2007 LSBC 26
Report issued: May 28, 2007
Citation issued: December 1, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

James Douglas Hall

Respondent

Decision of the Hearing Panel on Penalty

Hearing date: July 28, 2006

Panel: Anna Fung, Q.C., Chair, Ralston S. Alexander, Q.C., William Everett, Q.C.

Counsel for the Law Society: Brian McKinley
No-one appearing on behalf of the Respondent

Background

[1] On March 8, 2006, in an oral decision on Facts and Verdict, this Panel found that the Respondent had professionally misconducted himself in respect of 11 counts of a citation issued by the Law Society on December 1, 2005. Written reasons on Facts and Verdict were issued on March 15, 2006.

[2] The details of the 11 counts of professional misconduct made out against the Respondent are described in the decision on Facts and Verdict. In general terms, the misconduct included a failure to abide by a direction of the Practice Standards Committee in a number of material respects, a failure to maintain proper books and records in accordance with the requirements of the Rules of the Law Society, the wilful filing of a Form 47 Trust Report that the Respondent knew to contain a forged signature of a Certified General Accountant, the completion of the Lawyer's Declaration in Part A and Part C of the Form 47 Trust Report that, to the knowledge of the Respondent, contained false and misleading information, the practising of law while suspended by the Law Society from an entitlement to do so, the breaching of various undertakings to the Law Society, including an undertaking to not practise in the area of Wills and Estates and an undertaking to respond to the Law Society within 14 days of communications from the Law Society, the failure to provide a client with the quality of service at least equal to that which would be expected of a competent lawyer and the misleading of both a client and another member of the Law Society as to a particular state of affairs that the Respondent knew to be false. The professional misconduct found against the Respondent was pervasive, extremely serious and, in the case of the failure to maintain proper books and records, extended over a period of years.

[3] The Panel reconvened on July 28, 2006 for the purpose of considering an appropriate penalty in the circumstances. The Respondent did not appear at the Penalty hearing, although he had been provided notice well in advance of the date of the hearing. On the morning of the hearing, and only in response to a telephone call from counsel for the Law Society as to whether he was attending the Penalty hearing, the Respondent provided an e-mail to counsel for the Law Society, wherein he noted:

> ... please be advised that I will not be attending today's hearing. My reasons are that I am currently suffering from depression and that I am on the brink of bankruptcy so I cannot afford to make the trip to Vancouver. I am two months behind in my rent and my fax machine has been cut off. I request an adjournment so I may present evidence of this nature to the Panel.

[4] The Law Society argued that the Respondent had had months to prepare any evidence that he wished to present at the hearing and that he had waited until the morning of the hearing to seek an adjournment. Counsel for the Law Society advised that, since the publication of the decision on Facts and Verdict, all of the communication in his relationship with the Respondent had been initiated by the Law Society and that he had not had any response from the Respondent until the morning of the Penalty hearing.

[5] After considering the submission of the Law Society and the Respondent's request for an adjournment of this hearing, the Panel determined that it would proceed to deal with the penalty phase of the hearing in the absence of the Respondent. The Panel determined that the Respondent had nearly two months to consider his position in respect of the Penalty hearing following the Panel's decision on Facts and Verdict, which decision had been communicated to the Respondent, and the Panel determined that it was not in the public interest to adjourn the Penalty hearing given the seriousness and pervasiveness of the professional misconduct.

Submissions of the Law Society

Additional Evidence

[6] Counsel for the Law Society began by requesting an opportunity to adduce additional evidence that he argued was relevant to the question of penalty. The stated purpose of the request to adduce additional evidence was that there were aggravating circumstances demonstrated by the additional evidence that the Law Society felt the Panel should have before it. After a determination by the Panel that the Respondent had been provided with the additional evidence and had been advised of the Law Society's intention to call the additional evidence, the Panel agreed to hear the additional evidence without making a decision as to what the Panel would do with the additional evidence.

[7] Some of the additional evidence was provided by Karen A. Keating, C.A., a forensic accountant who was, at all material times, in the employment of the Law Society (the " Auditor"). The additional evidence adduced by the Law Society through the Auditor dealt with an additional allegation of misappropriation of trust funds. In addition the Law Society adduced evidence that it was necessary for the Law Society to seek a Supreme Court injunction to prevent continued unauthorized practice by the Respondent while he was under suspension.

Professional Conduct Record

[8] The Law Society requested the Panel to consider the Professional Conduct Record of the Respondent.

[9] The Respondent's Professional Conduct Record begins with a Conduct Review. The Respondent was required to meet with a Conduct Review Subcommittee of the Discipline Committee to discuss circumstances in which he had neglected to have an appropriate document signed by a client. Instead of recalling the party that had not signed the document, he simply substituted other pages that were signed by the client so that the document that should have been signed by the client appeared to have been

signed properly. These events took place while the Respondent was an articled student. The Subcommittee attributed the behaviour to a lack of supervision of the Respondent. In the face of an acknowledgement of wrongdoing and a promise by the Respondent never to do anything like that again, the Subcommittee determined that no further action needed to be taken in respect of this matter.

[10] The next incident in the Respondent's Professional Conduct Record occurred when a citation was issued in July of 2000. This citation dealt with events that occurred over a period of time from 1993 through 1997. The citation alleged that, while he was a director and or officer of a private company, the Respondent took funds from the company as remuneration when the payment of those funds was not authorized by the Directors of the company and was specifically prohibited by the Articles of the company without the authority of a special resolution. In the same incident, the Respondent intentionally misled an independent accountant the Directors had hired to investigate the financial circumstances of the company, by telling that auditor that he had filed certain income tax returns when he knew they had not been filed. His explanation for this lie was that he had intended to file the returns immediately after telling the accountant that they had been filed, but he forgot to do so. The Respondent acknowledged that his behaviour constituted conduct unbecoming a lawyer, and he was fined $6,500.00 and ordered to pay costs of a further $4,471.00.

[11] The Respondent next came to the attention of the Law Society for a matter in which he was found by a Hearing Panel to have professionally misconducted himself for failing, despite repeated requests, to respond to Law Society communications over a period of time from November 2001 through February 2002. The Law Society was seeking an explanation for the Respondent's alleged failure to pay a practice debt. Following a finding of professional misconduct for his failure to respond to the Law Society, the Respondent was suspended for one week and ordered to pay costs in the amount of $500.00. The Hearing Panel in that matter noted that the Respondent was not responding to inquiries from the Law Society at the very same time that he was found to have been guilty of conduct unbecoming a lawyer in the matter of the improper payment of remuneration to himself without Directors' authority, and the false representations he had provided to the independent accountant regarding the income tax returns. The Panel noted that only 17 days had elapsed from the publishing of the Facts and Verdict finding in the earlier matter when the inquiry from the Law Society about the failure to pay the practice debt arrived on his desk. The Panel noted that the Respondent should have, by then, discerned that he ought to take inquiries from the Law Society more seriously.

[12] The next matter in the Respondent's Professional Conduct Record was a further instance of a citation issued against the Respondent for his failure to respond to the Law Society. The Respondent did not appear at that hearing, but instead sent a fax requesting an adjournment and advised that, if no adjournment was granted, then the Respondent was prepared to admit to the professional misconduct. The Panel proceeded with the hearing and made a determination of professional misconduct in respect of the Respondent's failure to respond to Law Society inquiries. The Panel noted that, while the Respondent was waiting for the penalty decision to be issued on the earlier instance of failing to respond to the Law Society, he was once again failing to respond to the Law Society on the matter that was the subject of this citation. For this professional misconduct, the Respondent was suspended for one month and directed to provide a substantive response to the Law Society in respect of the outstanding inquiry. He was further ordered to provide an undertaking to respond to any future inquires from the Law Society within 14 days.

[13] The next item on the Respondent's Professional Conduct Record was a citation issued in respect of a breach of undertaking for which the Respondent was found guilty of professional misconduct. The Panel in that instance ordered that the Respondent be reprimanded, pay a fine of $5,000.00 and pay costs of $4,332.00. This decision was taken on the basis of a characterization by the Panel that the breach of undertaking was inadvertent.

[14] The next entry in the Respondent's Professional Conduct Record was the interim suspension order by three Benchers pursuant to Section 39 of the *Legal Profession Act*. By that proceeding, the Respondent was suspended from the practice of law, effective November 8, 2005.

Analysis

[15] The Law Society argued that the Respondent had shown a wanton disregard for the authority of the Law Society to regulate his practice. He had neglected to abide by six of the nine conditions imposed upon his practice as a result of a Practice Review. He did not, and does not, keep financial books and records in accordance with the Rules of the Law Society and in a form that can be audited. When requested to provide a trust report, he provided a forged document and, following his suspension from the practice of law, he continued to practise despite that suspension and in breach of a specific undertaking that he had provided to the Law Society to refrain from practising in a particular area.

[16] As a result of the foregoing, the Panel has been urged by the Law Society to make a finding that the Respondent is ungovernable - that is, that he has by his behaviour demonstrated such disregard for the authority of the Law Society to regulate his practice that the only appropriate remedy in the circumstances by which the public interest can be protected is for the Respondent to be disbarred. We are advised that the notion of a member of the Law Society being found to be " ungovernable" and therefore disbarred has not been previously considered in those specific terms in this Province. We are aware of previous discipline cases where the demonstrated refusal or neglect of lawyers to respond to Law Society requests for information has prompted panels to comment upon the need for compliance by lawyers with Law Society directives. The importance of facilitating the Law Society's investigations into complaints of possible misconduct has been observed to be at the very heart of preserving the privilege of self-governance, which lies at the core of the independence of the bar.

[17] In the circumstances of this case, we find it to be unnecessary to make an express finding that the Respondent is ungovernable. We are satisfied, on the basis of the matters proven before us (as more fully described in our decision on Facts and Verdict), that the Respondent is so fundamentally dishonest, as demonstrated from his pattern of conduct, that no remedy short of his disbarment can properly protect the public. His Professional Conduct Record is replete with recurring instances of dishonesty and, given all the second chances that have been provided to the Respondent, there is no reason to think that he has any chance of rehabilitation.

[18] For reasons that are more fully described later in this report we make it clear that we have come to this conclusion solely on the basis of the findings that we made in our decision on Facts and Verdict and on the basis of the Professional Conduct Record of the Respondent. We specifically note that we did not accord any weight to the additional evidence adduced by the Law Society at the opening of the Penalty Hearing

[19] We think it useful, however, for the Benchers in their ongoing consideration of discipline policy matters to consider the notion of ungovernability as a ground for disbarment. The facts of this case are particularly on point for this discussion, and we therefore take the opportunity to consider some of the Canadian authorities on the subject.

[20] The basis for a finding of ungovernability is that the public interest can only be served if members of the profession respect and respond to the Law Society as a regulating authority. In order for the Law Society to fulfill its mandate of protecting the public interest in the administration of justice, (as required by Section 3 of the *Legal Profession Act*), it is necessary for members of the Law Society to respond to and respect the authority of the Law Society as a regulating body. That respect will be evidenced by lawyers

responding promptly to communications, by lawyers observing directives (for example, dealing with suspensions and the entitlement to practise) and by lawyers appearing at discipline hearings when required to do so by the citation process.

[21] In each of these respects, the Respondent has failed. He has consistently disregarded the Law Society's requests for information, and has been cited on more than one occasion for those failures. In addition, he continued to practise law while his entitlement to do so was suspended.

Selected Canadian Authorities on Ungovernability

[22] In the *Law Society of Upper Canada v. Hicks*, [2005] L.S.D.D. No. 6, the lawyer was the subject of a citation that alleged his failure to serve clients in a conscientious, diligent and efficient manner, his failure to meet financial obligations of his practice, his failure to comply with judicial orders and his failure to cooperate with the Law Society. The lawyer represented a client on impaired driving charges. The client was convicted and given a one-year driving prohibition. He was employed in a job where he required a driver's licence and, at the suggestion of the lawyer, an appeal of the conviction was launched. The lawyer then became very difficult for the client to contact, and no information about the progress of the appeal was forthcoming. There were messages left and not returned. When the client did get a chance to speak to the lawyer, he received a variety of excuses. The client attended Court on a particular day believing that his appeal was to be heard. The lawyer told him that, due to a Court error, no prosecutor was available, so the appeal would not be heard on that day. In fact, what had happened is that the necessary documents had not been filed to process the appeal, and the appeal was later dismissed as abandoned and the client's driver's licence was once again suspended. The lawyer advised the client that it was a clerical error and that he would take care of it. Again, the client had difficulty contacting the lawyer and getting information about his case. He called repeatedly and left messages. The client then lost his job because he could not drive, and he hired a second lawyer who reinstated the appeal and had the conviction set aside. In the appeal, the reluctant lawyer filed an affidavit in which he admitted that he had failed to fulfill his professional obligation, and he acknowledged responsibility for the dismissal of the appeal.

[23] The lawyer had a prior discipline history that included findings of professional misconduct for failing to reply to the Law Society, failing to file accounting documents, failing to produce his books and records for inspection and several findings of practising while under suspension. There is an uncanny similarity between the Conduct Record of Mr. Hicks and that of the Respondent in this citation. In other complaints, the lawyer admitted to failing to serve a client, failing to pay suppliers for services rendered to the practice, failing to respond and failing to cooperate with the Law Society. The lawyer throughout the hearing repeatedly described himself as a good lawyer, but he offered no medical or other evidence to explain his failures. He did acknowledge that he had not attended to his practice as he should have done, and he characterized many of his failures to serve his clients as " administrative matters" or as " a failure to follow through" . He acknowledged that he did not respond to the Society in an appropriate manner, but he did not understand or appreciate the seriousness of his behaviour. That Hearing Panel determined that the lawyer was ungovernable, that he did not get any message from his previous discipline hearing history and that he offered no explanation for his failure to deal with the Society. He had proven that he was unable and unwilling to be governed by the Society. The Panel, in response to the lawyer's proposed penalty of a modest suspension and a plan of supervision, suggested that, if the lawyer was found to be ungovernable, then no amount of supervision would make him governable. That Panel noted that there is no fixed definition of ungovernability and that a factual analysis is needed on a case-by-case basis. It went on to say, at paragraph 46:

> The Law Society exists to govern the profession in the public interest. If lawyers will not abide by

> the authority of the Law Society, and demonstrate that they abide by that authority, the Law Society cannot fulfill its mandate. That is the essence of what governability means.

The lawyer was ordered disbarred.

[24] In the *Law Society of Manitoba v. Ward*, [1996] L.S.D.D. No. 119, a Panel of three Benchers considered the behaviour of the lawyer in his failure to file an annual Trust Account Report and his repeated failure to respond to communications from the Law Society. The Panel noted the previous record of Mr. Ward with the Law Society that included convictions for similar failures to respond, failures to file Trust Account Reports and a series of fines, all of which remained unpaid, and suspensions. The Panel noted:

> ... there is a pattern of conduct which is well established in this case; a pattern of conduct which appears to have begun when Mr. Ward failed to file his annual accountant's report, Form D ... That pattern of conduct has continued and has involved breaches of the rules of the Society for two consecutive years for failing to file the Form D. It has involved breaches of the rules of the Society in respect of failing to respond to the Society's communications on a persistent basis. It has involved a failure to pay fines, costs, penalties and annual fees for ... something in excess of a year now. It has involved failures and acts of omission primarily. These have been persistent, inexplicable, and unfortunately from our point of view, unexplained.
>
> In our view, the right to practice law carries with it obligations to the Society and to its members. The minimum obligations in our view are, compliance with rules and communication with the Society as might reasonably be expected. ... The justification for self government is at least partly based on the assumption that the Society will in fact govern its members and that its members will accept governance. Ward has demonstrated through his behaviour that he does not accept governance.
>
> We regard this as a serious matter. We regard this as a cumulative ongoing set of behaviours and patterns which demonstrate that the member refuses to be governed. Ward cannot say that he is not aware that he was required to respond. Me [sic] should be taken to be aware of the rules. He has been served repeatedly with correspondence and documents requiring him to respond.
>
> As a result of all of this we have concluded that Mr. Ward is in fact, as submitted by counsel for the Society, an ungovernable member. We have concluded that Mr. Ward, [sic] that the fit and proper disposition of these matters is that he be disbarred and struck from the rolls as a barrister and as a solicitor in the Law Society of Manitoba.

[25] In the *Law Society of Upper Canada v. Misir*, [2005] L.S.D.D. No.60, the " Notice of Application" (citation) alleged 12 particulars of professional misconduct. The lawyer misappropriated $12,450 and did not make restitution. The lawyer abandoned his practice and took no steps to remove an administrative suspension nor did he wind up his practice. He left his clients in the lurch. A number of the lawyer's clients could not find him or contact him after that time. The lawyer did not apologize to any of the clients whose interests he had abandoned. The lawyer failed to respond to telephone calls and letters from the Law Society and another solicitor. He failed to cooperate in the Law Society investigation. He failed to keep the Law Society up to date with accurate contact information.

[26] The case summary provided as follows:

> The member held himself out as a barrister and solicitor while he was suspended. He misrepresented the status of a client's file, stating in a letter to the Society that the client file had been transferred to another lawyer when, in fact, it had not. He completed, signed and filed a false and misleading 2003 Member's Annual Report. He failed to maintain proper books and records, in particular, client trust ledgers and complete monthly reconciliations, as required by the Society's by-laws. He failed to handle client trust money in accordance with the by-laws. He made false representations to LawPRO in February 2005, to avoid a suspension for non-payment of LawPRO insurance premiums.
>
> ... All 12 particulars of professional misconduct in the notice of application were proved, except two sub-particulars. The member was ungovernable. The member was disbarred. ...
>
> The evidence clearly established that the member had abandoned his practice, had misappropriated $12,450 from his mixed trust account and was ungovernable. In cases involving misappropriation, members generally will be disbarred despite evidence of prior good character and financial or other pressures. In cases where the member is found to be ungovernable, and where practices are abandoned, the result will normally be disbarment. The member did not provide any evidence outlining exceptional circumstances in mitigation, or any character evidence. Disbarment was the only penalty that would effectively protect the public.

[27] The foregoing cases suggest that the relevant factors upon which a finding of ungovernability might be made will include some or all of the following:

1. A consistent and repetitive failure to respond to the Law Society's inquiries.

2. An element of neglect of duties and obligations to the Law Society with respect to trust account reporting and records.

3. Some element of misleading behaviour directed to a client and/or the Law Society.

4. A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours.

5. A discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances.

6. A history of breaches of undertaking without apparent regard for the consequences of such behaviour.

7. A record or history of practising law while under suspension.

[28] 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.

[29] 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. Such a finding would be consistent with the jurisprudence from other Canadian Law Societies, outlined above, that suggests disbarment is the only appropriate outcome when a lawyer is found to be ungovernable.

Additional Evidence

[30] As indicated earlier in these reasons, the Law Society sought to adduce additional evidence at the beginning of this penalty hearing on the basis that the Panel could hear the additional evidence as an aggravating circumstance in determining the appropriate penalty. The Panel agreed to hear the additional evidence leaving for a later determination the weight it would accord the additional evidence submitted.

[31] In considering the weight to be accorded to the additional evidence the Panel has considered the decision of the British Columbia Court of Appeal in the case of *Brock-Berry v. Registered Nurses Association of British Columbia* (1995), 127 D.L.R (4th) 674. In that decision the Court of Appeal considered an appeal by the Registered Nurses Association from a Supreme Court decision in which Mr. Justice Shabbits found that a Hearing Panel had erred when assessing a penalty following a hearing on a citation against Ms. Brock-Berry. The Panel had decided to terminate the membership of Ms. Brock-Berry in the Association and stated that it had reached that determination on the basis of finding that she had appeared to be dishonest when giving her testimony at the hearing into the initial allegations of misconduct. The Panel noted additionally that she had, in her evidence, denied any wrongdoing and that she had shown neither insight nor remorse with respect to her behaviour.

[32] Mr. Justice Shabbits found that it appeared that that the Panel had sentenced Ms. Brock-Berry for conduct that was not alleged in the citation and determined that the order could not stand. He made this determination in respect of the finding of dishonesty and in respect of the fact that she had denied any wrongdoing. He did note that the panel could properly consider her insight into her behaviour as a factor bearing on the likelihood of rehabilitation.

[33] Madam Justice Rowles, speaking for the Court of Appeal agreed that it appeared that Ms. Brock-Berry had been punished for conduct that was not contained in the citation. She observed that she was in substantial agreement with the decision of Mr. Justice Shabbits on that subject and directed that the appeal of the Association be dismissed.

[34] The considerations that arise in the *Brock-Berry* case are substantially similar to those that would arise if this Panel were to consider the additional evidence adduced as an aggravating factor in our determination of the appropriate penalty. We were asked to punish the Respondent, at least in part, for conduct that was not included in the citation upon which we previously made our decision on Facts and Verdict. On the authority of *Brock-Berry* we are not entitled to take this additional evidence into account in assessing the appropriate penalty. As indicated earlier in this decision, the Panel did not accord any weight to the additional evidence and the penalty decision that follows is based entirely upon the facts described in our decision on Facts and Verdict and on the Professional Conduct Record of the Respondent.

Decision

[35] This Panel has noted that the Respondent has displayed a general indifference and even contempt for matters of significance involving the Law Society. He is a repeat offender for his failure to

respond to Law Society requests for information and appears to be relatively indifferent to his obligations to comply with undertakings that he has provided, both to the Law Society and to members of the public.

[36] It is the view of this Panel that this lawyer must be disbarred. We come to that conclusion as the result of a finding by us of his fundamental lack of honesty in his dealings with clients, with auditors and with the Law Society. He has provided to the Law Society a document (a Trust Report) that he forged with a view to misleading the Law Society into thinking that he had complied with the audit requirements of the *Legal Profession Act* and, when confronted with his misleading behaviour, he offered further misinformation to the Law Society in an attempt to cover up his forgery. This fundamental lack of honesty goes to the heart of this Respondent's lack of suitability to continue to be a practising member of the Law Society of British Columbia.

[37] We are satisfied, on the circumstances of the citation before us and the finding of professional misconduct on all 11 counts of that citation, which, taken together with the Professional Conduct Record of the Respondent, indicate that he should no longer enjoy the privilege of practising law as a member of the Law Society of British Columbia. His Professional Conduct Record and the specific findings made by this Panel in response to the 11-count citation provide a sufficient basis upon which we are able to make a determination that the Respondent must and should be disbarred.

[38] We note specifically that there is authority for disbarment as the required penalty in circumstances where fundamental dishonesty has been demonstrated. The authorities verify that these findings can be made in circumstances where no misappropriation has occurred. We make this observation in response to any suggestion that might be made that the only circumstance where disbarment can occur is when a finding of misappropriation has occurred. There are numerous authorities within the Law Society of British Columbia, and we note the cases of *Law Society of BC v. McNabb*, [1999] LSBC 2, *Law Society of BC v. Ewachniuk*, [2000] LSBC 18 and *Law Society of BC v. Parmar,* [2002] LSBC 20. In those instances, behaviour that did not amount to misappropriation but that demonstrated disrespect for the administration of justice was exhibited, and the Panel of the day determined that disbarment was an appropriate response in each of those cases.

[39] The public interest demands that the Respondent be prevented from wreaking his dishonest behaviour upon his clients and other members of the legal profession and the public, and accordingly we order that he be disbarred.

Costs

[40] The Law Society presented a Bill of Costs totalling $17,180.93, and we find those costs to be reasonable in all of the circumstances, given the complexity of the matters before this Panel, the wide-ranging circumstances of the citation, including the fact of the 11 separate counts that were proven, and the length of time and number of witnesses required to be called to properly present the case for the Law Society. We therefore order that the Respondent pay costs to the Law Society in the sum of $17,180.93.