independent assessment.

[73] Alternatively, the Law Society further submits that even if the Hearing Panel does not determine the Respondent to be ungovernable, the appropriate disciplinary action in this case is, nevertheless, disbarment. The Law Society emphasizes that disbarment would underscore the paramount importance of preserving public confidence in self-regulation. Based on our determination that the Respondent be disbarred on the basis that he is ungovernable, we do not need to consider the Law Society's alternative position that the Respondent be disbarred based only on the misconduct proven in this case. In any event, if it were necessary to do so, we would also have determined that the Respondent's misconduct warrants disbarment based on the factors set out in the leading case of *Ogilvie*.

**THE LAW SOCIETY'S POSITION AND DISCUSSION ON COSTS**

[74] The Law Society also seeks costs of $5,572.50, inclusive of disbursements and counsel time, payable within six months from the date of the pronouncement of the hearing panel's decision on disciplinary action or on such other date as the hearing

panel may order. This amount has been calculated in accordance with the Schedule 4 of the Law Society Tariff. The Law Society submits that it represents a fraction of the Law Society's true costs.

[75] We agree with the Law Society's submissions that costs are not ordered as punitive measures for professional misconduct, but are ordered separately and independently from any sanction imposed. An order for costs is not intended to address the misconduct that is the subject of the citation, but rather the costs resulting in the hearing of the matter.

[76] The authority to order costs is provided by s. 46 of the *Act* and Rule 5-11. Under Rule 5-11(3), a panel must have regard to the tariff when calculating costs. An order for costs calculated according to the tariff should be awarded unless under Rule 5-11(4), the panel determines it is reasonable and appropriate to award no costs or costs in an amount other than that permitted by the tariff.

## DECISION ON COSTS

[77] We order costs payable by the Respondent to the Law Society in the amount of $5,572.50, inclusive of disbursements and counsel time, payable within six months from the date of the pronouncement of the Panel's decision on disciplinary action.

[78] We find that there is no reason to deviate from the application of the tariff in the circumstances of this case.