2015 LSBC 35
Decision issued: July 13, 2015
Citation issued: November 13, 2012

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DOUGLAS WARREN WELDER

RESPONDENT

DECISION OF THE HEARING PANEL
ON
DISCIPLINARY ACTION

Hearing date:	March 25, 2015
Panel:	Lynal Doerksen, Chair Graeme Roberts, Public representative Sandra Weafer, Lawyer
Discipline Counsel:	Jaia Rai
Appearing on his own behalf:	Douglas Welder

[1] On November 28, 2014 this Panel found the Respondent had committed professional misconduct in connection with his involvement with a Ponzi scheme. These are the reasons for our finding that the appropriate disciplinary action is that the Respondent be disbarred.

THE MISCONDUCT

[2] The details of the misconduct are set out in our decision at 2014 LSBC 58. The details need not be repeated here; it is sufficient to summarize the findings as

follows: The Respondent was acting for a company, International Fiduciary Corporation ("IFC"). IFC was being investigated by the BC Securities Commission ("BCSC"), and on November 1, 2006 the BCSC issued a cease trading order ("CTO") prohibiting further investments in the IFC. The evidence established that the Respondent knew of the CTO, even to the extent of opening a file on November 7, 2006 for one of the principals of IFC and identifying the matter as "BCSC Cease Trade Order." Between that date and November 28, 2006, the Respondent received monies from seven different individuals, families or corporations. The Respondent took these monies into his trust account and either transferred the monies to IFC or another person or company in violation of the CTO, or failed to return the monies to the investors and failed to account to the investors. Further, The Respondent did not advise these investors that he was not protecting their interests, as required by Chapter 4 of the *Professional Conduct Handbook* in effect at the time.

POSITION OF THE PARTIES

[3] Discipline counsel takes the position that disbarment is the only sanction that is appropriate in this case given the nature of the misconduct and the Respondent's significant professional conduct record. She further argued that a finding of ungovernability should be made on the basis that the Respondent is combative and unrestrained by professional norms. Her position is that his professional conduct record shows a pattern of failures to abide by his professional obligations, with his explanations often being that he has failed to understand or appreciate those obligations.

[4] The Respondent, on the other hand, accepts that his conduct is serious and deserving of significant sanction but says that neither disbarment nor a finding of ungovernability is appropriate as his past conduct has not been marked by dishonesty or by a failure to adhere to the authority of the Law Society. His position is that, as he is currently not a practising member, the appropriate sanctions are a suspension of two years, costs with 18 months to pay and appropriate conditions on any application for reinstatement in order to protect the public.

RELEVANT STATUTORY PROVISIONS

[5] Having found that the Respondent committed professional misconduct, the disciplinary actions available to the Hearing Panel are governed by section 38(5) and (7) of the *Legal Profession Act* and range from reprimand to disbarment.

Further, pursuant to Rule 4-35, the Respondent was given notice by the Law Society on December 12, 2012 that, in the event of an adverse determination, the Panel would be invited by the Law Society to make a finding of ungovernability and would seek disbarment, whether or not a finding of ungovernability was made.

[6] These reasons will address first the appropriate sanction for the Respondent, absent the ungovernability issue. They will then address whether a finding of ungovernability should be made.

FACTORS TO CONSIDER GENERALLY

[7] It is important to note that the purpose of discipline proceedings is to protect the public and to preserve public confidence in the legal profession. Although the list is not exhaustive, the case of *Law Society of BC v. Ogilvie*, [1999] LSBC 17 sets out the factors that should be considered when determining the appropriate disciplinary action for a finding of professional misconduct. These are:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[8] Not every factor will come into play in every case. However, in every case the primary consideration will be the protection of the public. As was stated in *Law Society of BC v. Lessing*, 2013 LSBC 29, at par. 61, this consideration is wider than simply "protecting the public from lawyers who might, for instance, steal monies from clients. It has a much broader meaning. It includes public confidence in lawyers generally." In this case, the most relevant factors for consideration are the nature and gravity of the conduct, the previous character and prior discipline record, the presence or absence of mitigating circumstances, the need for deterrence, the range of penalties in other cases, and the need to ensure public confidence in the profession. Each will be discussed in turn.

Nature and gravity of the conduct

[9] In this case, the misconduct was serious. The Respondent knew about the CTO and should have known that transferring funds to IFC was in violation of the order. This Panel found that the Respondent's conduct was a marked departure from the conduct expected of a lawyer and constitutes professional misconduct. As stated in our earlier reasons, "acting contrary to an order given by a statutory body is a very serious matter." In addition, the Respondent provided no advice to the investors that he was not protecting their interests. The total amount of money involved was over 1.5 million dollars. This conduct, absent the Respondent's significant past conduct record, would be of grave concern to the Law Society. This conduct from someone with the Respondent's record results in the sanction we have imposed in this case. The Respondent himself concedes in his written submissions that his actions, or lack of actions had "serious repercussions to those that deposited funds into my trust account."

Professional Conduct Record

[10] In this case, we need to consider not only the seriousness of the Respondent's conduct, but also his extensive conduct record. This dates back to 1991. His conduct was summarized most recently in a decision of a hearing panel dated April 30, 2014 and indexed as 2014 LSBC 20. We can do no better than to repeat that summary here:

[12] The whole of the Respondent's professional conduct record was before the Panel and referred to by the parties in their submissions. It includes six conduct reviews, six citations and a practice standards referral over the period of 1991 to date. We have summarized portions of the record in chronological order below:

a. *Conduct Review #1 - July 3, 1992* – This conduct review concerned the Respondent's failure to recognize a conflict in acting on both sides of a real estate conveyance in 1989. In its report to the Standing Discipline Committee, the conduct review subcommittee noted:

> The Subcommittee believes that Mr. Welder now understands what constitutes a conflict of interest and what is required of him if a conflict occurs.

Result: On that basis and on the Respondent's assurance that neither he nor his firm would act on both sides of conveyance in the future, the Subcommittee recommended that no further action be taken.

b. *Citation #1 - February 16, 1994* – The Respondent made a conditional admission to professional misconduct in making unfounded allegations against another member.

Result: Admission endorsed on record.

c. *Conduct Review #2 – September 11, 1995* – This conduct review arose from citation #1, two allegations of which were referred to a conduct review subcommittee. On its review, the subcommittee expressed its view that "this problem [between the Respondent and the other lawyer] has arisen from a failure to prevent the prior conflict between clients from affecting relations between counsel." It urged the Respondent to "do his best to de-escalate this matter and to end it on a reasonable and professional basis …"

Result: No further action.

d. *Conduct Review #3 – November 5, 1998* – This conduct review concerned the Respondent's failure to administer an estate in a timely manner. The subcommittee ultimately held that the Respondent's management of the file did not amount to "clear incompetence" and, with "some hesitation", recommended that no further action be taken.

However, it also reported as follows:

> Mr. Welder's response to the complaint did not bring any credit on himself. He took the occasion to attack [the beneficiary/complainant] but with respect to the substance of the claim, did not dispute the delay …

And further that:

> It should be pointed out that the Subcommittee did not accept the suggestions or allegations of [the Respondent] that [the beneficiary/complainant] and some of the other beneficiaries were uncooperative or in any way acted in an improper way. Indeed, the Subcommittee felt that the beneficiaries were more than patient.

Result: No further action.

e. *Citation #2 - December, 1998* – The Respondent was cited for professional misconduct in respect of his attempt to overturn an order of the Court of Appeal by a motion to the Supreme Court of Canada without giving notice to opposing counsel and having made misrepresentations to opposing counsel. On his conditional admission of misconduct, the hearing panel noted in its written decision:

> The allegations set forth in the citation are serious. That characterization is accepted by both the Respondent and the Law Society. They amount to conspiracy to defraud, they contain acts that amount to misleading, and other actions that may be considered sharp practice. It is clear that the Respondent's conduct falls below that which is to be expected from a member of the Law Society of this Province.

Result: 60 day suspension and costs.

f. *Citation #3 - October 22, 2001* – The Respondent was cited for and admitted his professional misconduct in failing to report unsatisfied judgments to the Law Society and in failing to collect and remit PST and GST. The panel noted the co-operation of the Respondent in reaching an Agreed Statement of Facts with the Law Society and his voluntary advice to the Law Society of an additional judgment when he became aware of the Rule to report judgments.

Result: Fine of $2,500, reprimand and the imposition of financial reporting conditions.

g. *Citation #4 – February 9, 2005* – The Respondent was cited for failing to remit funds collected for GST, PST and source deductions. An Agreed Statement of Facts was filed in which the Respondent acknowledged that he did the acts alleged, and that in so doing, "professionally misconducted himself." The hearing panel imposed a one-year suspension with a condition to provide monthly proof of full compliance with tax remittance required, and to fully cooperate with discipline committee's request for information.

   On review, the Benchers reduced the suspension to three months, holding that the panel erred in not taking into consideration mitigating factors in favour of the Respondent as follows:

   (a) The Applicant acknowledged his misconduct. This is evidenced by the admissions in the Agreed Statement of Facts and the fact that he honestly disclosed the non-remittance of funds. This is a significant mitigating factor as it is evidence that there is hope for the rehabilitation of the Applicant;

   (b) The impact of the penalty upon the member: in the hearing before this Panel, the Applicant submitted that the one-year suspension would be such a blow to his practice that it was not likely that he could ever regain sufficient momentum to practise successfully again. We agree that a consequence this harsh is unwarranted by the offence itself, and that such an outcome is a likely result of such a suspension.

h. *Practice Standards Referral – June 2005* – The Practice Standards Committee initiated a review of the Respondent's practice. The evidence does not disclose the basis for this referral to practice standards. However, the record reflects that recommendations were made, a compliance report was satisfied and the file closed.

i. *Conduct Review #4 – 2007* – The Respondent failed to comply with ongoing financial reporting requirements undertaken by him as a condition of a stay pending review of the suspension ordered by the hearing panel in citation #3 in 2005. On September 6, 2007, a Conduct Review Subcommittee met with him, and he admitted that he had not abided by the terms of the undertaking he had given. The subcommittee reported:

   [17] Although clearly Mr. Welder was in breach of the undertaking, the consequences there from were mitigated by the fact that Mr.

> Welder had, in fact, made the payments on time as required, but through inadvertence he had failed to provide the proper notice of such payments. When it was brought to his attention he immediately complied. Mr. Welder has an extensive history with the Law Society, including 41 complaints going back to at least 1987.

[18] The Subcommittee was at a loss as to why this matter was referred to the Subcommittee. However, upon reviewing Rule 4-9 and the options available to the Subcommittee, it was felt that nothing would be gained from imposing any further conditions. The undertaking signed by Mr. Welder appears on the face to continue until he is relieved of the undertaking by the Discipline Committee. In addition, the penalty imposed on June 8, 2007 requires Mr. Welder to pay his taxes and remittances with further proof there from. Those requirements should be sufficient to ensure that Mr. Welder continues to make payments and provide proof of payments on a regular basis.

RECOMMENDATION

[19] The Subcommittee recommends that there be no further action.

j. *Conduct Review #5 – November, 2009* – The Respondent was subject of this conduct review as a result of his failure to fulfill an undertaking "arising from a complicated closing." The Conduct Review Subcommittee met with the Respondent twice. At the first meeting the Respondent "acknowledged his conduct and responses were below the norm expected of lawyers." The Subcommittee issued an interim report recommending that the Respondent "avail himself of professional psychological counselling service," meet with the counsellor "at least three times" and have the counsellor report directly to the Law Society, by way of the Subcommittee.

Having subsequently received the counsellor's report, the Subcommittee reported as follows:

> As indicated by Mr. Welder, his issues are not resolved but he is self-aware and working on matters concerning procrastination and the impact that this has had on his profession. We were impressed that Mr. Welder offered to re-attend for further voluntary counselling. This shows some insight. Mr. Welder was co-

> operative with us and with this process. The conduct which was the subject of this report resulted from poor office procedures and procrastination. He has changed the office procedures and he is working on the procrastination. We have urged him to keep timely with all correspondence.
>
> Therefore, given all the circumstances and commitment of Mr. Welder to continue with professional counselling, we recommend that no further action be taken.

k. *Citation #5 – August 12, 2009* – The Respondent was cited for failing to provide financial information requested by the Law Society during the course of an investigation of his practice. In finding that the Respondent committed professional misconduct, the hearing panel made the following finding:

> We pause at this point to note that the Respondent's conduct during the investigation was far from exemplary. He was not fully cooperative with Law Society staff during the field portion of the investigation. Despite his protestations to the contrary, the evidence shows that he played a "cat and mouse" game with the investigators. He testified to the effect that, while he did not attempt to obstruct the investigation, he did not believe it was his duty to assist it. He did not dispute the evidence of the Law Society staff that, in responding to follow-up requests for information, he advised Law Society staff that her requests were "not on the top of his priority list" and that he saw the additional requests as "a constant harassment." As set out in more detail above, the Respondent's written responses to questions from Law Society staff were provided well after the deadlines set by the Law Society, if they were provided at all. …
>
> The Respondent's conduct throughout this investigation demonstrated that his intention was to provide the minimum amount of information and cooperation. ….

On Review the Benchers ordered that the Respondent pay costs of the review and remitted the issue of penalty to the hearing panel. The hearing panel stated, among other things:

> The Panel considers the Respondent's conduct to be grave. His conduct, both during the audit and the later investigation, showed a deliberate and prolonged failure or refusal to cooperate with the Law Society's investigators. …
>
> Although the Respondent has now complied with the Law Society's requests for information, his submissions regarding disciplinary action indicate that he does not believe that his conduct was serious. To that extent he has not acknowledged his own misconduct, and there are no mitigating circumstances.

Result: 45-day suspension and costs.

l. *Citation #6 – March 22, 2011* – The citation was issued for failing to report two Canada Revenue Agency's Requirements to Pay to the Law Society and for failing to comply with ongoing obligations arising out of citation #4. The hearing panel noted:

> In the case at hand, the Respondent's conduct was ongoing, repeated and occurred over a period of approximately 20 months. He failed to respond substantively to seven letters from the Law Society between February 2009 and January 2011. Indeed, his actions were obstructionist in nature. …
>
> The Respondent's conduct was similar concerning his failure to provide a proposal to satisfy the judgments. He had also failed to respond to staff inquiries about a proposal to satisfy the CRA judgments. He had been offered a final chance to provide a proposal in January 2011 and again failed to do so.
>
> The pattern of misconduct, particularly when combined with an admission of a failure to comply with the provisions of an earlier Review Panel decision, strike at the ability of the Law Society to perform its core function, which is to regulate its members in the public interest.

The Respondent co-operated and made a conditional admission pursuant to Rule 4-22.

Result: Three month suspension and costs.

m. *Conduct Review #6 – 2012* – This conduct review resulted from the Respondent's conduct in witnessing client signatures on a land transfer document and leaving it with the clients in circumstances that, to the Respondent's knowledge, would be a fraudulent preference. The client registered the transfer document, leading to unnecessary further legal costs and expense to the client. The Panel found that the Respondent lacked objectivity and needed to disassociate himself from the client's cause. The review was sufficient disciplinary action.

Result: No further action.

[11] The April 30, 2014 decision (Citation #7) resulted from a finding of professional misconduct for acting in a conflict of interest. In that case, the Respondent was suspended for a year, certain remedial orders were made, and he was ordered to pay costs in the amount of $13,692.

[12] The Respondent's conduct record is, in short, abysmal. More will be said about it in the context of the ungovernability issue, but it is worthy of note that the panel in the 2014 case said of him that "this is very likely to be his last opportunity to display the sort of conduct expected of and required of all lawyers in BC." (Par. 26).

Presence or absence of mitigating circumstances

[13] The Panel is at a loss to find any mitigating circumstances in this case. Although the Respondent says he has accepted our findings on Facts and Determination, that alone is not a mitigating factor. Until the decision on Facts and Determination was released, the Respondent did nothing to acknowledge his misconduct – he did not respond to the Notice to Admit prepared by the Law Society in this matter and, in fact, at the hearing on facts and determination sought to set aside his deemed admissions. As to other mitigating factors he states that, "I can only say that I did not know any of the depositors, did not encourage them to invest with IFC, I did not invest with IFC nor did I loan anyone money to allow them to invest in IFC or continue the impression that the IFC Ponzi scheme was legitimate." The mere fact that the Respondent's conduct could have been worse than it was is not in and of itself a mitigating factor.

Deterrence

[14] This is certainly a case where both general and specific deterrence come into play. The Respondent accepts this but submits that a period of suspension coupled with

remedial orders would sufficiently deal with specific deterrence. In this case, the Respondent has had numerous previous matters with the Law Society. An increasing range of penalties has not managed to deter further misconduct. Further, as the review panel stated in *Lessing* with respect to breaches of court orders, "a lawyer's failure to abide by court orders … cuts very close to the bone and requires a strong response." [par. 118]

Range of penalties in similar cases

[15] This Panel must have regard to the range of penalties in similar cases. Counsel for the Law Society referred us to a number of cases. Although none were exactly the same, they indicate a range of penalties that includes disbarment. The Respondent argues that the range of penalties for similar conduct is three months to a year, but even he concedes that a longer penalty would be appropriate due to his discipline history.

[16] This Panel finds that the most appropriate comparator case is *Law Society of BC v. McCandless*, 2010 LSBC 09. The *McCandless* case involves the same Ponzi scheme with IFC as was in issue in this case. Although the same Ponzi scheme was involved, there is some difference in the misconduct by McCandless. In that case, McCandless engaged in conduct that was intended to give shareholders the impression that their investments were secure, and McCandless facilitated continuation of the scheme by investing his own money in the scheme. There are similarities as well. Both McCandless and the Respondent acted in a way that allowed the fraud to continue. Both failed to give investors legal advice. Both allowed their position as a lawyer to give credibility to the scheme.

[17] The Respondent argues that the McCandless conduct was more serious in that McCandless acted in a conflict of interest by investing his own money in the scheme and McCandless knew it was a Ponzi scheme. The Law Society argues that in fact the Respondent's conduct is more serious – as Mr. McCandless did not accept funds from investors and submit them to IFC in violation of the CTO. This Panel does not need to determine whose conduct as between Mr. McCandless and the Respondent was the more serious. The Respondent's conduct was very serious and passes the threshold where disbarment is an appropriate available remedy.

Public confidence in the profession

[18] The Respondent argues that it would be sufficient in this case to impose a two-year suspension and conditions on his application for reinstatement. He acknowledges that he must spend "sometime in the woods" to reflect on what he will do next.

However, this Panel finds that a suspension, however lengthy, will not adequately address the public's confidence in the integrity of the legal profession and in the administration of justice, including the ability of the profession to regulate itself.

[19] Notwithstanding his numerous previous dealings with the Law Society, the Respondent still failed to recognize something as basic as his obligation to abide by the terms of an order of an administrative body. By failing in his professional obligations and ignoring all of the red flags around IFC, seven separate investors invested $1,653,425 in a Ponzi scheme. The Respondent has a significant disciplinary history – described by the panel in his most recent disciplinary finding as "singular." The only appropriate penalty for such serious conduct coupled with such a significant disciplinary record is disbarment. Public confidence in the integrity of the legal profession would be undermined by allowing anything less than disbarment in this case.

UNGOVERNABILITY

[20] Law Society counsel argues that the Respondent is ungovernable and should be disbarred regardless of this Panel's determination on penalty for the findings of professional misconduct. The Respondent submits that none of his prior findings of misconduct have involved dishonesty and that this is a requirement in order to make a finding of ungovernability.

[21] The case of *Law Society of BC v. Hall*, 2007 LSBC 26, is instructive on the issue of ungovernability. At paragraph 27 and 28, after a review of other authorities from Ontario and Manitoba the panel stated:

> [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.

[22] The case of *Law Society of BC v. Spears*, 2009 LSBC 28 at para. 7 states:

> [7] It is a fundamental requirement of anyone who wishes to have the privilege of practising law that that person accept that their conduct will be governed by the Law Society and that they must respect and abide by the rules that govern their conduct. 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.

[23] This Panel finds 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.

[24] It is noted that the issue of governability has already been considered in a prior case involving the Respondent. In *Law Society of BC v. Welder* (Citation #7, wherein the Respondent's professional conduct record was recited at paragraph 10 above) the panel had this to say about the Respondent:

> [17] In this case, the Respondent's conduct and behaviour as evidenced by his professional conduct record appears to fall, at least generally, within several, but not all, of those indicia of ungovernability. However, in some instances, the indicia of ungovernability are mitigated by other factors not present in the cases considered by the panel in *Hall*. Of note:
>
> (a) Most significantly, the findings of the hearing panels in respect to citations #5 and #6 evidence a disturbing failure to respond to Law

Society inquiries. Citation #5 relates to inquiries relating to "bank accounts which hold or held trust or general funds";

(b) Citations #3 and #4 and conduct review #4 are evidence of "neglect of duties and obligations to the Law Society" in the Respondent's failure to report unsatisfied judgments to the Law Society and to comply with ongoing financial reporting requirements. However, in the hearings in respect of each of citations #3 and #4, the Respondent co-operated with the Law Society by agreeing to an Agreed Statement of Facts and by subsequently voluntarily advising the Law Society when he became aware of the Rule to report judgments (citation #3) and by "honestly disclos[ing] the non-remittance of funds" (citation #4).

The breach giving rise to conduct review #4 was mitigated by the fact that the Respondent had, in fact, made the payments on time as required and immediately complied with the reporting requirements when his failure to do so was brought to his attention;

(c) The Respondent's "attack" of the complainant in conduct review #3 was similar to his treatment of his former client in this proceeding. Both may be considered evidence of "misleading behaviour" directed to a client, albeit not during the conduct of the Respondent's retainer with the client.

Citation #2 is clear evidence of "misleading behaviour" directed toward opposing counsel;

(d) Each of the six citations demonstrates a "discipline history involving allegations of professional misconduct over a period of time and involving a series of different circumstances."

The Respondent admitted professional misconduct in respect of four of the six citations and entered into Agreed Statements of Fact in respect of three;

(e) While conduct review #5 is evidence of the Respondent's failure to fulfill an undertaking, it is the sole incident of his doing so. It does not amount to a "history of breaches of undertaking without apparent regard for the consequences of such behaviour." In respect of that matter, the Subcommittee noted that, "We were impressed that Mr. Welder offered to re-attend for further

voluntary counselling. This shows some insight. Mr. Welder was co-operative with us and with this process. …";

(f) There is no refusal to attend at a discipline hearing;

(g) There is no record of practising law while under suspension.

[18] Without doubt, the most troubling aspect of the Respondent's professional conduct record is the conduct giving rise to citations #5 and #6 and the hearing panels' express findings in their determinations of those citations.

[19] This Panel accepts the serious nature of that conduct as described by the panels in the passages set out in subparagraphs 12(l) and (k) above. [quoted in para. [10] of this decision] Indeed, but for other mitigating factors with respect to other aspects of the Respondent's record, it would be difficult to distinguish that conduct from the conduct described in *Law Society of Upper Canada v. Hicks*, [2005] LSDD No. 6 and *Law Society of Manitoba v. Ward*, [1996] LSDD No. 119.

[20] However, without diminishing its seriousness in any way, much of the conduct evidenced by the Respondent's conduct record is mitigated by factors that do not exist in *Hicks* or *Ward.*

[21] 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.

> [22] In our view, those factors offer some indication that, in the language of *Spears* (supra), the Respondent is not "consistently unwilling" to be governed by the Law Society.
>
> [23] 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.
>
> [24] We stress, however, that that conclusion is based on this Panel's application of the particular circumstances of this case. The Panel reiterates the decision of the panel in *Hall* that it will be for every panel to determine the appropriate treatment of the indicia of governability "including their usefulness in the discipline process and the manner, if at all, that they will be applied."
>
> [25] We, too, do not intend to foreclose the possibility that finding of ungovernability can be made for less, or more, serious conduct or for less lengthy conduct records.
>
> [26] Furthermore, although this Panel recognizes that it cannot predetermine any future findings, nor does it purport to, we would impart the same caution to the Respondent as did the Panel in *Spears*: that this is very likely to be his last opportunity to display the sort of conduct expected of and required of all lawyers in BC.

[25] Of note is the fact that the conduct we are concerned with occurred in 2006 and 2007 and thus occurred prior to the matter dealt with by this prior panel. We will not speculate as to what this prior panel would have done if this matter were before them. This Panel also notes that the words of the prior panel, that this is likely his "last chance," do not mean this Panel must find the Respondent ungovernable.

[26] This Panel adopts the findings of the prior panel as set out above with one exception: we do not agree that, because there was no further action taken after any of the six conduct reviews of the Respondent, this is a mitigating factor. In this Panel's view, at best, this is a lack of a further aggravating factor but not a mitigating factor. However, there are further aggravating factors to consider.

[27] First, the Respondent advises that this matter is dated and this should be taken into consideration on assessing the penalty. Without examining why this matter took so long to reach this stage, we find that this is a factor that, in the Respondent's case, works against him on the issue of ungovernability. The delay has given the

Respondent a considerable period of time since this incident occurred to show that he has learned from his past mistakes and reformed himself. If the Respondent had a spotless professional record since this incident, the Respondent could argue that this indicates he has truly reformed and deserving of a less severe penalty. Unfortunately, the Respondent has acquired two further conduct reviews and three further citations.

[28] Second, the Respondent has repeated previous mistakes. Conduct review #1 and citation #7 concern the Respondent acting in a conflict of interest. Citation #3 and #4 both concern the Respondent failing to remit funds collected for GST and PST. Citation #3 and #6 concern the Respondent's failure to notify the Law Society of judgments rendered against him.

[29] Third, the seriousness of the Respondent's actions and responses with respect to the Law Society have escalated and show an unwillingness to comply with basic requirements of the Law Society. This is seen in the investigation into this matter and the Respondent's inability or unwillingness to co-operate with the Law Society investigators. This resulted in citation #5; the panel described his actions as "a deliberate and prolonged failure or refusal to cooperate with the Law Society's investigators." In citation #6 the panel found the Respondent had failed to respond substantively to seven letters from the Law Society and that "his actions were obstructionist in nature."

[30] This obstructionist pattern of behaviour displayed itself in the hearing of this matter. At the commencement of this hearing the Respondent applied for an adjournment. Although there is nothing improper about asking for an adjournment, the manner and reasons for the adjournment do matter. Our reasons for denying the adjournment and several other applications made by the Respondent are set out at 2014 LSBC 53. Our comments in the concluding paragraph are apt:

> [45] The Respondent knew full well the consequences of not responding to the Law Society's correspondence, and we agree with the Law Society's submission on this point: the Respondent "lay in the weeds" and hoped to delay this hearing with his woefully late application. The myriad requests by the Respondent upon the start of this hearing appear to be nothing short of an attempt to create a "smokescreen" that would be difficult to see through and therefore require of this Panel an adjournment. To grant an adjournment at this stage of the hearing on the basis put forward by the Respondent would undermine the purpose of the "Notice to Admit" and bring discredit to this hearing process. As stated at the beginning of these

reasons, the applications of the Respondent, including the application for an adjournment of this hearing, are denied.

[31] The Respondent submits that the cases in which a lawyer has been found ungovernable involved cases of dishonesty. We agree that deceit will be a factor, if it exists, but disagree that it must be found to exist before a finding of ungovernability can be made.

[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.

[33] We find the Respondent ungovernable and that the appropriate sanction is disbarment.

COSTS

[34] This Panel orders that costs in the amount of $19,194.40 be awarded the Law Society. This amount reflects the appropriate amount of fees on Scale B, in accordance with the complexity of the case and the amount of disclosure. The Respondent will have 18 months from the date this decision is issued to pay the award of costs.