

2023 LSBC 21  
Hearing File No.: HE20210045  
Decision Issued: May 30, 2023  
Citation Issued: October 13, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL  
HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**AENGUS RICHARD MARTYN FOGARTY**

RESPONDENT

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

Written Materials: March 2, 2023

Panel: Geoffrey G.R. McDonald, Chair  
Cindy M. Cheuk, Lawyer  
Laura Nashman, Public representative

Discipline Counsel: Mandana Namazi

No one appearing on behalf of the  
Respondent

Written reasons of the Panel by: Geoffrey G.R. McDonald

- [1] On September 14, 2022, with written reasons to follow, the Panel determined that the Respondent, Aengus Richard Martyn Fogarty, committed all three instances of professional misconduct as alleged in the citation issued October 13, 2021 (the “Citation”). The Panel’s written reasons were released on November 7, 2022. The Panel found that the Respondent committed the following acts:
- (a) The Respondent affirmed and filed with the Tribunal an affidavit that contained false, misleading, or fabricated evidence. The Respondent affirmed the affidavit on November 14, 2019, and tendered it on November 18, 2019, on the first day of a Tribunal hearing. The affidavit contained several fabricated webpages and false information that the Respondent sought to rely on in response to a Law Society citation dated June 19, 2019. The Respondent purposely included the false information for the purpose of attempting to deceive the Tribunal hearing panel (*Law Society of BC v. Fogarty*, 2022 LSBC 42, at paragraph 7 (“*Fogarty 2022*”)).
  - (b) The Respondent failed to respond to Law Society requests for information set out in letters dated June 27, 2018, and June 12, 2018. Since June 9, 2021, the Respondent has been completely non-responsive to the Law Society and the outstanding information requests.
  - (c) Since December 9, 2019, the Respondent failed to respond to an email from the Law Society dated November 29, 2019 requesting information. The information request was in regard to the affidavit containing false information that is the subject of allegation one of the Citation. The Respondent sent a few emails in December 2019 asserting that for health reasons he would require more time to respond. On December 20, 2019, the Respondent gave a partial reply, but it was not responsive to the information requested by the Law Society. The Law Society emailed the Respondent on January 8, 2020, advising that the information was still outstanding and that the Respondent was now on an administrative suspension until he provided a full and substantive response. The Respondent did not respond to the January 8, 2020, Law Society email and has not communicated with the Law Society about the outstanding information since December 20, 2019.
- [2] Though properly notified of the Citation, supporting materials including the Notice to Admit, and the hearing dates, the Respondent did not respond to the Law Society and did not attend the facts and determination hearing (*Fogarty*

2022, at paragraph 2). Pursuant to LSBC Practice Direction 5.1(2) the Panel directed that the disciplinary action hearing would proceed in writing. The Tribunal notified the Respondent in accordance with the Law Society Rules and Law Society counsel provided their written materials on January 13, 2023. The Respondent did not reply to any of the Law Society communications and did not provide any materials for the Panel to consider. On March 2, 2023, the Panel held the disciplinary action hearing in writing.

- [3] The Law Society argues that the Respondent is ungovernable and must be disbarred. In the alternative, the Law Society takes the position that even if the Panel does not find the Respondent is ungovernable, the appropriate disciplinary action is disbarment. A finding that a lawyer is ungovernable can be a ground for disbarment (*Law Society of BC v. Hall*, 2007 LSBC 26, at paragraph 19 to 20). Rule 4-44 (as it then was) requires a respondent have a minimum of 30 days notice that the Law Society is seeking a finding the lawyer is ungovernable. In this case, the Law Society provided notice in their written submissions provided to the Respondent on January 13, 2023 – well over thirty days before the March 2, 2023 hearing in writing. The Law Society also seeks costs in accordance with the tariff.
- [4] The Respondent has a relevant professional conduct record (“PCR”). He was previously sanctioned in *Law Society of BC v. Fogarty*, 2021 LSBC 01 (facts and determination) and *Law Society of BC v. Fogarty*, 2021 LSBC 25 (disciplinary action) for failing to respond fully and substantively to Law Society communications. The Respondent was fined \$7,000 and suspended until he responds fully to the Law Society’s outstanding requests for information. He has not responded to those requests and remains suspended. The Respondent’s PCR also includes three other administrative suspensions for failing to respond to the Law Society. The Respondent became a former member in January 2020 for nonpayment of fees.
- [5] As noted above, the Panel does not have the benefit of any submissions from the Respondent regarding the appropriate disciplinary action. The Panel is not aware of any mitigating evidence or explanation for the Respondent’s conduct. Because of the Respondent’s decision to not attend and not take part in the hearing process the Panel is left with the facts proven by the Law Society and the Respondent’s PCR to determine the appropriate disciplinary action.
- [6] The Panel must determine whether the Respondent is ungovernable. Though that term is not defined under the Rules it has been interpreted in numerous decisions. The Panel was referred to *Hall*, *Law Society of BC v. Spears*, 2009

LSBC 28, *Law Society of BC v. McLean*, 2015 LSBC 30, *Law Society of BC v. Welder*, 2015 LSBC 35, *Law Society of BC v. McLean*, 2016 LSBC 06, *Law Society of BC v. Pyper*, 2019 LSBC 21, and *Law Society of BC v. Lessing*, 2022 LSBC 7 (“Lessing 2”), *Law Society of BC v. Lessing*, 2022 LSBC 19 (“Lessing 3”) and *Law Society of BC v. Lessing*, 2022 LSBC 28 (“Lessing 4”). A lawyer is ungovernable who shows wanton disregard and disrespect for the Law Society’s regulatory processes or demonstrates a consistent unwillingness to comply with the *Act*, Rules, *Code of Professional Conduct for British Columbia* or a lawyer’s professional obligations including their obligations to the Law Society.

- [7] The Respondent has consistently and regularly refused to meet his professional obligations to respond substantively to the Law Society. The Respondent has ignored or only partially replied to the Law Society on multiple occasions over a span of several years. Moreover, he has shown complete disrespect and contempt for the Law Society and its role as the regulator by trying to avoid regulation by the Law Society by fabricating an affidavit for the purpose of attempting to mislead a disciplinary hearing panel. The only reasonable conclusion is that the Respondent has shown a consistent unwillingness to comply with professional obligations required of him by the Law Society. The Respondent is ungovernable.
- [8] The Panel finds that the Respondent must be disbarred because of his ungovernability. British Columbians benefit from having an independent regulator, the Law Society, who acts to protect the public interest and ensures the public has access to independent legal advice and services free from government interference. The Law Society can only carry out its functions if lawyers abide by its authority. By seeking call and admission lawyers consent to being governed by the Law Society. A lawyer who will not obey or defer to the Law Society’s authority puts the public at risk and in most cases cannot be allowed to practice. In *Law Society of BC v Ogilvie*, 1999 LSBC 17, at paragraph 19, the hearing panel observed,

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.

- [9] On the facts of this case, the Respondent’s open contempt and disregard for the Law Society’s role as regulator requires that he be disbarred. The Respondent has demonstrated a clear record of noncompliance by refusing to provide the

requested information. The deliberate fabrication of evidence to mislead a hearing panel is a clear demonstration that the Respondent will not be governed. Disbarment is necessary to protect the public interest.

- [10] Even if the Respondent were governable, the Panel would disbar the Respondent for fabricating the affidavit that is the subject of allegation one in the Citation. The Law Society is tasked with protecting the public interest by ensuring lawyers' independence, integrity, and competence (*Legal Profession Act*, section 3). Disciplinary actions are ordered primarily in the public interest to ensure that lawyers live up to their essential role of providing honest, competent, and independent legal services to the public. Where a lawyer fails to live up to these duties the Law Society is obliged to take action to protect the public. This requires an assessment of what steps are necessary to protect the public, including maintaining confidence in the administration of justice and the disciplinary process, and any risk to the public if the lawyer were to continue practice (*LSBC v Lessing*, 2013 LSBC 29 ("*Lessing I*"), at paragraphs 57 to 59, citing *Ogilvie*, at paragraph 9). While rehabilitation of a lawyer is a factor Panels must consider, protection of the public will always be paramount (*Lessing I*, at paragraph 61). A non-exhaustive list set out in *Ogilvie*, at paragraph 10, is generally accepted as the factors panels must consider when determining the appropriate disciplinary action. Not all the *Ogilvie* factors are applicable to every case. Panels must apply the factors appropriate to the case before them (*Lessing I*, at paragraph 56).
- [11] The *Ogilvie* factors, essential to allegation one, are the nature and gravity of the offence and the need to ensure the public's confidence in the integrity of the legal profession. Intentionally making an affidavit containing false or misleading information for the purpose of attempting to mislead a hearing panel is a grave act of deceit. The public and the profession must know that lawyers who commit serious acts of dishonesty and corruption will be prevented from practicing. Such lawyers have no place in the profession. The only appropriate sanction is disbarment.
- [12] The Respondent's conduct as set out in allegations two and three, failures to respond to the Law Society, are also serious as they are attacks on the Law Society's ability to regulate the profession, but are clearly less serious than the Respondent's conduct as set out in allegation one. Considered in isolation a suspension for a fixed period might be sufficient. However, the Respondent's failure to respond to the Law Society must be viewed in the factual context in conjunction with allegation one. These allegations emphasize that the Respondent has contempt for the Law Society and its processes. His refusal to

respond is an attack on the regulation of the profession. These allegations emphasize the need for the Respondent to be disbarred.

[13] The Law Society seeks costs and disbursements of \$6,620, calculated from Schedule 4 of the Law Society Tariff, payable on the first day of the first month following the Panel's decision on disciplinary action. The Panel agrees with the Law Society's submissions on costs and orders costs and disbursements as set out above.

[14] In summary, the Panel makes the following findings and determinations:

- (a) The Respondent is ungovernable. Moreover, on the facts of this case, the Respondent must be disbarred because of his ungovernability.
- (b) Even if the Respondent were governable, the Panel would disbar the Respondent based on these facts.
- (c) The Respondent is disbarred.
- (d) The Respondent is ordered to pay the Law Society costs and disbursements in the amount of \$6,620. The payment for costs is due on the first day of the first month after this decision is issued.