

2016 LSBC 06
Decision issued: February 12, 2016
Citation issued: October 7, 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 AND COSTS**

Hearing date: December 7, 2015

Panel: Pinder K. Cheema, QC, Chair

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

INTRODUCTION

- [1] On August 24, 2015, this Panel issued its decision as to Facts and Determination (*Law Society of BC v. McLean*, 2015 LSBC 39) regarding the citation issued on October 7, 2014 against the Respondent and amended on February 20, 2015 (the “Citation”).
- [2] This Panel found that the Respondent had committed professional misconduct in respect of each of the ten allegations contained in the Citation, with the exception of the portions of allegations 5(b), 6(a), (b) and (f), each of which were dismissed.
- [3] As of the hearing date of May 26, 2015, the Respondent was a former member. As of the date of this hearing on disciplinary action, the Respondent had been found

ungovernable and disbarred by another hearing panel (2015 LSBC 39). A review of that decision is pending.

- [4] The Respondent did not appear at this hearing on disciplinary action, nor did anyone appear on his behalf. He did not file materials or respond to the Notice of Hearing.
- [5] The Law Society seeks a finding of ungovernability against the Respondent and submits that, if such a finding is made, disbarment is the appropriate disciplinary action.
- [6] The Law Society also seeks costs of \$12,165.78.

SERVICE ON THE RESPONDENT

- [7] The Panel satisfied itself that the Respondent had been served with notice of the hearing date in accordance with Rule 10-1(6) of the Rules. In addition, he was provided 30 days' notice of the date, time and place of the hearing:
 - (a) by letter dated October 29, 2015, by regular mail, to his last known business and residential address;
 - (b) by letter dated November 2, 2015, served in accordance with an Order of Substituted Service dated February 19, 2015, at an address in downtown Vancouver, BC, and, further, by regular mail, to his last known residential address and his last known business address; and
 - (c) by letter dated November 3, 2015, served personally on the Respondent by Carrie Lee Godfrey on November 6, 2015, as noted below.
- [8] The above letters also advised the Respondent that the hearing may proceed in his absence. Section 42(2) of the *Legal Profession Act* permits a panel to proceed if it is satisfied that the Respondent has been duly served.
- [9] The letters also advised the Respondent that the Law Society would be recommending that the Panel make a finding of ungovernability pursuant to Rule 4-44(5) of the Law Society Rules and that the disciplinary action sought would be disbarment.
- [10] Affidavits of service were filed in this proceeding. Personal service was effected by Carrie Lee Godfrey, process server, who deposed the following in her affidavit:

1. On Friday, the 6th of November, 2015, at 10:18 am, I served KEVIN MCLEAN with the following documents ... :

LETTER dated November 3, 2015 with a bound copy of your Professional Conduct Record, ...
2. I served each document referred to in section 1 of this affidavit by handing it to and leaving it with KEVIN MCLEAN outside courtroom #70 at the Vancouver Supreme Court house at 800 Smithe Street, Vancouver, in the Province of British Columbia, on Friday the 6th of November, 2015, at 10:18am.
3. ... I sat in courtroom #70 at which time I was able to identify KEVIN MCLEAN as he was called for his proceeding. [sic] I waited until the proceeding [sic] was finished and left the courtroom and waited outside the courtroom until KEVIN MCLEAN came out. I then approached KEVIN MCLEAN and tried to hand him the aforementioned documents, but he refused to take them. I touched KEVIN MCLEAN with the documents [sic] and told him that he had been served, at which time he ran away from me. ... I set the documents down on a side table in the waiting area outside the courtroom and I left.

- [11] The Panel also noted that there was no response by the Respondent to any of the other efforts to serve him.
- [12] Based on the affidavits filed by the Law Society on December 7, 2015, this Panel is satisfied that the Respondent was given at least 30 days' notice of the hearing to take place on December 7, 2015, commencing at 9:30 am, at 845 Cambie Street, Vancouver, BC and, further, that the Law Society would raise the issue of ungovernability during the course of the disciplinary hearing.
- [13] The hearing commenced as scheduled at 9:30am on December 7, 2015 before one Panel member as authorized by the President pursuant to Rules 5-3 and 5-2(2)(f). Those rules permit a single Benchler to continue if it is not otherwise possible to reconvene the panel. In this case, neither of the other members of the original hearing panel was able to participate in the disciplinary action phase of the proceeding.
- [14] The Respondent was not present in person or by agent at 9:30 am. The Panel adjourned to 10:15 am to ensure that he had not been unavoidably detained.

- [15] When the Panel reconvened at 10:15 am, the Respondent was not present, and Law Society Counsel advised that no communication had been received from him. Accordingly, the Panel agreed to exercise its discretion under s. 42(2) of the Act to proceed with the hearing in the absence of the Respondent.

ISSUES

1. Is the Respondent ungovernable? If yes, should he be disbarred?
2. If he is found not to be ungovernable, what is the appropriate disciplinary action?

The Respondent's prior conduct record

- [16] Rule 4-35(4) permits a panel to consider the professional conduct record of the Respondent in determining a disciplinary action.
- [17] The Law Society filed the Respondent's Professional Conduct Record ("PCR") as of November 3, 2015 as exhibit 13 at this hearing.
- [18] The Respondent was called and admitted as a member of the Law Society on August 27, 2010. He practised with Smetheram and Company from October 8 2010 until June 20, 2011 when he joined Varty and Company. He practised with them until April 1, 2012, when he became a sole practitioner.
- [19] On April 10, 2015, he became a former member of the Law Society.
- [20] 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

A 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 completely 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 requirements 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 report.

(h) Citation issued October 21, 2014

On March 20, 2015, a hearing panel found that the Respondent had committed professional misconduct by failing to respond to communications from the Law Society during the course of three separate investigations of complaints, failing to comply with three separate Law Society Orders and failing to complete the small firm course and thereby breaching the Law Society Rules, an undertaking given by the Respondent to the Law Society and a Rule 3-7.1 Order. On June 29, 2015, he was found to be ungovernable and disbarred. A review of this decision is pending.

[21] The PCR discloses over 20 separate findings of professional misconduct.

THE RESPONDENT'S CONDUCT IN THIS MATTER

[22] This Panel, in its decision on Facts and Determination, found the Respondent had committed professional misconduct in regard to the ten allegations contained in the Citation. They are summarized as follows:

- (a) sending correspondence to a self-represented litigant, on five separate occasions, threatening to take execution proceedings, while he knew, or ought to have known that he could not until the Bill of Costs had been taxed;
- (b) unilaterally setting dates for a hearing when he had been advised by the self-represented litigant of suitable dates;
- (c) sending correspondence to a self-represented litigant, conveying false information and, on that basis, threatening to take execution proceedings;
- (d) failing to respond to the self-represented litigant on four occasions to set a hearing date;

- (e) misrepresenting to the court that he had not responded to the self-represented litigant who wanted to set hearing dates because the litigant had retained counsel and then failing to correct the court's misunderstanding, which was created by his initial false statement to the court;
- (f) failing to respond to opposing counsel on 14 occasions (in the context of his defamation action, which he commenced after the litigant had complained to the Law Society about the Respondent);
- (g) unilaterally filing a Notice of Trial, contrary to discussions with opposing counsel;
- (h) failing to file documents as agreed;
- (i) failing to attend scheduled court appearances;
- (j) failing to provide requested information to the court;
- (k) failing to report an unsatisfied judgment to the Law Society;
- (l) offering to settle his defamation action if the complainant withdrew his complaint to the Law Society; and
- (m) failing to respond to Law Society correspondence by deadlines, or at all.

UNGOVERNABILITY

[23] Section 38(5) and (7) of the Act provides that, where a panel has made an adverse finding against a respondent, the available disciplinary actions range from reprimand to disbarment.

[24] Rule 4-44 permits the panel to impose disciplinary action based on the un governability of the respondent, provided at least 30 days' notice of this issue has been given.

LAW ON UNGOVERNABILITY

[25] Law Society counsel referred to a number of relevant decisions that discuss the concept and indicia of un governability.

[26] The panels are unanimous in that there is no set definition of un governability. Each case must be determined on its own facts. (see *Law Society of BC v. Hall*, 2007

LSBC 26 at para. 28). However, they do agree that a finding of ungovernability will be made where there is evidence of a consistent unwillingness to comply with the Law Society as regulator or a disregard and disrespect for the regulatory processes that govern the lawyer's conduct.

[27] *Hall and Law Society of BC v. Welder*, 2015 LSBC 35, set out the following eight factors to be considered:

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; and
8. the number of citations and conduct reviews the Respondent has acquired in his professional conduct record.

[28] A panel may find a lawyer to be ungovernable even if not all of the factors above are present. (see *Hall*, para 28-29, and *Law Society of BC v. McLean*, 2015 LSBC 30 at para. 43).

[29] In deciding if the Respondent's conduct meets the test of ungovernability, the panel must consider both the misconduct in the present matter and the past disciplinary history, together with a consideration of any exceptional circumstances that might attenuate such a finding.

DECISION ON DISCIPLINARY ACTION

[30] This Panel finds the Respondent ungovernable for the reasons set out below.

- (a) Consistent and repetitive failure to respond to the Law Society's inquiries — Five such findings have now been made against the Respondent by different panels (see *Law Society of BC v. McLean*, 2015 LSBC 06 and *Law Society of BC v. McLean*, 2015 LSBC 09, and this Panel's decision issued August 24, 2015);
- (b) Neglect of duties with respect to trust account reporting and records — Three separate findings of professional misconduct have been made, and the Respondent has been administratively suspended for failure to produce his records in a compliance audit. Further findings of professional misconduct were made concerning his failure to produce his laptop and related passwords to access his accounts and emails, his failure to comply with a Benchers' order relating to operation of his trust account, and his failure to report an unsatisfied judgment;
- (c) Some element of misleading behaviour directed to a client or the Law Society — There is evidence that the Respondent attempts to avoid or evade service of documents from the Law Society. This is particularly set out in paragraph 3 of the affidavit of Carrie Lee Godfrey dated November 6, 2015, where she deposed that, when she tried to hand him the documents, he refused to take them; when she touched him with the documents and told him he had been served, he ran away from her;
- (d) A failure or refusal to attend at the discipline hearing convened to consider the offending behaviours — Twelve hearing dates have been scheduled to hear the various citations against the Respondent between July 29, 2014 and September 17, 2015. He did not attend any of these dates, and while he provided an explanation of his absence for five of these dates, he did not provide support for his reasons for three of those five dates, although ordered or invited to do so. This hearing on disciplinary action is the 13th date where the Respondent has failed to respond or attend;
- (e) A discipline history of allegations of professional misconduct over time, in different circumstances — The Respondent was called in 2010. There have now been over 20 findings of professional misconduct made against the Respondent over a four-year period, including failing to respond to communications from opposing counsel, failing to comply with specific rules, failing to comply with specific Benchers' orders and, finally, the findings of professional misconduct in the within matter;

- (f) A history of breaches of undertaking without apparent regard for the consequences of such behaviour — There is one finding of professional misconduct in failing to complete the small firm practice course in the face of his various obligations to do so, including *his undertaking to the Law Society* dated September 18, 2013;
- (g) A record or history of practising while under suspension — The Respondent was not found to have practised while under suspension, but following a citation issued on October 21, 2014, he was found to have committed professional misconduct by practising without a practice supervisor, in breach of a Benchers' order, pursuant to Rule 3-7.1 (see *McLean*, 2015 LSBC 09, para. 132);
- (h) The number of citations and conduct reviews the Respondent has acquired in his PCR — The Respondent has one conduct review and five citations in his PCR. He has 20 specific findings of professional misconduct. Ten findings arise in the within matter.

[31] The Law Society suggests a ninth factor should be added to the above list — whether the Respondent has a history of failing to comply with Law Society orders. As an example, the Law Society points to the breach of the Rule 3-7.1 Benchers' order. This Panel finds that this proposed category duplicates existing factors and is not prepared to consider it as a ninth factor.

[32] The Panel finds that the Respondent has demonstrated both a consistent unwillingness to be regulated and a disregard, disrespect and disdain for the governing and regulatory processes.

[33] As this Panel stated earlier, the mandate of the Law Society is to protect the public interest in the administration of justice. In this regard, *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45 at para. 19, is instructive:

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

[34] As to the appropriate disciplinary sanction, *Law Society of BC v. Spears*, 2009 LSBC 28, at paragraphs 7 and 8, the following passage is instructive where a lawyer has been found to be ungovernable:

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 basis 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.

[emphasis added]

DISCIPLINARY ACTION

[35] The primary purpose of disciplinary proceedings is to fulfill the Law Society’s mandate in section 3 of the *Legal Profession Act* to uphold and protect the public interest in the administration of justice by ensuring the independence, integrity, honour and competence of lawyers.

[36] The sanction to be imposed must be consistent with and reflect these purposes. *Law Society of BC v. Lessing*, 2013 LSBC 29, highlighted the need for the disciplinary action process to ensure that the public is protected from acts of professional misconduct. It is incumbent on the Panel to ensure that any penalty imposed protects the public and takes into account the risk of permitting the respondent to continue in practice.

[37] Factors to be considered in achieving the legislative mandate are set out in *Ogilvie*, at paragraphs 9 and 10. We will not quote them all here, and previous cases have stated that not all of the factors would come into play for each case. However, protection of the public and rehabilitation of the lawyer play the most important roles and, in the event of a conflict with other interests, protection of the public prevails.

[38] This Panel has reviewed the Respondent’s PCR. It contains a conduct review, a practice review and an order limiting his practice, a Practice Supervision Agreement and 20 separate findings of professional misconduct.

- [39] The Respondent's record is lengthy, and his conduct over the last four years has increased in its severity, the number of instances and the range of groups impacted. His misconduct in this Citation extended to opposing counsel, to self-represented litigants and to the court. On two separate, unrelated occasions the Respondent misrepresented a situation to the court and, when he knew or ought to have known that the court as a result was labouring under a misapprehension, he failed to correct the court's misapprehension.
- [40] This Panel recognizes that it is not the Respondent's clients who have been the subject of his acts of misconduct. It is the general public, self-represented litigants, opposing counsel, the Law Society, whose role it is to protect the public, and the courts.
- [41] Accordingly, the principle of maintaining the public's confidence in the integrity of the profession is paramount.
- [42] The panel in *Lessing* considered the significance of the PCR and the concept of progressive discipline in determining the appropriate disciplinary action. Some factors that the Panel may consider in assessing the weight to attach to the PCR include the dates of the matters in the PCR, the seriousness of the matters, the similarity of the matters and any remedial actions taken by the Respondent.
- [43] In this matter, the PCR contains numerous recent entries of professional misconduct over a short period of time. The findings of misconduct in the PCR are similar to the findings in this matter, including failures to respond to the Law Society. There is no evidence of any remedial action taken by the Respondent nor of any mitigating circumstances.
- [44] The Respondent did not attend any stage of the hearing as to either Facts and Determination or Disciplinary Action. He did not file any materials. He did not contact the Law Society to offer an explanation for this absence or engage an agent to attend on his behalf. When personally served with the documents on November 6, 2015, by Carrie Anne Godfrey, he refused to accept them and when advised he had been served, he ran away. In short, he completely absented himself from the regulatory, governing process. There is no basis on which this Panel can conclude that the Respondent is interested in making any rehabilitative efforts.
- [45] This Panel finds that, given the finding of ungovernability, disbarment must follow as it is the only disciplinary action that will effectively protect the public.

DISBARMENT OF A FORMER LAWYER

- [46] As of April 10, 2015, the Respondent was a former member of the Law Society. On May 14, 2015, a hearing panel found him ungovernable and imposed the ultimate sanction of disbarment (see 2015 LSBC 30).
- [47] Sections 1 and 38 of the *Legal Profession Act* authorize this Hearing Panel to discipline a former member of the Law Society for misconduct that took place when the person was a member of the Law Society.
- [48] In other words, non-membership at the time of a citation hearing does not protect a person from a review of conduct that is alleged to be professional misconduct or a breach of the Act, Rules or the *BC Code* arising from when the person was a member.
- [49] Accordingly, this Panel finds that it has jurisdiction to make a determination of ungovernability and to impose the appropriate disciplinary action. In this case, it is disbarment (see *Law Society of BC v. Power*, 2009 LSBC 23, paras 45-47; and *Law Society of BC v. Tak*, 2014 LSBC 57).

COSTS

- [50] The Law Society presented a draft Bill of Costs, pursuant to Rule 5-11, in the amount of \$12,165.78, inclusive of Tariff items and disbursements.
- [51] The Panel asked the Law Society to ensure the Respondent was served with the Bill of Costs so that he had the opportunity to file any written submissions by January 8, 2016.
- [52] The Panel has now received the affidavit of Katherine Shaben, sworn on January 8, 2016 and has marked it as Exhibit 15 in these proceedings. Exhibit C to that affidavit is a letter from Law Society counsel to the Respondent, dated December 8, 2015, enclosing the draft Bill of Costs, and advising the Respondent that the “Panel has directed that you file any written submissions on costs by January 8, 2016.”
- [53] The Respondent did not respond. The Panel finds the costs as set out to be reasonable, based on the number of allegations, and the disbursements incurred to serve the Respondent.

ORDER

- [54] The Panel orders that the Respondent

- (a) is disbarred; and
- (b) must pay costs in the amount \$12,165.78 on or before April 15, 2016.