

2015 LSBC 30
Decision issued: June 29, 2015
Citation issued: October 21, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KEVIN ALEXANDER MCLEAN

RESPONDENT

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

Hearing date: May 14, 2015

Panel: Miriam Kresivo, QC, Chair
William M. Everett, QC, Lawyer
Dan Goodleaf, Public representative

Discipline Counsel: Alison Kirby
No one appearing on behalf of the Respondent

INTRODUCTION

- [1] On March 20, 2015 this Panel issued its decision on Facts and Determination regarding the citation issued October 21, 2014 against the Respondent and amended November 7, 2014 (the “Citation”).
- [2] This Panel found that the Respondent had committed professional misconduct in respect of each of the seven allegations contained in the Citation, with the exception of the portion of allegation 4(a)(i) of the Citation relating to daily meetings with his practice supervisor, which allegation was dismissed.
- [3] Since the hearing on Facts and Determination, the Respondent failed to pay his Law Society fees by December 31, 2014. On January 20, 2015, the Executive

Director made a Direction under Rule 4-4.2(4) that the Respondent was to continue as a member not in good standing and not permitted to practise law. On April 10, 2015, the Executive Director rescinded his Direction under Rule 4-4.2(7) and since that date the Respondent has ceased to be a member of the Law Society.

- [4] The Respondent did not appear at this hearing on Disciplinary Action on his own behalf. Nor did anyone appear on behalf of the Respondent.
- [5] The Law Society is seeking a finding of ungovernability against the Respondent and, if such a finding is made, the Law Society submits that the appropriate disciplinary action is disbarment.
- [6] The Law Society is also seeking costs of \$6,785.

SERVICE ON THE RESPONDENT

- [7] As was the case leading up to the hearing on Facts and Determination, the Law Society continued to experience difficulty in serving the Respondent with notice of this hearing on Disciplinary Action.
- [8] Rules 10-1(1) and (3) provide in part as follows regarding service:
- 10-1(1) A lawyer, former lawyer, articulated student or applicant may be served with a notice or other document personally, by leaving it at his or her place of business or by sending it by
- (a) registered mail, ordinary mail or courier to his or her last known business or residential address,
- ...
- (3) A document sent by ordinary mail is deemed to be served 7 days after it is sent.

- [9] Discipline counsel provided evidence through affidavits regarding service of notice of the hearing on Disciplinary Action on the Respondent. In addition, Mark Bussanich, a staff lawyer with the Law Society's Investigation, Monitoring and Enforcement Department, gave evidence regarding service.
- [10] The evidence disclosed that:

- (a) The legal administrative assistant to discipline counsel sent a letter dated March 23, 2015 from counsel for the Law Society to the Respondent by

regular mail, addressed to his last known business and residential addresses, in accordance with Rule 10-1(1)(a). The letter did not include a notice of hearing regarding the Disciplinary Action phase of this hearing. Rather, it advised the Respondent that the Disciplinary Action phase of the hearing would be scheduled shortly. The letter did provide the Respondent with notice that the Law Society intended to seek disbarment on the basis of ungovernability at the hearing and reminded the Respondent that if he failed to appear at the hearing, the Hearing Panel may proceed with the hearing in his absence and make any order that it could have made had the Respondent been present.

- (b) On April 22, 2015 the Hearing Administrator at the Law Society sent to the Respondent by mail addressed to his last known business and residential addresses a letter and Notice of Hearing, both dated April 22, 2015, in accordance with Rule 10-1(1)(a). The letter and Notice of Hearing provided notice that this hearing on Disciplinary Action was set to commence on May 14, 2015 at 9:30 a.m. at the Law Society's offices and also provided notice that, if the Respondent failed to appear at this hearing, the Panel may proceed with the hearing in his absence and make any order that it could have made had the Respondent been present; and
- (c) On May 5, 2015, the legal administrative assistant to discipline counsel sent a further letter dated May 5, 2015 from counsel for the Law Society to the Respondent by regular mail addressed to his last known business and residential addresses, in accordance with Rule 10-1(1)(a). The May 5, 2015 letter confirmed the hearing date, time and place, reminded the Respondent that if he failed to appear at the hearing, the Hearing Panel may proceed with the hearing in his absence and make any order that it could have made had the Respondent been present, and also advised the Respondent that the Law Society intended to seek disbarment on the basis of ungovernability at the hearing. No response was received from the Respondent to the May 5, 2015 letter.
- (d) In addition, the May 5, 2015 letter was also sent from discipline counsel to the Respondent by regular mail to –an address on Seymour Street in downtown Vancouver, which the Respondent had provided on or about April 1, 2015 as an address for service in a civil action commenced by the Respondent against the Law Society. Counsel for the Law Society submitted that sending the May 5, 2015 letter to the Seymour Street address was not proof of service, but was done out of an abundance of caution.

- [11] The March 23, 2015 letter, the April 22, 2015 letter and Notice of Hearing, and the May 5, 2015 letter were deemed to be served on the Respondent seven days after they were sent under Rule 10-1(3).
- [12] On the basis of the affidavit evidence filed by the Law Society, this Panel is satisfied that the Respondent was served with notice of this hearing on Disciplinary Action by the April 22, 2015 letter prior to the hearing date in accordance with Rules 10-1(1)(a) and (3).
- [13] Rule 4-35(5) and (6) provides:
- (5) 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.
 - (6) The panel must not take disciplinary action under subrule (5) 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.
- [14] On the basis of affidavit evidence filed by the Law Society, this Panel is satisfied that the Respondent was given at least 30 days notice that ungovernability would be raised as an issue at the hearing on Disciplinary Action by the letter dated March 23, 2015.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

- [15] Section 42(2) of the *Legal Profession Act* (the “Act”) provides that, where a respondent fails to attend a hearing on a citation and the panel is satisfied that the respondent has been served with notice of the hearing, the panel may proceed with the hearing in the respondent’s absence and make any order that could have been made were the respondent present.
- [16] The Respondent failed to appear at the hearing on Facts and Determination, and this Panel exercised its discretion under s. 42(2) of the Act to proceed in his absence.
- [17] The Respondent also failed to appear at this hearing on Disciplinary Action on May 14, 2015, and upon learning he was absent, the Panel adjourned the hearing for approximately 15 to 20 minutes in order to provide him with additional time to appear.

- [18] Upon reconvening, the Respondent had not appeared, and counsel for the Law Society submitted that this Panel should exercise its discretion under s. 42(2) of the Act to proceed with the hearing on Disciplinary Action in the Respondent's absence.
- [19] As stated above, this Panel is satisfied that the Respondent was served with notice of this hearing on Disciplinary Action by the letter dated April 22, 2015 sent by regular mail to his last known business and residential addresses, and was served with notice at least 30 days prior to this hearing on Disciplinary Action of the Law Society's intention to seek disbarment on the basis of ungovernability by the letter dated March 23, 2015, sent by regular mail to his last known business and residential addresses. Based on the foregoing and the fact that both the April 22 2015 and March 23, 2015 letters contained a caution that this proceeding could proceed in his absence, the Respondent's failure to attend at the hearing on Facts and Determination, his failure to provide any explanation for not appearing, and his status as a former member of the Law Society, this Panel exercised its discretion under s. 42(2) of the Act to proceed with this hearing on Disciplinary Action in his absence.

ISSUES

- [20] Is the Respondent ungovernable, and if so, is disbarment the appropriate disciplinary action and does it apply to a former member of the Law Society?
- [21] If this Panel does not find that the Respondent is ungovernable, what is the appropriate disciplinary action?

THE RESPONDENT'S PRIOR DISCIPLINE RECORD

- [22] 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.

- [23] The Respondent's Professional Conduct Record ("PCR") as of May 1, 2015 was filed as an exhibit.
- [24] The Respondent was called and admitted as a member of the Law Society on August 27, 2010.

[25] Following his call, he practised with Smetheram & Company Law Corporation from October 28, 2010 to June 20, 2011 and then with Varty & Company from June 20, 2011 to April 1, 2012. On April 1, 2012 the Respondent began practice as a sole practitioner.

[26] Details of the Respondent's PCR, not including the professional misconduct detailed in this Panel's decision on Facts and Determination, are as follows:

(a) February 21, 2013 Conduct Review

The Conduct Review Subcommittee ("Subcommittee") examined three separate but, as the Subcommittee stated, "thematically related complaints," all regarding the Respondent's failure to comply with rules of the *Professional Conduct Handbook*. The Respondent attended the Conduct Review with counsel.

The first complaint concerned: (a) the Respondent contacting the complainant (opposing party) directly after the complainant had retained counsel, (b) the Respondent's rude communication with opposing counsel, and (c) the Respondent filing an affidavit that contained inflammatory and insulting remarks about the complainant.

The second complaint concerned sharp practice on the part of the Respondent in a landlord and tenant dispute. He sought a penalty of double the damage deposit on behalf of a tenant for the landlord's alleged failure to pay the damage deposit by a statutory deadline, in circumstances where the Subcommittee found that the Respondent knew that the facts did not support a penalty claim.

The third complaint concerned the Respondent's failure to respond to his former law firm and to attend to law firm matters appropriately prior to and after leaving the firm.

The Subcommittee, in its Report, pointed out to the Respondent that three referrals to the Discipline Committee "was egregious for even the longest serving member of the Law Society, let alone one who has only been practising for two years." The Subcommittee Report further found:

24. There are strong threads of arrogance, hubris and self-involvement in this young lawyer's early career. The Subcommittee is hopeful, but not overly confident, that this can be overcome through a process of compassionate

mentorship by his peers, a natural maturing process and through an effort toward greater self-awareness on the part of the Member.

...

27. Although progress was made during the meeting, the Subcommittee is not entirely confident that the Member has “a good road ahead” of him. The Subcommittee explained, in great detail with much emphasis, the policy of Progressive Discipline. The Subcommittee feels that that message was heard by the Member and by his counsel.

(b) Referral to the Practice Standards Committee

On December 6, 2012 the Law Society’s Practice Standards Committee ordered a review of the Respondent’s practice pursuant to Rule 3-12(3)(d), which provides in part that the Committee may make such an order upon finding that there are reasonable grounds to believe that a lawyer is practising law in an incompetent manner.

On May 9, 2013 the Committee agreed to accept, with a minor amendment, the 30 recommendations contained in the 2013 Report reviewing the Respondent’s practice. The 2013 Report included the following recommendations:

- i) that the Respondent address deficiencies in his office procedures and systems;
- ii) that the Respondent take two online courses on the Law Society’s Learning Centre website and complete a total of at least 24 hours of CPD credits for each of 2013 and 2014, all to address shortcomings in the Respondent’s knowledge base;
- iii) an undertaking by the Respondent to restrict his practice to civil litigation, motor vehicle and corporate matters, because the Respondent’s knowledge of the law did not appear to be very broad; and
- iv) that the Respondent enter into a practice supervision agreement with a lawyer approved by the Practice Standards Department that would specifically require the Respondent’s pleadings and

court application documents to be reviewed and approved by the Practice Supervisor prior to filing.

The Respondent entered into a Practice Supervision Agreement dated February 3, 2014 (“PSA”) with RK as his Practice Supervisor.

On April 10, 2014 most of the Committee’s recommendations were converted into an Order of the Practice Standards Committee.

(c) Citation issued November 19, 2013

On January 12, 2015, a hearing panel found the Respondent’s conduct in failing to respond to several letters and telephone calls in 2012 from his former clients’ counsel, regarding imposed trust conditions and the client file, constituted professional misconduct. The hearing panel has not yet rendered its decision on disciplinary action.

(d) Administrative suspension of membership

The Respondent was suspended from membership in the Law Society on November 20, 2013 for failing to provide information requested in connection with a Law Society compliance audit. The Respondent provided the requested information in January 2014 and his right to practise was reinstated effective January 29, 2014.

(e) Law Society order imposing conditions and limitations on Respondent’s practice

On January 29, 2014, an order of three Benchers imposed conditions and limitations on the Respondent’s practice (“PSA Order”) including, among other things, the requirement that he enter into the PSA, that he only operate his trust accounts with a second signatory approved by the Law Society and that he cooperate with all Law Society investigations. The PSA Order was amended on August 25, 2014 to include, among other things, orders that the Respondent not take on any new clients after August 25, 2014, nor any new matters without the permission of the Executive Director, and that he only operate his trust account(s) with a second signatory until August 31, 2014 and thereafter not operate a trust account at all.

(f) Citations issued July 18, 2014

On July 18, 2014, two citations were issued against the Respondent. The first citation alleged that the Respondent failed to respond properly to letters from the Law Society concerning its investigation of a complaint arising from his representation of a client. The second citation alleged that the Respondent failed to comply with an Order made by the Chair of the Discipline Committee on May 27, 2014 requiring the Respondent to provide the Law Society with login and password information and access to email transmissions and to his laptop, desktop computers and mobile devices for imaging.

The two citations were heard together on December 4, 2014 in a summary hearing. The Respondent, although duly served, did not appear. The hearing panel found the Respondent to have committed professional misconduct in respect of each citation and fined the Respondent \$2,500 in respect of the first citation and \$4,000 in respect of the second citation.

(g) Administrative suspension of membership

The Respondent's membership in the Law Society was suspended on September 18, 2014 for failing to submit his completed trust report to the Law Society. As of May 5, 2015 the Respondent had not submitted his completed trust report.

THE RESPONDENT'S CONDUCT IN THIS MATTER

[27] Particulars of the Respondent's professional misconduct in respect of the seven allegations in the Citation in this matter are set out in this Panel's decision on Facts and Determination, and are briefly summarized as follows:

- (a) failures in respect of three separate complaints being investigated by the Law Society, to provide full and substantive responses promptly or at all to communications from the Law Society;
- (b) failures to comply with a Benchers' Order of January 29, 2014 ("Practice Order") placing interim conditions and limitations on the Respondent's practice and requiring him to enter into and comply with a PSA by:
 - i) failing to comply with the terms of the PSA relating to weekly meetings with his Practice Supervisor;

- ii) failing, following the termination of the PSA, to immediately cease practising law until such time as he had entered into and agreed to a new employment or practice supervision agreement; and
 - iii) failing to operate his trust account with a secondary signatory approved by the Law Society.
- (c) failure to complete the Small Firm Course, in breach of the Law Society Rules (“Rules”), an undertaking given by the Respondent to the Law Society, and an Order made by the Law Society.

UNGOVERNABILITY

[28] S. 38(5) of the Act provides, *inter alia*, that, where an adverse determination is made against a respondent, the panel must impose one or more of a range of disciplinary actions, from reprimand to disbarment.

[29] Rule 4-35(5) provides that, regardless of the nature of the allegation in the citation, the panel may take disciplinary action based on the un governability of the respondent by the Law Society.

Case law on un governability

[30] Neither the Act nor the Rules provide any specific guidance or indicia as to what constitutes “un governability.” Previous decisions by Law Society panels in BC and other jurisdictions provide some guidance.

[31] This Panel was referred to three decisions of Law Society of BC hearing panels that considered the notion of un governability as a ground for disbarment¹. However, the hearing panels in each of those cases declined to make a finding that the respondent was un governable. A brief summary of each of those cases is set out below.

The *Spears* case

[32] In *Spears*, the respondent cooperated in the process by attending at the hearing with counsel, admitting service of the citation, agreeing to a Statement of Facts and making conditional admissions to five allegations of professional misconduct and

¹ *Law Society of BC v. Hall*, 2007 LSBC 26; *Law Society of BC v. Spears*, 2009 LSBC 28; and *Law Society of BC v. Welder*, 2014 LSBC 20

consenting to particular disciplinary action, subject to the panel's approval. The respondent's admitted misconduct included breaches of undertakings to the Law Society, failure to provide the Law Society with a status report on certain files, failure, in breach of a Practice Supervision Agreement, to provide a summary of all open files to his Practice Supervisor, and making statements to Law Society staff that were not true.

[33] The panel in *Spears* approved the disciplinary action proposed by the respondent and recommended by the Law Society, but made the following comments regarding ungovernability:

- [7] The Panel is very concerned that the Respondent has in the past demonstrated an unwillingness to comply with conditions imposed upon him by the Law Society. It is a fundamental requirement of anyone who wishes to have the privilege of practising law that that person accept that their conduct will be governed by the Law Society and that they must respect and abide by the rules that govern their conduct. If a lawyer demonstrates that he or she is consistently unwilling or unable to fulfill these basic requirements of the privilege to practise, that lawyer can be characterized as "ungovernable" and cannot be permitted to continue to practise.
- [8] The Law Society's mandate to regulate lawyers in the best interests of the public cannot be fulfilled if it permits lawyers who have demonstrated ungovernability to continue to practise.
- [9] 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.
- [10] The Panel recognizes it cannot bind the hands of any future disciplinary panels, but it does wish to convey to the Respondent that this is very likely to be his last opportunity to display the sort of conduct expected of and required of all lawyers.

The *Hall* case

[34] In *Hall*, the respondent did not appear at the hearing. He faced 11 allegations of professional misconduct, which were described by the panel as pervasive and extremely serious and included:

[2] ... 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. ...

[35] The respondent's prior professional conduct record included a conduct review, four citations and an interim suspension ordered pursuant to s. 39 of the Act. The conduct review involved improper conduct regarding the signing of documentation while the respondent was an articulated student and recommended no further action in light of the respondent's acknowledgment of wrongdoing and promise never to do anything like it again. The four citations concerned the respondent: (a) while a director or officer of a private company, taking funds from the company as remuneration when such payment was not authorized by the directors and was prohibited by the articles of the company and intentionally misleading an independent accountant the directors had hired to investigate the financial circumstances of the company; (b) failing, despite repeated requests, to respond to Law Society communications; (c) further failing to respond to the Law Society; and (d) breach of an undertaking.

[36] The panel in *Hall* came to the conclusion that the respondent must be disbarred on the basis of the findings of misconduct before it in that hearing and stated at paras. 36 and 37:

[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.

[37] It was therefore not necessary for the panel to address ungovernability. Nevertheless, it took the opportunity to do so. It reviewed disciplinary cases in which lawyers were found to be ungovernable in Ontario² and Manitoba³ and concluded at paras. 27 to 29:

[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.

² *Law Society of Upper Canada v. Hicks*, [2005] LSDD No. 6, and *Law Society of Upper Canada v. Misir*, [2005] LSDD No. 60

³ *Law Society of Manitoba v. Ward*, [1996] LSDD No. 119

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.

The *Welder* case

[38] In *Welder* the respondent appeared at the hearing. The panel found that the respondent had committed professional misconduct by representing a client in a proceeding against a former client contrary to the Rules. The Law Society sought a finding of ungovernability on the combined basis of the respondent's misconduct in the matter and the totality of his professional conduct record, which included six conduct reviews and six citations. The conduct reviews concerned a failure to

recognize a conflict, conflict with other counsel, failure to administer an estate in a timely manner, breach of an undertaking to comply with ongoing financial reporting requirements, failure to fulfill an undertaking arising from a complicated closing and witnessing client signatures on a land transfer document in circumstances that, to the respondent's knowledge, would constitute a fraudulent preference. The citations concerned professional misconduct for making unfounded allegations against another lawyer, failing to give notice to opposing counsel of a court motion and making misrepresentations to opposing counsel, failing to report unsatisfied judgments to the Law Society and to collect and remit taxes, failing to remit taxes collected, failing to provide financial information requested by the Law Society (which resulted in a 45-day suspension) and failing to report CRA Requirements to Pay to the Law Society.

- [39] Regarding the possibility of remediating or rehabilitating the respondent, the panel found that he seemed to have recognized the error in his conduct and what steps he should have taken to avoid a similar situation. In those circumstances, the panel was not ready to find that he was beyond remediation and rehabilitation.
- [40] The panel concluded that the respondent's conduct fell just short of warranting a finding of ungovernability and ordered a one-year suspension and costs.

Summary regarding ungovernability

- [41] The authorities reviewed above provide guidance and context for what constitutes ungovernability. In summary, the Law Society exists to govern the profession in the public interest. The right to practice carries with it an obligation to abide by the Law Society's authority to govern. The Law Society cannot fulfill its mandate if lawyers demonstrate that they will not abide by that authority through a pattern of persistent conduct, evidencing general indifference to, and/or a wanton disregard and/or disrespect for the Law Society's regulatory process.⁴
- [42] However, there is no fixed definition of ungovernability. It must be determined by a factual analysis on a case by case basis⁵ and grounded on the judgment and common sense of the hearing panel.
- [43] In carrying out its factual analysis as to whether a lawyer is ungovernable, the *Hall* case suggests a number of factors that a panel may consider (see para. 40 above). It

⁴ *Hicks* at para. 46 and *Ward* at para.24

⁵ *Hall* at para. 28

is not necessary that all the suggested factors be established to make a finding of ungovernability. Nor are the suggested factors exhaustive.⁶

- [44] In addition, ungovernability is not determined solely on the basis of the findings of misconduct in respect of the particular matter that is before a hearing panel. Rather, it should be determined on the combined basis of a respondent's misconduct in the matter before a hearing panel and his or her prior professional conduct record.
- [45] Further, in determining whether to make a finding of ungovernability a panel should also consider whether there is evidence of any exceptional circumstance mitigating such a finding.⁷ Mitigating circumstances may include the respondent's cooperation in the Law Society disciplinary process, acknowledgments and admissions of improper conduct and any efforts made by a respondent to explain and/or address the reasons giving rise to such conduct, through medical and/or psychological assistance, counseling, further education or otherwise.

General principles

- [46] In *Law Society of BC v. Lessing*,⁸ a review panel considered the two factors that will, in most cases play an important role in determining appropriate disciplinary action. First, is the protection of the public, including public confidence in the disciplinary process and public confidence in the profession generally. Second, is the rehabilitation of the member. Where the two factors are in conflict the protection of the public will prevail.
- [47] In addition, in *Law Society of BC v. Hill*,⁹ the panel commented at para. 3 as follows:

*It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.*

[emphasis added]

⁶ *Hall* at paras. 27 and 28

⁷ *Misir* at paras. 55 and 60 and *Welder* at paras. 17-24

⁸ 2013 LSBC 29 (Review) at paras. 57-60

⁹ *Law Society of BC v. Hill*, 2011 LSBC 16

DECISION ON DISCIPLINARY ACTION

- [48] The Respondent's PCR combined with the Panel's finding of professional misconduct on seven allegations in respect of this Citation, as detailed in paragraphs 26 and 27 above, include a Conduct Review, a Practice Review by the Practice Standards Committee and an Order placing limitations on his practice, a Practice Supervision Agreement, ten separate findings of professional misconduct and suspension from practice.
- [49] The Respondent's conduct record is extensive, serious and took place within five years of his call. His conduct engages many of the indicia regarding ungovernability referred to in *Hall*.
- [50] There was no evidence before this Panel of any exceptional mitigating circumstances. The Respondent did not attend the hearing on Facts and Determination or this hearing on Disciplinary Action. He did not cooperate in any manner with these hearings or offer any explanation for his misconduct. There was no reason for this Panel to believe that there is any possibility of the Respondent's remediation or rehabilitation. His conduct record clearly indicates he did not get any message from his disciplinary history.
- [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.
- [52] It is this Panel's view that the finding of disbarment is consistent with the authorities¹⁰ and is the only disciplinary action that will effectively protect the public.

DISBARMENT OF A FORMER MEMBER OF THE LAW SOCIETY

- [53] Is disbarment available to this Panel as appropriate disciplinary action where, as in this matter, the Respondent is a former member of the Law Society?
- [54] Section 38(4)(b)(v) of the Act provides that a panel may determine, if a respondent is not a member, conduct that would, if the respondent was a member, constitute

¹⁰ *Hall; Hicks; Misir; and Ward.*

professional misconduct. This Panel made such determinations of professional misconduct against the Respondent in its decision on Facts and Determination.

[55] Section 38(5) of the Act provides that, where such adverse determination is made against a respondent, the panel must impose one or more of a range of sanctions, which range includes disbarment.

[56] Section 1 of the Act defines “disbar” to mean to declare that a lawyer or former lawyer is unsuitable to practise law and to terminate the lawyer’s membership in the society.

[57] The issue of a respondent who was no longer a member of the Law Society being disbarred was considered in *Law Society of BC v. Power*¹¹ at paragraphs 45 – 46:

[45] Although it may appear odd that a Panel may suspend or disbar a non-member, the *Act* requires that it be done if that is the appropriate penalty.

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

[58] This Panel finds that the Act provides it with jurisdiction to disbar a former member.

[59] Having found that the Respondent is ungovernable, it is not necessary for the Panel to consider the question in para. 21, which was premised on a different conclusion.

COSTS

[60] The Law Society presented a Bill of Costs pursuant to Rule 5-9, showing a total for the estimated Tariff items and disbursements of \$5,548.78. Discipline counsel, at the end of the hearing, sought an amendment to the Bill of Costs increasing the amount claimed to \$6,785. This Panel finds the costs claimed to be reasonable in all the circumstances, including the wide-ranging allegations in the Citation and the

¹¹ 2009 LSBC 23

legal issues raised. The Panel orders that the Respondent pay costs of \$6,785 within two months from the date of this decision on Disciplinary Action.

ORDER

[61] The Panel Orders that:

- (a) the Respondent is determined to be ungovernable and that he be disbarred; and
- (b) the Respondent pay costs to the Law Society in the amount of \$6,785 within two months from the date this decision on Disciplinary Action is issued.