**Law Society of British Columbia - Investigations and Discipline Programs Summary**

## Background

*Mandate*

1. The Professional Regulation Department's work is guided by the Law Society's object and duty to uphold and protect the public interest in the administration of justice, as prescribed in the *Legal Profession Act* (the "**Act**"). In particular, this department assists in the Law Society's efforts to ensure that lawyers act with integrity, honour and competence (Act, s. 3(b)), uphold standards of professional responsibility for lawyers (Act, s. 3(c)), regulate the practice of law (Act, s. 3(d)), and support and assist lawyers in fulfilling their duties in the practice of law (Act, s. 3(e)).

2. The Professional Regulation Department is comprised of several groups: Intake and Early Resolution, Investigations, Practice Standards, Custodianships, Unauthorized Practice, and Discipline. The Intake and Early Resolution and Investigations Groups are together referred to as the "Professional Conduct" Group. Collectively, the Professional Regulation Department engages in the following activities:

    a. Investigating complaints and, if appropriate, referring matters for consideration by the Discipline Committee or the Practice Standards Committee (Professional Conduct);

    b. Conducting hearings into alleged lawyer misconduct and conducting interim proceedings where necessary to protect the public (Discipline);

    c. Monitoring and enforcing compliance with voluntary undertakings and sanctions imposed by hearing panels (suspensions, practice restrictions and fines) (Investigations)

    d. Implementing and monitoring remedial programs where there are competency or practice concerns about a lawyer (Practice Standards);

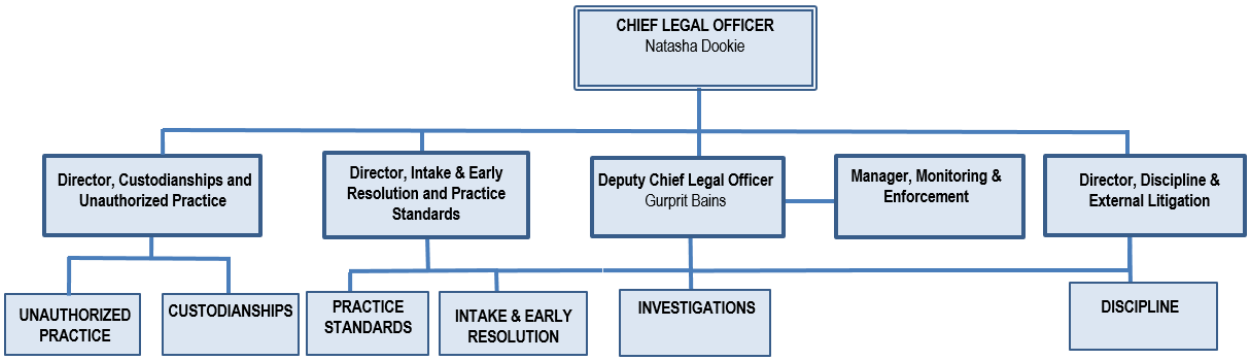
    e. Taking custody of a lawyer's practice if they are unable to do so and have not made arrangements for their clients (Custodianships);

    f. Protecting the public by taking action against individuals who illegally offer legal services or misrepresent themselves as lawyers (Unauthorized Practice); and

    g. Providing education and information to lawyers and the public (All).

3. The Professional Regulation Department is led by the Chief Legal Officer, and supported by the Deputy Chief Legal Officer, three Directors and a Manager. A simplified organizational chart is provided in Figure 1 below.

**Figure 1: Simplified Organizational Chart for the Professional Regulation Department**




4. This summary will focus on the work of the Investigations and Discipline Groups, being the groups within Professional Regulation that are significantly engaged in the Law Society's anti-money laundering ("**AML**") efforts. Although not a part of the Professional Regulation Department, the Forensic Accounting Group will also be discussed, as this group plays an important role in the Law Society's AML efforts through their work on investigation files. Forensic Accounting reports to the Chief Financial Officer and Director of Trust Regulation.

*Staffing and Budget*

5. The Investigations Group consists of 12 staff lawyers (all of whom are at least five year calls), two paralegals, one investigator (former RCMP officer), one investigating accountant (CPA and CFE), two paralegals shared with the Discipline Group, and administrative support staff. The operating expenses for the Investigations Group (including external counsel fees) have increased by over 50% since 2015, in order to provide the Investigations Group with resources to investigate matters effectively and in a timely manner.

6. The Discipline Group consists of five discipline counsel (all of whom are at least 7 year calls), three paralegals (in addition to the two paralegals shared with Investigations), and administrative support staff. The operating expenses for the Discipline Group have increased by over 113% from 2015 to 2019, including the addition of three temporary positions to deal with the group's increased workload arising from the increase in the number of citations issued by the Discipline Committee.

7. The Forensic Accounting Group consists of four forensic accountants[1] (CPA), two analysts (one is a CPA) and administrative support staff. Forensic accountants have extensive forensic and investigative accounting experience, supplemented by at least ten years of accounting or auditing experience, including at least five years of experience in forensic accounting or fraud examinations.

8. Staff in the Investigations, Discipline and Forensic Accounting Groups receive considerable training, including training on AML and anti-fraud issues. Staff have the following relevant designations:

    a. The Deputy Chief Legal Officer and three Investigations staff lawyers are certified anti-money laundering specialists (CAMS) through the Association of Certified Anti-money Laundering Specialists and one additional staff lawyer is in the process of achieving this certification.

    b. The Chief Financial Officer and Director of Trust Regulation, as well as three forensic accountants have CAMS designations. Five of the forensic staff are also certified fraud examiners (CFE) through the Association of Certified Fraud Examiners. One additional forensic accountant is in the process of achieving their CAMS designation.

    c. The investigator (a former RCMP and CSIS officer) and investigating accountant both hold CFE designations.

9. All lawyers, accountants, paralegals and investigators in the Investigations, Discipline and Forensic Accounting Groups participate in team meetings to discuss trends and issues arising during investigations, audits and hearings, including money laundering typologies and red flags. Staff from these groups have also attended various internal and external workshops, seminars and other AML training opportunities offered by, among others, the Association of Certified Fraud Examiners, the Canadian Bar Association, the Continuing Legal Education Society of BC, Transparency International, the Law Society of BC, the Association of Certified Anti-money Laundering Specialists, and the RCMP.[2]

10. The Investigations, Forensic Accounting and Discipline Groups are funded through the Law Society's General Fund revenues, the bulk of which are generated from annual practice fees paid by lawyers.[3] From a budgetary perspective, resources allocated to Investigations, to

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[1] One position is currently vacant.

[2] Law Society Briefing Note on Professional Conduct Staff Training re: AML Matters dated January 10, 2020 (LSB007690) and Forensic Accounting Staff Designations and Training as of January 10, 2020 (LSB007569).

[3] Law Society 2019 Financial Statements:
https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/ar/2019-financials.pdf

Forensic Accounting and to the work of the Discipline Group have nearly doubled in the period of time from 2015 to 2020.

**Investigations Group**

*General Information about Complaints*

11. Part 3, Division 1 of the Law Society Rules sets out the rules enacted by the Benchers to deal with the investigation of complaints under the authority of s. 26 of the Act.

12. Any person may deliver a written complaint against an articled student, lawyer or law firm to the Law Society (Rule 3-2) and the Executive Director (staff designated by the Executive Director) must consider every complaint received (Rule 3-4).

13. The Law Society must treat information received from any source indicating that a lawyer's conduct may constitute a discipline violation as a complaint. A "discipline violation" is defined in the Law Society Rules as any of the following: (a) professional misconduct, (b) conduct unbecoming the legal profession, (c) a breach of the Act or the Law Society Rules, (d) incompetent performance of duties undertaken by a lawyer in the capacity of a lawyer, or (e) conduct that would constitute professional misconduct, conduct unbecoming the legal profession or a contravention of the Act or the Rules if done by a lawyer or law firm (Rule 1).

14. The Law Society encourages the public, law enforcement, other agencies and regulators to refer any concerns about a lawyer's conduct for potential investigation. The Law Society receives complaints (or information about a lawyer that is treated as a complaint) from a broad array of sources, including the public, other lawyers, self-reports, other regulators, government agencies, law enforcement agencies, and the courts. In addition, the Law Society will initiate an investigation based on information that comes to our attention including in media reports, court decisions or during an investigation of another matter. Other Law Society departments also refer conduct issues to the Investigations Group including the Trust Assurance Department.

15. The Law Society receives approximately 1100-1300 complaints a year. The vast majority of complaints are handled by the Intake and Early Resolution Group. This Group handles complaints that are either likely capable of being resolved with no further action or raise competency concerns that may warrant a referral to the Practice Standards Committee for remedial measures. Complaints that raise serious conduct concerns that, if proven, could result in a referral to the Discipline Committee for a disciplinary outcome are handled by the Investigations Group.

*Outcomes of Complaint Investigations*

16. At the conclusion of an investigation, the complaint may either be closed by staff or referred to the Discipline Committee or the Practice Standards Committee for consideration. Rule 3-8(1) provides that after investigating a complaint, the Executive Director must take no further action if satisfied that the complaint (a) is not valid or its validity cannot be proven, or (b) does not disclose conduct serious enough to warrant further investigation. The Executive Director may also take no further action on a complaint if satisfied that the matter giving rise to the complaint has been resolved (Rule 3-8(2)). This may occur if, for example, the conduct giving rise to the complaint has been sufficiently addressed, such as through the lawyer's acknowledgment of the conduct and remediation of their practices. Other circumstances that may give rise to a file being closed are if the lawyer has rectified the situation, or made sufficient apology and recompense to any person harmed by their conduct, such as the client. In other circumstances, the lawyer may have given an undertaking to the Law Society to protect the public interest, such as an undertaking that places a condition or restriction on their practice. If a complaint is closed by staff under Rule 3-8, then the complainant may apply to have the matter reviewed by the Complainants' Review Committee, which is a committee comprised of Benchers (Rule 3-14).

17. The investigating staff may refer the matter to the Practice Standards Committee, typically if the complaint deals with competency concerns. If the Practice Standards Committee agrees that there are competency concerns, they may order a practice review, and subsequently make recommendations and take other measures aimed at improving the lawyer's competencies. Where necessary, the Committee may obtain undertakings or make orders restricting the lawyer's practice.

18. Generally, any investigation that is not closed by staff (either pursuant to Rule 3-5 with no investigation, or Rule 3-8 after an investigation), or referred to Practice Standards in relation to a competency concern, will be referred to the Discipline Committee for consideration of a potential disciplinary response.

19. Figure 2 below provides an overview of the number of complaints handled by Professional Conduct in 2019 and the outcome of concluded complaints. Figure 3 provides information on the matters referred to the Discipline Committee in 2019.

**Figure 2: Complaint Results, 2019**[4]

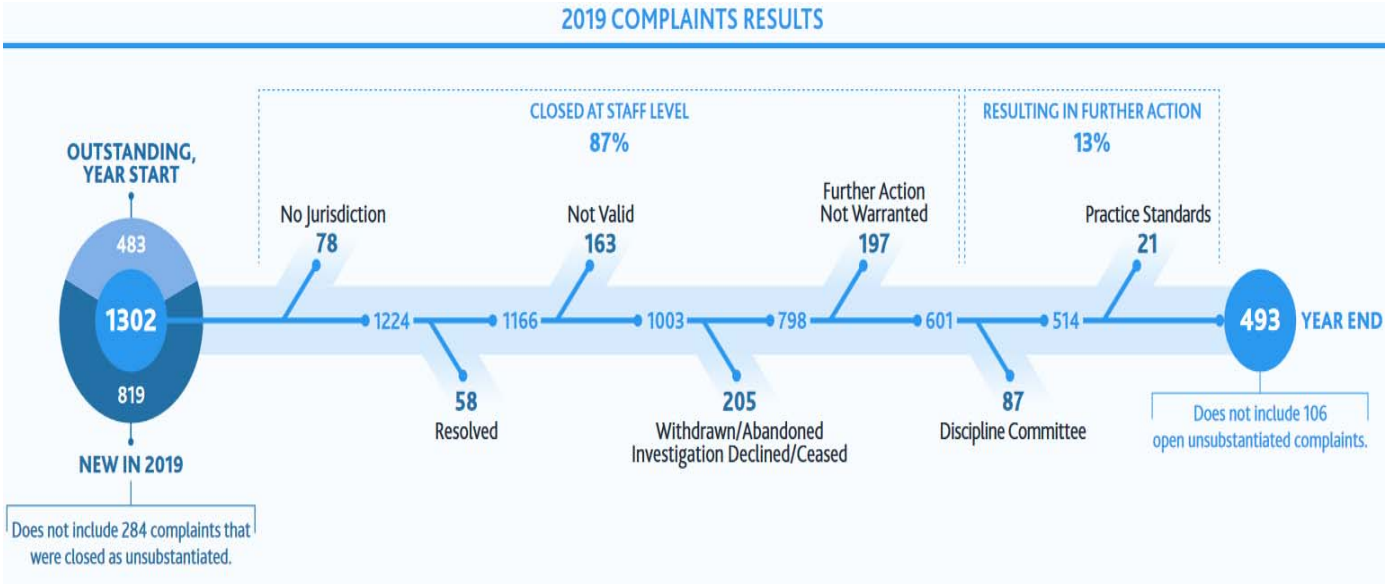
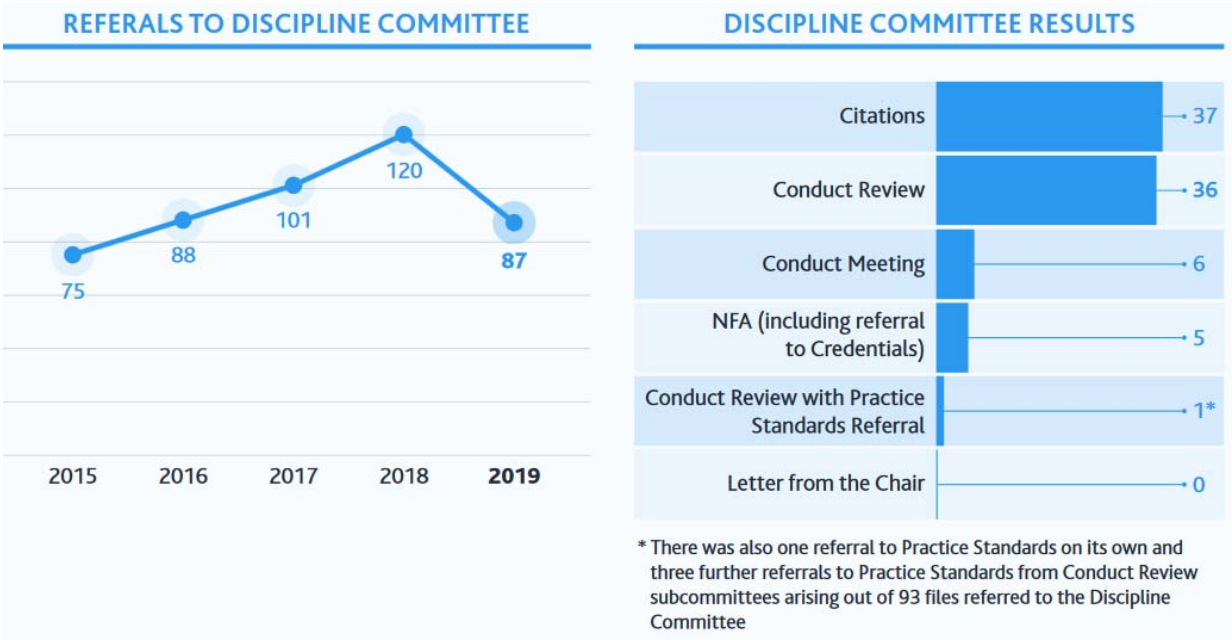



**Figure 3: Referrals to Discipline Committee and Outcomes, 2019**[5]




[4] https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/ar/2019-AnnualReport.pdf
[5] https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/ar/2019-AnnualReport.pdf

**Investigations Group**

20. As noted, the Investigations Group is responsible for investigating complaints that raise serious conduct concerns that, if proven, may result in a disciplinary outcome. The Investigations Group opens approximately 240 new complaint files each year.

21. All complaints that involve potential breaches of the no-cash or CIV rules, or alleged misuse of trust account/failure to make inquiries issues, are handled by the Investigations Group. In addition, this group handles all referrals from the Trust Assurance Department (concerns identified during a compliance audit or concerns raised by trust reports or other self-reports such as reports of trust shortages). The Deputy Chief Legal Officer leads the Investigations Group and reviews all new files which are then assigned to appropriate investigating staff (lawyers, accountant or paralegals) or referred to external counsel for investigation.

*Interim Measures to Protect the Public*

22. At the outset and during every serious investigation, the Law Society assesses whether the subject lawyer (the lawyer under investigation) poses a risk to the public such that interim measures are required pending the outcome of the investigation. Where appropriate, the Law Society will seek a voluntary undertaking (a solemn, enforceable promise) from the subject lawyer that imposes conditions or restrictions on their practice of law. The undertakings are drafted to address the particular risk to the public arising from the lawyer's alleged conduct under investigation. In the most serious cases, the Law Society seeks an undertaking that the lawyer not engage in the practice of law pending the outcome of the investigation and the conclusion of any proceedings that may arise from it. In other cases, the Law Society may be satisfied that any risk to the public is adequately addressed with conditions or restrictions on the lawyer's practice, such as no longer operating a trust account, practising law under the direct supervision of another lawyer approved by the Law Society, or not practising law in a particular area. The Law Society alerts the public to the practice conditions or restrictions as they are displayed on the lawyer's profile on the Lawyer Directory on the Law Society's website. The Manager Monitoring & Enforcement is responsible for monitoring the subject lawyer's compliance with any undertakings.

23. If the subject lawyer refuses to give an undertaking considered necessary, the Law Society will pursue an interim order to protect the public interest under Rule 3-10 of the Law Society Rules. Rule 3-10 provides that three or more Benchers may impose conditions or limitations on a lawyer's practice or suspend the lawyer if they are satisfied on reasonable grounds, that extraordinary action is needed to protect the public interest. Rule 3-10 proceedings are generally conducted on short notice to the subject lawyer given the concerns about the risk to the public. Unless a non-disclosure order is made by the Benchers, the Law Society will publish

any conditions or limitations imposed on the lawyer's practice on the lawyer's profile displayed on the Lawyer Directory.

*Investigative Powers*

24. At the outset of a serious investigation (generally before notifying the subject lawyer of it), the Law Society will consider whether the conduct concerns warrant seeking an order under Rule 4-55 for an investigation of the books, records and accounts of the lawyer and law firm. Rule 4-55 authorizes the Chair of the Discipline Committee to order an investigation of all books, records and accounts of a lawyer (or former lawyer) if the Chair reasonably believes that the lawyer may have committed a discipline violation. While a complaint investigation is focussed on specific conduct issues, the scope of a Rule 4-55 investigation is broad, extending to the lawyer's entire practice. The Rule 4-55 order is made without notice to the subject lawyer so there is no risk of any information or records being altered or destroyed. An investigation made pursuant to a Rule 4-55 order is resource intensive and involves a team of Law Society staff, including the investigating lawyer, a forensic accountant, a forensic analyst or assistant, an investigator, discipline counsel, and the Deputy Chief Legal Officer. In addition, the Law Society retains external computer forensic specialists. The Rule 4-55 order is served on the subject lawyer and if the lawyer agrees to abide by the 4-55 order, a team of computer forensic specialists will immediately commence preparing a mirror image of the lawyer's computers, hard drives and smart phones, as well as the computers used by the lawyer's staff[6]. At the same time, the forensic accountant and forensic analyst will obtain and scan client files, accounting records and other records of the practice within a date range selected as the scope of the investigation. The forensic accountant will review the collected records and conduct searches of the mirror imaged data for the purposes of preparing a forensic investigation report. Additional investigation will generally be conducted by the investigating lawyer, which may include an interview of the subject lawyer. Over the past five years, there have been eighteen Rule 4-55 investigations conducted by the Law Society.

25. The Law Society has significant investigative powers even when a Rule 4-55 order is not obtained. The subject lawyer must co-operate, including responding fully and substantively to any questions and to all requests made by staff in the course of the investigation (Rule 3-5(7)). The subject lawyer is required to provide information and material as requested, including:

    a. Providing a written response to the allegations under investigation (Rule 3-5(7) and (9));

[6] Prior to the Law Society reviewing any mirror imaged data, the subject lawyer has the opportunity to make an exclusion request in order to request that documents that are privileged (as between the lawyer and their own counsel) or personal and irrelevant be excluded.

b. Producing files, documents or other records for examination as soon as practicable and before the deadline set by the Executive Director (Rules 3-5(8) and 3-5(11)). This may include producing client files, correspondence with the client (including emails and text messages), bills, receipts, accounting records, bank statements, client ledgers, or any other documents that may relate to the matter under investigation;

c. Attending an interview to answer questions and provide information. The interview is usually recorded (Rule 3-5(8));

d. Causing an employee or agent of the lawyer (such as an assistant, bookkeeper, paralegal or accountant) to attend an interview (Rule 3-5(8)); and

e. Granting access to Law Society staff to enter the lawyer's business premises (Rule 3-5(8)), including for the purposes of inspecting the lawyer's files and office procedures.

26. A lawyer cannot refuse to answer questions or produce documents during an investigation on the basis of solicitor-client privilege. The Law Society is entitled to review any information or records during an investigation including privileged materials (Rule 3-5(11) and s. 88 of the Act). In *Skogstad* v. *Law Society of British Columbia*, 2007 BCCA 310, the Court of Appeal confirmed that, as a result of s. 88 of the Act, a lawyer does not violate solicitor-client privilege by disclosing to the Law Society information protected by privilege.

27. A lawyer who fails to produce the requested records or information or attend an interview will in most cases be suspended until they have fully complied (Rule 3-6).[7] The obligation to cooperate with an investigation and to provide information and records to the Law Society is not limited to the subject lawyer. The Law Society may request information and records from any lawyer during an investigation and the other lawyer must cooperate pursuant to Rule 3-5.

28. The Law Society also has authority under the Act to require any person to produce information or answer questions that are necessary for an investigation. Section 26(4) gives the Law Society authority to make orders against any person. Under s. 26(4)(a), the Law Society may make an order requiring a person to attend an interview, either in person or remotely. Under s. 26(4)(b), the Law Society may make an order requiring a person (including a corporation or other organization) to produce any record or thing in such person's possession or control. Section 26 orders have been used to obtain information from financial institutions, corporate

[7] The lawyer may apply to the Discipline Committee to have the suspension delayed or not be suspended if there are "special circumstances". In some cases, a suspension is not sought and instead the matter is referred to the Discipline Committee for the issuance of a citation for the lawyer's failure to cooperative with an investigation.

entities, and others. A failure or refusal to comply with an order made under s. 26 may result in an application to the Supreme Court for an order directing compliance, and/or an order that such person is liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

29. The Law Society may also obtain information from public sources such as court records, other regulator hearing decisions, land title searches, corporate registries, websites (current and archived) and news media.

30. Investigating staff have substantial access to information about the subject lawyer. Available records include information retained in the Law Society's digital information system (LSIS), in other complaint files, in prior compliance audits and trust reports, in the lawyer's Practice Standards file (if any) and in their member file, which will include prior correspondence and information regarding the lawyer's credentials and discipline history. If the lawyer is or has been a member of another Law Society, the investigating lawyer may contact the other law society for information about the lawyer's practising status and disciplinary history.

31. Investigations often involve internal collaboration with other groups. If the matter under investigation involves complex accounting issues, then the investigating lawyer may seek assistance from the Law Society's Forensic Accounting Group. A forensic accountant may assist by reviewing records and preparing a report. If the investigation may result in a citation, the file is teamed with discipline counsel and usually a paralegal. The team communicates and meets periodically to discuss issues as they arise.

*Obtaining Information from Law Enforcement and Other Bodies*

32. Since the early 2000s, the Law Society has in place memoranda of understanding ("**MOU**") with all 11 municipal police forces in British Columbia and with the RCMP "E" Division. These MOUs establish procedures for the Law Society to request information from the police, as well as the terms and conditions for the use and dissemination of such information.

33. The Law Society has also established protocols to obtain information from the Criminal Justice Branch of the Ministry of Attorney General. Although there is no formal information sharing agreement in place with the Public Prosecution Service of Canada ("**PPSC**"), the Law Society engages with the PPSC on a case by case basis through an informal process in circumstances where a lawyer may be charged with a federal offence.

34. The Law Society may also obtain information from other regulatory bodies such as the BC Securities Commission and the US Securities and Exchange Commission. These collaborative relationships are important to the Law Society and assist the Group in conducting effective investigations.

*Investigations Related to CIV Rules, No Cash Rule or Misuse of Trust Account/Failure to Make Inquiries*

35. Among the conduct issues investigated by the Law Society are issues related to the rules listed in subparagraphs (a) to (f) below:

    a. Using a lawyer's trust account to move funds in the absence of legal services being provided directly related to those funds (now Rule 3-58.1);

    b. Failing to take reasonable steps to pay out funds from a lawyer's trust account as soon as practicable on completion of the legal services to which the funds relate (now Rule 3-58.1);

    c. Engaging in any activity that the lawyer knew or ought to have known assisted in or encourages any dishonesty, crime or fraud (*Code* 3.2-7);

    d. Failing to make reasonable inquiries where suspicious circumstances or red flags of dishonesty, crime or fraud are present, before proceeding with the matter. This includes the requirement to make inquiries about, among other things: the source of money, instructions to disburse funds, the nature of the transaction or retainer, the identity of parties involved, including the client and associates. As discussed in *LSBC v. Elias*[8] and reproduced in *LSBC* v. *Gurney*:[9] "*Where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an objective test that the transaction is legitimate.*"

    Issues (a) to (d) are internally referred to as the "misuse of a trust account" and "failure to make inquiries."

    e. Failing comply with the requirements of Rule 3-59, often referred to as the "no cash Rule."

    f. Failing to comply with the client identification and verification requirements set out in the Rules at Part 3 Division 11, also known as the "CIV Rules." As described in *LSBC* v. *Wilson*:[10] *"The Law Society rules about client identification and verification are complex and important. The goal is to ensure that the legal*

[8] *Elias v. Law Society of British Columbia*, 1996 CanLII 1359 (BC CA), http://canlii.ca/t/1f08l
[9] *Law Society of British Columbia v. Gurney*, 2017 LSBC 15, para 79, http://canlii.ca/t/hsd7v
[10] *Law Society of British Columbia v. Wilson*, 2019 LSBC 25, para 21, http://canlii.ca/t/j1cx4

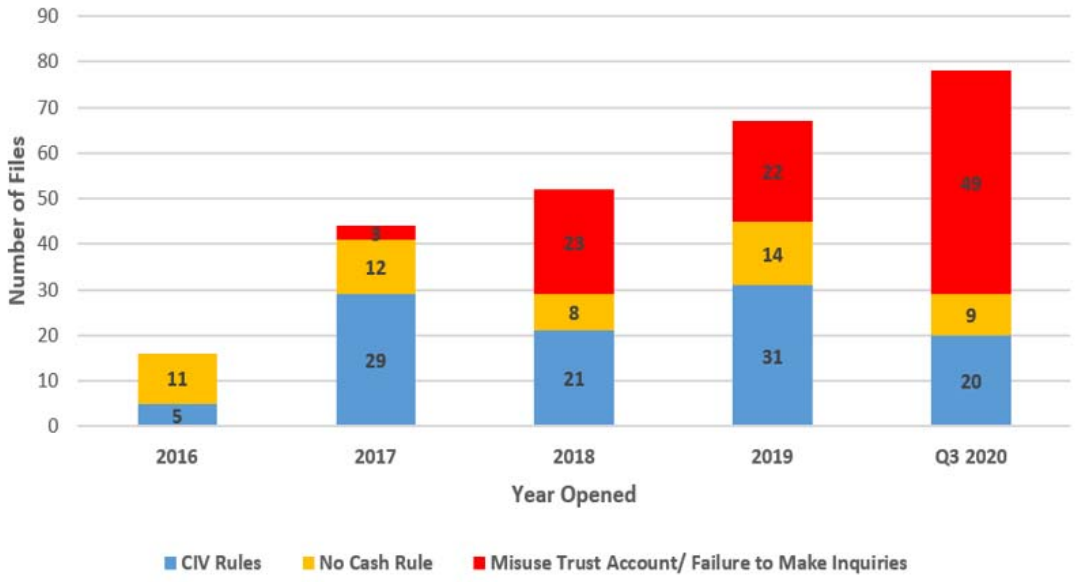
*profession does not become an inadvertent participant in the improper processing of laundered money and that the fraud of identity theft is not aided and abetted by lawyers."*

36. As of September 30, 2020 (Q3), the Investigations Group had 230 open files. Of the open file inventory, 92 files pertain to the CIV Rules, the no cash Rule, or to the potential misuse of a trust account and/or failure to make inquiries in suspicious circumstances. These 92 files represent 40% of the Group's open investigations, with particulars as follows:

    a. 73 investigations regarding the potential misuse of a trust account and/or failure to make inquiries in suspicious circumstances;[11]
    b. 14 investigations regarding potential CIV Rule breaches;[12] and
    c. five investigations regarding potential no cash Rule breaches.

37. Figure 4 sets out the number of investigations opened each year since 2016 pertaining to these rules.[13]

**Figure 4: Investigation Files Opened by Year Related to CIV Rules, No Cash Rule or Misuse of Trust Account/Failure to Make Inquiries**




[11] Of these open 73 files, 28 files also involve potential CIV Rule breaches; three files involve a potential no cash Rule breach; and one file potentially involves both a CIV Rule breach and a no cash Rule breach.
[12] One file also involves a potential no cash Rule breach.
[13] Investigation files may involve multiple conduct issues and for the purposes of this analysis, each file has only been counted in one category.

38. Figures 5 to 7 below provide an analysis of the status and disposition of investigations that involve potential conduct concerns related to client identification and verification, the no cash Rule, or misuse of a trust account.

**Figure 5: Status of CIV Investigations by Year Files Opened**

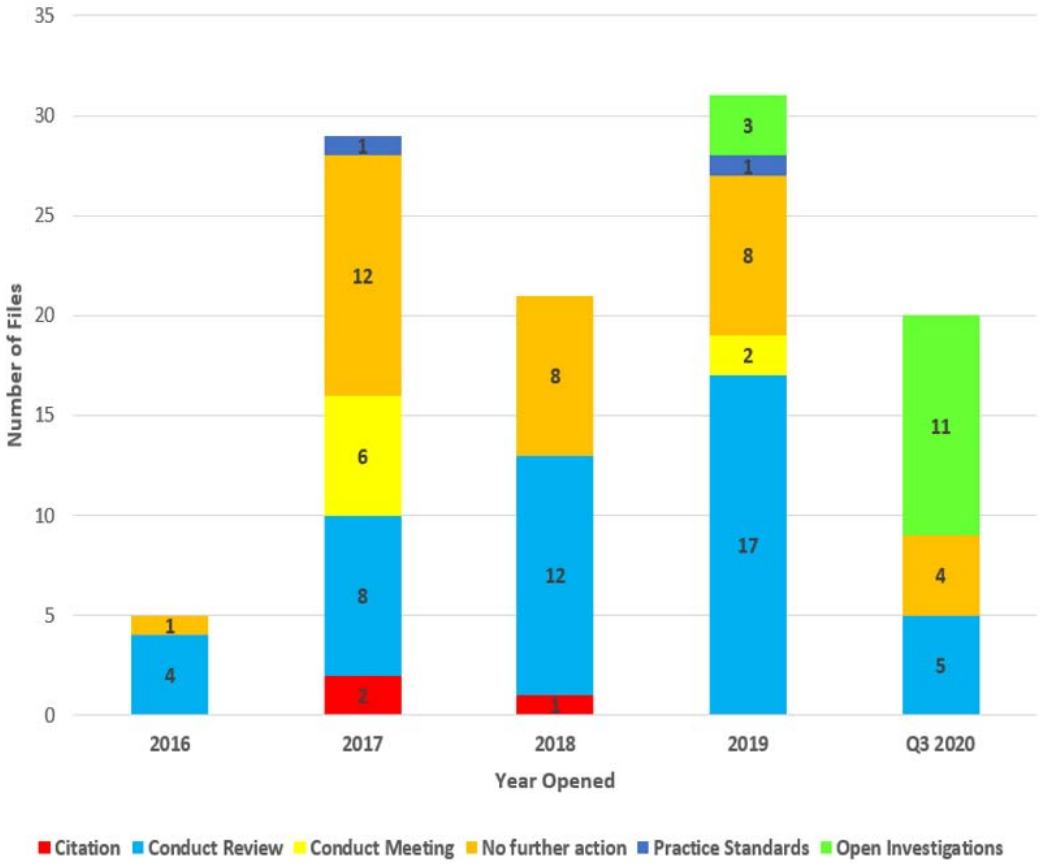


**Figure 6: Status of No Cash Investigations by Year Files Opened**

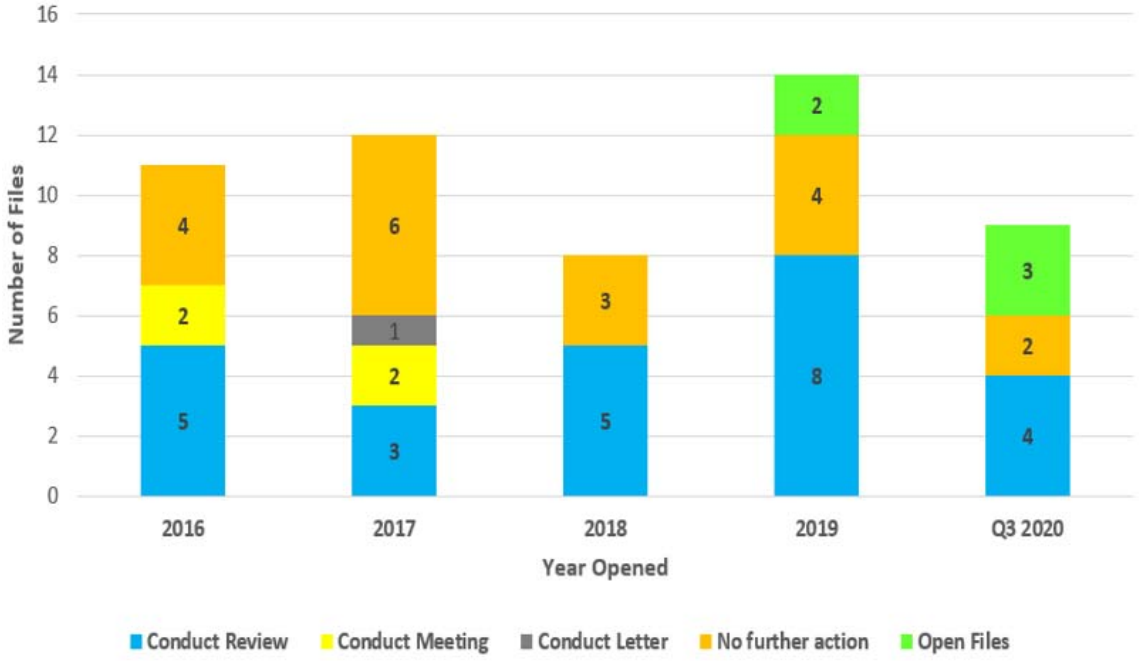
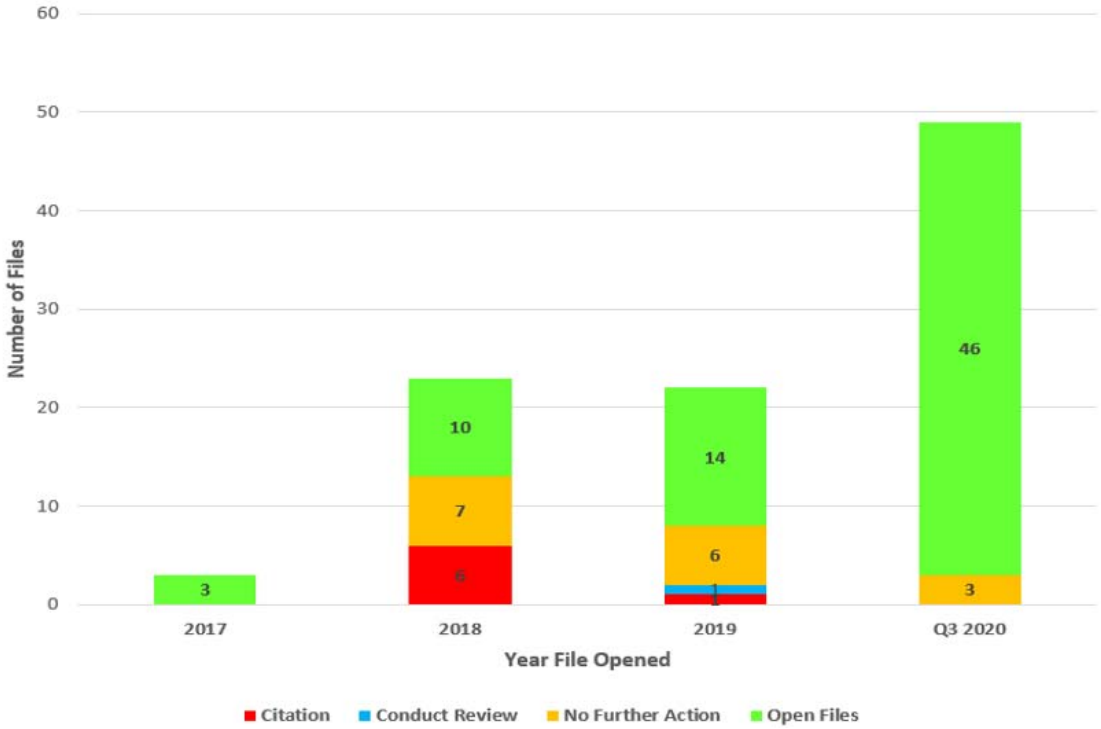



**Figure 7: Status of Misuse of Trust Account and/or Failure to Make Inquiries Investigations by Year Files Opened**



**Discipline Group**

*Hearings*

39. Citations are prosecuted by the Discipline Group, within the Professional Regulation Department. Hearings may be held for a variety of reasons, such as to consider an application regarding an interim suspension or practice conditions, to consider a citation (including preliminary applications regarding witnesses, document disclosure and other matters), or to review a prior hearing panel decision. The following is a brief description of the process for a citation hearing.

40. The Act provides that the Benchers may authorize a hearing into the conduct or competence of a lawyer by issuing a citation (Act, s. 36(f)). A citation is a document that sets out the Law Society's allegations against the lawyer, and outlines the manner in which the lawyer's conduct is alleged to amount to a discipline violation (that is, how the lawyer's conduct may constitute professional misconduct, conduct unbecoming the legal profession, a breach of the Act, a breach of the Rules, and/or incompetence). After the Discipline Committee has authorized the issuance of a citation, the Executive Director must publish the fact of the direction to issue the citation, the content of the citation and the status of the citation (Rule 4-20). Except in extraordinary circumstances, to be determined following an application to the President of the Law Society, the publication of a citation must identify the lawyer against whom the allegations are made (Rules 4-20(5) and 4-20.1).

41. The issuance of a citation triggers a number of subsequent actions by the Law Society in preparation for a hearing. For example, the President of the Law Society will establish a hearing panel to conduct the hearing and determine the appropriate outcome for the matter, including whether any disciplinary action is warranted (Rule 4-39), the Executive Director will appoint or retain a lawyer to act on the Law Society's behalf as discipline counsel (Rule 4-27), and the date, time and place for the hearing will be set (Rule 4-32). Public notice of hearings is given on the Law Society's website[14] and hearings are generally open to the public. The Act, the Rules (in particular Part 4 - Discipline and Part 5 – Hearings and Appeals) and practice directions issued from time to time by the President of the Law Society, set out further processes and procedures associated with the conduct of a hearing.

42. After a hearing, the hearing panel must make a determination and either dismiss the citation or make the adverse determination that the lawyer committed a discipline violation (Act s. 38(4)). If an adverse determination is made, then the hearing panel must do one or more of the following: (a) reprimand the lawyer, (b) fine the lawyer an amount not exceeding $50,000, (c) impose conditions or limitations on the lawyer's practice, (d) suspend the lawyer from the

[14] https://www.lawsociety.bc.ca/lsbc/apps/hearings/current-cases.cfm

practice of law or from practice in one or more fields of law, (e) disbar the lawyer, (f) require the lawyer to take certain actions such as completing a remedial program, complete an examination, or practise under certain conditions or (g) if the person is not a member of the Law Society, prohibit the person from practising law in British Columbia indefinitely or for a specified period of time (Act, s. 38(5)).[15]

43. Except in circumstances provided for under the Rules, the Executive Director must publish a summary of the circumstances of any hearing decision, reasons and actions taken (Rule 4-48). Hearing decisions are typically posted online in the Law Society's hearing decisions and admissions database[16] and on the website of the Canadian Legal Information Institute (CanLII).[17]

**Recent Discipline Decisions Related to CIV Rules, No Cash Rule or Misuse of Trust Account/Failure to Make Inquiries**

44. Recent hearing panel decisions include the following, copies of which are attached at Appendix A.

45. In *Law Society of British Columbia v. Gurney*,[18] the lawyer was found to have committed professional misconduct for having used his trust account to receive and disburse a total of $25,845,489.87 on behalf of a corporate client without making reasonable inquiries about the circumstances and without providing any substantial legal services. The lawyer did not have any prior dealings with or knowledge of the client, and the client had been referred to him by another lawyer that had been suspended by the Law Society. The lawyer received funds from offshore through his trust account in regard to four line of credit agreements in which the client was the borrower. The lawyer's services consisted solely of receiving and immediately disbursing approximately $26 million in offshore funds by converting the funds into bank drafts, and his fees were tied to the amounts run through his trust account. He made only pro forma inquiries about the transactions and knew little about the borrower, its business, its principal or the purpose of the loans. The lawyer did not admit his misconduct. In finding professional misconduct, the hearing panel confirmed at paragraph 79 that:

> "*A lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but the lawyer must also play a role as a legal advisor with regard to the transaction. This is the requirement to provide legal services.*"

[15] Different disciplinary actions are available in respect of an adverse determination made against an articled student or law firm (Act, s. 38(6) and (6.1)).
[16] https://www.lawsociety.bc.ca/lsbc/apps/hearings/search.cfm
[17] https://www.canlii.org/en/bc/lsbc/
[18] *Gurney (R*e), 2017 LSBC 15 (CanLII), http://canlii.ca/t/hsd7v

46. The lawyer was suspended for six months, ordered to pay disgorgement of $25,845, representing the fees earned by the lawyer as a result of his professional misconduct, and had conditions imposed on his use of a trust account (including a requirement to report to a Senior Forensic Accountant at the Law Society within five business days after becoming aware of any trust transaction involving a remitter, remitting institution, beneficiary or receiving financial institution not located in Canada).[19]

47. In *Law Society of British Columbia v. Hsu*,[20] a junior lawyer allowed approximately $14 million to flow through her trust account, and her conduct facilitated fraud and the misappropriation of millions of dollars by her client. She missed various red flags that led to her allowing her trust account to be used to funnel funds from investors to an unscrupulous fraudster, when there was no necessity for her trust account to be used. She received approximately $29,000 in fees. The matter involved securities law, which the lawyer knew little about. The lawyer acknowledged that she failed to perform legal services to the standard of a competent lawyer, including by failing to make reasonable inquiries of the client, and that she engaged in activities that she ought to have known assisted in or encouraged dishonesty, crime or fraud. The panel found that there was no indication of dishonesty on the part of the lawyer, and that she appeared to have been an unwitting dupe. She did not have a prior professional conduct record. The lawyer admitted her misconduct and received a three-month suspension and a practice restriction that she not practise in the area of securities law until relieved of the restriction.

48. In *Law Society of British Columbia v. Malik*,[21] a former lawyer admitted to professional misconduct in failing to make reasonable inquires or exercise due diligence regarding the legitimacy of the business, affairs or transactions he was engaged to complete. Specifically, he did not make reasonable inquiries to obtain information about his corporate client's purported directors and officers or their purported consultants. While the engagement letter to retain him was counter-signed by two individuals listed as directors, he did not contact them, meet with them or speak to them directly. He did not confirm the instructions he had received from others with the directors when he prepared and filed documents to change control of the company away from them and to effect the sale and transfer of 100 per cent of their shares. The lawyer undertook to not apply for reinstatement to the Law Society prior to January 1, 2021.

49. In *Law Society of British Columbia v. Daignault*,[22] the lawyer admitted to professional misconduct in having used his trust account to receive and disburse funds for clients in three transactions where he did not provide any substantial legal services and failed to advise those

[19] *Gurney (Re)*, 2017 LSBC 32 (CanLII), http://canlii.ca/t/h5s8l
[20] *Hsu (Re)*, 2019 LSBC 29, https://www.lawsociety.bc.ca/lsbc/apps/hearings/viewreport.cfm?hearing_id=1350
[21] Admission of Misconduct and Undertaking to the Discipline Committee accepted March 30, 2020, https://www.lawsociety.bc.ca/lsbc/apps/hearings/viewreport.cfm?hearing_id=1415
[22] *Daignault (Re)*, 2020 LSBC 18 (CanLII), http://canlii.ca/t/j6h0c

depositing the funds that he was not protecting their interests. The lawyer did not have a professional conduct record. He admitted his misconduct, expressed regret, and there was no evidence of dishonesty or personal gain. The panel found that "*[i]nattention, rather than intention, lay at the root of the Respondent's culpable acts and omissions*." The lawyer understood, and there was no evidence to the contrary, that the underlying transactions were legitimate. The hearing panel did not find any evidence of fraud or loss in connection with the transactions. In accepting the lawyer's admission of professional misconduct, the hearing panel noted that the lawyer "*ought to have known that he was professionally obliged to not permit his trust account to be used for transactions that were unconnected to legal work*" and that "*it has long been understood that lawyers must guard against potential misuse of their trust accounts precisely because solicitor-client privilege applies to lawyers' trust transactions for client*s" (paragraphs 66 and 70). The panel took into account a significant investigative delay of five-and-a-half years as a mitigating factor, and ordered a two-week suspension.

50. In *Law Society of British Columbia v. Hammond*,[23] the lawyer admitted to professional misconduct in receiving and disbursing $474,000 USD in trust funds over a three-month period without providing legal services in connection with the trust matter and without making adequate inquiries or a record of inquiries. The matter related to an escrow/stakeholder arrangement and had been referred to him by another lawyer whom he had known and trusted for over 30 years. The lawyer's terms of engagement provided that he would hold the funds in trust for the client, pay out amounts as directed by the client, charge $200 for processing each payment, and that he was "merely facilitating the transfer of money" and was not advising the client or determining whether any performance milestones had been met for the client's investment. The lawyer did not make or record any inquiries with respect to the performance milestones or other terms relating to the investors investments or payments. At the time of the misconduct, the lawyer was a 30-year call, and did not have a professional conduct record. He expressed remorse, cooperated with the Law Society's investigation, and admitted the facts in an Agreed Statement of Facts. There was no evidence of loss, fraud, or money laundering. As in *Daignault*, the lawyer understood, and there was no evidence to the contrary, that the underlying transactions were legitimate. The hearing panel likened the case to *Daignault* and ordered a suspension of two-weeks. In accepting the lawyer's admission of professional misconduct the hearing panel reiterated the following at paragraph 42:

> *Both the* BC Code *and prior decisions make clear that lawyers in British Columbia have long been obliged to act as gatekeepers of their trust accounts and to take active steps to ensure that those accounts are used only for the legitimate commercial purposes for which they are established.*

[23] *Hammond (Re)*, 2020 LSBC 30 (CanLII), http://canlii.ca/t/j8cvn

51. In *Law Society of British Columbia v. Yen*,[24] the lawyer was found to have committed professional misconduct for depositing and disbursing significant amounts through her trust account without making sufficient inquiries or providing legal services in relation to most of the funds. Over a two-year period, the lawyer received a total of $9,949,688.99 US and $1,274,764.96 Canadian in trust from a variety of sources, such as Panama, Singapore and a Singapore bank via Luxembourg, and paid the same amount out of trust in a total of 45 transactions. Of the amount paid out of trust, only approximately $1.5 million US was transferred directly to the credit of other legal files where the lawyer was providing legal services. The lawyer did not ask sufficient questions of the client as to why the trust account was being used to receive and disburse funds where the firm was not doing any legal work in connection with the disbursed funds. She also received some of the funds in trust without recording the source of the funds as required by the rules. The disciplinary action hearing for the *Yen* matter remains pending. In finding professional misconduct, the hearing panel noted at paragraph 40:

> *It is not enough that a lawyer does legal work, even substantial legal work, for a client who deposits money into the lawyer's trust account. These legal services must be "in connection with the trust matter*.

52. As noted above, authorized citations are typically published to the Law Society's website, along with notice of upcoming hearings dates.[25] Citations contain allegations that remain unproven, pending the outcome of the citation hearing.

53. Presently, there are four issued citations containing allegations pertaining to the rules listed in subparagraphs 35(a) – 35(f) that have not yet been determined by a hearing panel.

[24] *Yen (Re)*, 2020 LSBC 45 (CanLII), http://canlii.ca/t/j9sm5
[25] Law Society Webpage on Current Citations and Discipline Hearings: https://www.lawsociety.bc.ca/lsbc/apps/hearings/current-cases.cfm

**Appendix A: Recent Discipline Decisions Related to CIV Rules, No Cash Rule or Misuse of Trust Account/Failure to Make Inquiries**

See attached documents.

2020 LSBC 18
Decision issued: April 17, 2020
Citation issued: October 25, 2018



**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**RENE HENRI DAIGNAULT**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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|---|---|
| Hearing date: | March 12, 2020 |
| Panel: | Kenneth M. Walker, QC, Chair<br>Monique Pongracic-Speier, QC, Lawyer<br>Guangbin Yan, Public representative |
| Discipline Counsel: | Jaia Rai |
| Counsel for the Respondent: | William G. MacLeod, QC |

## INTRODUCTION

[1] This hearing came to us with an agreed statement of facts on "allegation 1" of the amended citation. The Law Society did not adduce any evidence in relation to "allegation 2" of the amended citation. Both the Law Society and counsel for the Respondent asked us to find professional misconduct on the agreed facts and asked us to consider that a two-week suspension was the appropriate disciplinary action. We heard submissions on both facts and disciplinary action and have agreed with both. These are our reasons.

[2] The Respondent, Rene Henri Daignault, is stated in the citation to have committed professional misconduct in respect of three transactions that went through his law firm's US and Canadian dollar trust accounts (collectively, the "Trust Account") between October 2011 and January 2012. In particular, the citation alleges that the

Respondent received and disbursed funds through the Trust Account on the instructions of a client without:

(a) providing any substantial legal services in connection with the trust matters; and

(b) advising the persons depositing the funds to the Trust Account, or persons on whose behalf the funds were being deposited, that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Professional Conduct Handbook* (the "*Handbook*") then in force.

[3] At the hearing of the citation on March 12, 2020, the parties tendered an agreed statement of facts. In the agreed statement of facts, the Respondent admits to certain actions and omissions, and admits that his conduct was professional misconduct, within the meaning of section 38(4) of the *Legal Profession Act* (the "*Act*").

[4] After reviewing the agreed statement of facts and hearing the parties, the Hearing Panel found that the conduct admitted by the Respondent was professional misconduct. We advised that our reasons for so finding would follow.

[5] The Hearing Panel also heard submissions on March 12, 2020 on the question of sanction. The Law Society and the Respondent both submitted that, in the particular circumstances of the case, a two-week suspension is appropriate. The Law Society does not seek costs.

## ISSUES

[6] The issues before the Hearing Panel are:

(a) whether the conduct admitted by the Respondent is professional misconduct;

(b) whether the proposed disciplinary action is within the acceptable range for this misconduct; and

(c) the appropriate disposition as to costs.

## STATEMENT OF FACTS

[7] The following facts are drawn from the agreed statement of facts.

## Background

[8] The Respondent was called to the bar and has been a member of the Law Society of British Columbia since 1993.

[9] Since approximately 2002, the Respondent has practised as a sole practitioner through a law corporation, R.H. Daignault Law Corporation. The Respondent's areas of practice include securities law.

[10] The Respondent's law corporation maintains the Trust Account, a US dollar general account and a Canadian dollar general account.

[11] From approximately 2002 to 2013, the Respondent represented a corporation (the "Client"). The Respondent took instructions on the Client's matters from its principal (the "Principal"). At some time during the retainer, the Respondent considered the Principal to be a friend.

## The Depositor 1 transaction

[12] On October 29, 2011, the Respondent received an email from a person ("Depositor 1") "confirm[ing] that USD 40,000 is on its way to your trust account" for the purchase of shares in an over-the-counter trading company connected to the Principal ("Company A"). The email indicated that the funds for the purchase would come from one entity (the "funder") and that the shares should be registered in the name of another entity (the "purchaser"). The names of the funder and the purchaser were given in the email. Depositor 1 described himself in the email as the managing partner of an asset management firm in Switzerland.

[13] Depositor 1, the funder and the purchaser were unknown to the Respondent. He did not make inquiries about them. Likewise, the Respondent did not know the identity of the vendor of the shares and did not inquire. He also did not inquire into the source of the funds that were to be sent to him.

[14] On October 31, 2011, the Respondent replied to Depositor 1's email and requested the purchaser's address so that he could provide it to the transfer agent. By reply the same day, Depositor 1 gave a Swiss address as the purchaser's contact address and a Panamanian address as the purchaser's domicile.

[15] The Respondent did not, in this email exchange or at any time thereafter, caution Depositor 1 that he (the Respondent) would treat the funds transferred into the Trust Account as the Client's funds; that he would take instructions only from the Client regarding the disbursement of the funds deposited by Depositor 1; and that

he (the Respondent) would not protect the interests of Depositor 1, the funder or the purchaser.

[16] On November 1, 2011, Depositor 1 wired $39,992.50 US to the Trust Account from a Swiss bank. The transfer documentation for the wire transfer indicates that the funder was an "overseas management company" in the British Virgin Islands.

[17] The Respondent admits that he received the funds from Depositor 1 in his capacity as the Client's lawyer.

[18] Based on the verbal advice of the Principal and in the absence of any written trust conditions, the Respondent treated the funds wired by Depositor 1 to the Trust Account as the Client's funds from the time of receipt.

[19] On November 1, 2011, the Principal gave the Respondent written instructions to disburse the funds. The Respondent paid $20,000 US out of trust to Company A as a loan. He also issued a cheque from the Trust Account to his general account in the amount of US $20,000 and then wired those funds to a California bank, to the credit of another company related to the Principal ("Company B").[1] The funds paid to Company B were a loan.

[20] After paying the funds from the Trust Account to Company A and Company B, the Respondent drafted convertible promissory notes in relation to the loans.

[21] When the Respondent disbursed the funds from the Trust Account on November 1, 2011, he did not know whether the share purchase for which the funds were paid into trust had completed. The Respondent learned some time later that the share transaction had not, in fact, completed.

[22] On November 2, 2011, the Respondent sent an email to Depositor 1 confirming receipt of US$39,992.50 into the Trust Account.

[23] Between December 2011 and February 2012, the Respondent and Depositor 1 exchanged email correspondence about the incomplete share transaction. Then, on February 16, 2012, Depositor 1 emailed the Respondent and said:

> Hi Rene

[1] At the hearing of this matter, the Respondent explained that he made the transfer from his trust to his general account because the Rules of the Law Society in November 2011 prohibited a lawyer from making wire transfers from a trust account.

> I am told that we should be receiving the USD 40k back from the [Company A] subscription. Please confirm and I will send you transfer instructions.

[24] The following day, the Respondent replied to Depositor 1:

> That was the rumor I heard too. But unfortunately I have not seen any funds.
>
> If, and when, the funds show up I will let you know and get your wire instructions then. …

[25] In another email to Depositor 1 on the same day, the Respondent said:

> What I am waiting for is the receipt of the funds to be returned, if I am to receive any, as the client may be sending them from some other account.

[26] Between October 2012 and January 2013, the Respondent and Depositor 1 exchanged other emails about the funds paid to the Trust Account in the Depositor 1 transaction. At some times, Depositor 1 claimed that the funds were paid under an escrow agreement. The evidence shows that there was no such agreement and that the claim was fallacious.

[27] The Respondent never returned the funds to Depositor 1, or to the funder or the purchaser in the Depositor 1 transaction. There is no evidence that the shares at issue in the Depositor 1 transaction were not eventually received or the purchase funds returned in place of delivery of the shares. No civil action was taken against the Respondent in relation to the Depositor 1 transaction.

[28] In early 2012, Depositor 1 was arrested in Manitoba. He was subsequently charged with money laundering, convicted and sentenced to three years in prison. In 2014, the British Columbia Securities Commission found Depositor 1 guilty of conduct contrary to the public interest for his part in illicit stock promotion. The Securities Commission suspended Depositor 1 from participating in trading activities for five years. The criminal and administrative penalties against Depositor 1 do not relate to any of the transactions at issue in the citation against the Respondent.

**Investigation by the Law Society**

[29] On December 27, 2012, Depositor 1 complained to the Law Society that he had provided US$32,992.50 to the Respondent to purchase shares in a company but that

the shares were never received.[2] On February 5, 2013, Depositor 1 provided further details of his complaint.

[30] In February 2013, the Law Society opened a file and began to investigate Depositor 1's complaint. In the course of the investigation, the Law Society examined other Trust Account transactions, including the two that follow.

**The Depositor 2 transaction**

[31] On October 26, 2011, the Respondent received US$40,828.70 into the Trust Account by wire transfer from a Panamanian company ("Depositor 2"), which transmitted the funds on behalf of a client (the "payor"). Soon after receiving the funds, the Respondent learned they were for the purchase of shares in Company A.

[32] On October 28, 2011, the Principal gave the Respondent written instructions to pay US$40,000 from the Trust Account to a bank in Santa Monica, California "[f]or the purpose of wiring funds to [Company B] as loan proceeds for a convertible note." Acting on those instructions, the Respondent issued a cheque from the Trust Account to his general account, and paid US$40,000 to Company B by wire transfer from his general account. The Respondent then advised the Principal by email that the wire transfer was complete.

[33] The Respondent had no knowledge of, or involvement in, the transaction for which he received and disbursed the funds in the Depositor 2 transaction. In particular, the Respondent did not know: the identity of the payor; the relationship between Depositor 2 and the payor; or the identity of the parties to the share transaction. Moreover, the Respondent did not know the details, terms and conditions of the share transaction. He did not request, obtain or prepare any written documentation pertaining to the Depositor 2 transaction.

[34] The Respondent did not, at any time, caution Depositor 2, the payor, or any person or entity that the Respondent believed had deposited the funds into the Trust Account, that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force.

[35] The Respondent did not know whether the Depositor 2 share transaction had completed when he paid funds out of the Trust Account. In fact, the Depositor 2 share transaction had not completed.

[2] The error in the statement of the amount sent to the Trust Account is Depositor 1's error.

[36] On November 7, 2011, the payor sent an email to the Respondent that noted that "the sum of $40,830" was wired to "your US$ trust account for the purchase of … shares of [Company A]." The email continued, "to date we have received no paper from you and so we are enquiring into receipt of a Purchase and Sale Agreement and eventual receipt of the shares."

[37] The Respondent did not respond to the payor's email.

[38] The payor sent further emails to the Respondent on February 7 and 14, 2012 requesting a refund of the Depositor 2 funds by payment in trust to another British Columbia law firm. The Respondent forwarded the February 7 and 14, 2012 emails to the Principal. The Principal sent the Respondent an email on February 15, 2012 stating that he would "work on this."

[39] The funds the Respondent held in trust to the Client's credit in mid-February 2012 were not sufficient to repay the Depositor 2 funds.

[40] On February 23, 2012, a business associate of the Principal, who was also among the Respondent's clients, wired US$100,000 into the Trust Account and gave the Respondent written authorization to take instructions from the Principal as to the disbursement of these funds. On February 29, 2012, the Principal instructed the Respondent to refund the Depositor 2 transaction from the proceeds deposited by the business associate. The Respondent did so the same day by paying US$40,828.70 in trust to the law firm indicated by the payor.

**The Depositor 3 transaction**

[41] On December 6, 2011, a company ("Depositor 3") paid US$33,760.50 to the Trust Account. The Respondent did not communicate with Depositor 3. The Respondent permitted the Trust Account to be used to receive and disburse the Depositor 3 funds, based on instructions from the Principal.

[42] Upon receipt of the Depositor 3 funds, the Respondent credited the funds to the Client. The Respondent was informed by the Principal that the Depositor 3 funds were payment for consulting services that the Principal had delivered through the Client. When asked during the Law Society investigation why the funds went through the Trust Account and were not paid directly to the Client, the Respondent stated that he "suspect[ed]" that the Client "never had a bank account."

[43] The Respondent did not provide any legal services in connection with the receipt or disbursement of the Depositor 3 funds.

[44] Between December 8, 2011 and January 2, 2012, the Respondent disbursed the Depositor 3 funds from the Trust Account in four tranches. On December 8, 2011, the Respondent paid out $3,000 as a loan to a corporate entity. On December 19, 2011, the Respondent paid out $22,000 as a loan to the Principal. On December 21, 2011, the Respondent paid out $8,000 as a loan to cover an invoice for Company B's audit fees. Finally, on January 2, 2012, the Respondent disbursed funds in part payment of an invoice he had issued to the Client.

[45] The Respondent did not advise Depositor 3, or any other person or entity he believed deposited the funds to the Trust Account, that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force.

**Citation**

[46] On October 25, 2018, the Law Society issued a citation against the Respondent (the "original citation"). The original citation alleged professional misconduct, pursuant to section 38(4) of the *Act* on two grounds. First, the original citation alleged that, between 2004 and 2012, the Respondent used his trust account to receive and disburse funds on behalf of the Client in four transactions in which the Respondent: failed to provide any substantial legal services in connection with the trust matters; failed to make reasonable inquiries regarding the circumstances surrounding the trust deposits; and failed to advise the persons depositing the funds that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force. The four transactions identified in allegation 1 of the original citation include those involving Depositors 1, 2 and 3.

[47] Second, the original citation alleged that between 2004 and 2009, the Respondent used the Trust Account to receive and disburse funds on behalf of a company in which the Respondent had an interest (the "non-arms-length company"). The Law Society alleges that the non-arms-length company was used to facilitate 11 transactions in circumstances where the Respondent failed to:

(a) provide any substantial legal services in connection with the trust matters;

(b) advise the persons depositing the funds into the Trust Account that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force;

(c) advise the persons depositing the funds that the Respondent was accepting and disbursing the funds on behalf of the non-arms-length company; that he had an interest in the non-arms-length company; that

he was acting for the non-arms-length company and not for any party to the transaction; and that, in the circumstance he was "effectively taking instructions from yourself regarding the disbursement of the funds"; and

(d) guard against carrying on business through the non-arms-length company in such a way that a person might reasonably find it difficult to determine whether, in any matter, the Respondent was acting as a lawyer, or might reasonably expect that, in carrying on business through the non-arms-length company, the Respondent would exercise legal judgment and skill for the protection of that person, as required by Chapter 7, Rule 6 of the *Handbook* then in force.

[48] On February 19, 2020, the Law Society issued an amended citation. The amended citation makes the allegations at issue in this Decision.

[49] In addition, the amended citation alleges that, between 2004 and 2005, the Respondent used the Trust Account to receive and disburse funds, purportedly on behalf of the non-arms-length company, and as a vehicle for facilitating three transactions, in circumstances where the Respondent failed to do one or both of:

(a) provide any substantial legal services in connection with the trust matters; or

(b) advise the persons depositing the funds to his trust account, or persons on whose behalf the funds were being deposited, that he was not protecting their interests as required by Chapter 4, Rule 1 of the *Handbook* then in force.

[50] The Law Society did not proceed with those aspects of the amended citation related to the non-arms-length-company.

**Admission of misconduct**

[51] The Respondent admits the facts set out above in relation to each of the Depositor 1, 2 and 3 transactions and admits that he committed professional misconduct in respect of the Law Society's allegations in relation to those transactions.

## ANALYSIS

### Professional misconduct

[52] The first task of the Hearing Panel is to determine whether the Respondent's conduct in any of the Depositor 1, 2 and 3 transactions is professional misconduct. In other words, we must determine whether his admission of professional misconduct should be accepted.

[53] Professional misconduct occurs where there is "a marked departure from the conduct that the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171. A "marked departure" involves a "fundamental degree of fault" or a "gross neglect" of duties as a lawyer: *Martin* at para. 154. The test is an objective test: *Law Society of BC v. Sangha*, 2020 LSBC 03 at para. 67. The Law Society bears the onus of proof on the balance of probabilities: *Law Society of BC v. Dent*, 2015 LSBC 37 at para. 54.

### Failure to provide the caution

[54] We begin with the allegation that the Respondent committed professional misconduct in one or more of the Depositor 1, 2 and 3 transactions by failing to provide the caution required by Chapter 4, Rule 1 of the *Handbook* then in force (the "caution"). At the times of the transactions, Chapter 4, Rule 1 of the *Handbook* provided:

> A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and the unrepresented person that the latter's interests are not being protected by the lawyer.

[55] The Respondent admits that he did not advise any of those involved in the Depositor 1, 2 and 3 transactions that he was not protecting the interests of those who were not his clients. The Respondent therefore breached the Rule in respect of all three transactions. Does the breach rise to level of misconduct?

[56] The reason why a lawyer in British Columbia is required to give the caution when dealing with unrepresented persons is the concern that "an unsophisticated and unrepresented party in his or her dealings with a lawyer will develop the impression that the lawyer is representing them in circumstances where the impression is not accurate": *Law Society of BC v. Skogstad*, 2008 LSBC 19 ("*Skogstad* facts") at para. 54. The Hearing Panel appreciates that it is unlikely that the unrepresented persons involved in the Depositor 1, 2 and 3 transactions were "unsophisticated." Certainly, it cannot be said on the evidence that Depositor 1 was "unsophisticated."

Nonetheless, the protection of the public requires that lawyers consistently adhere to the requirement to provide the caution. This is reflected in the use of the word "must" in Chapter 4, Rule 1.

[57] Moreover, the Hearing Panel observes that the Respondent failed to provide the caution in three separate transactions over a span of weeks between late October 2011 and early January 2012. The repeated failure to provide the caution shows a persistent disregard for the Respondent's professional obligations. This constitutes a marked departure from, and gross neglect of, the Respondent's duties as a lawyer.

**Failure to provide any substantial legal services in connection with the trust transactions**

[58] We turn to the allegation that the Respondent committed misconduct by his failure to provide any substantial legal services in connection with one or more of the Depositor 1, 2 and 3 trust transactions.

[59] The admitted facts show that no legal services were provided in connection with the Depositor 2 and 3 transactions. To the extent that the Respondent provided legal services in relation to the Depositor 1 transaction, they were provided to the Client *after* the transactions through the Trust Account and not in *connection* with it. The factual element of the allegation is made out in respect of each transaction.

[60] Was the failure to provide substantial legal services in connection with trust transactions misconduct? The parties' written submissions diverge on this point. The Law Society acknowledges that, in 2011 to 2012, neither the Law Society Rules nor the *Handbook* included an express requirement that lawyers use their trust accounts to receive and disburse funds only if providing related legal services. The Law Society argues, however, that the obligation was implicit. In support of this argument, the Law Society points to publications and bulletins issued between 1999 and 2005 commenting on lawyers' obligations to guard against becoming unwitting facilitators of crime or fraud, and to the reasoning in *Law Society of BC v. Hops*, 1999 LSBC 29, *Skogstad* facts and *Law Society of BC v. Skogstad*, 2009 LSBC 16 ("*Skogstad* DA"). The Law Society also submits that, in any event, the Hearing Panel is not asked to decide whether in 2011 to 2012 a lawyer was subject to a "stand-alone" professional obligation to forebear from allowing his trust account to be used for transactions except where the lawyer provides substantial legal services in connection with the transaction.

[61] In response, the Respondent argues that it is significant that, as of 2011 to 2012, no lawyer in British Columbia had been disciplined for receiving funds into trust in the absence of significant related legal services. The Respondent also argues that Law

Society publications warning lawyers to be on guard against those aiming to ensnare unwitting lawyers in fraudulent schemes are inapt to the circumstances of the case.

[62] We agree with counsel for the Respondent to the extent that Law Society publications warning lawyers to be on the alert for fraudsters do not particularly assist with the analysis required in this case. This case does not involve a lawyer as dupe to a fraudster. It is therefore unnecessary for the Hearing Panel to analyze the "anti-fraud" bulletins cited by counsel for the Law Society.

[63] We also agree with the Law Society that we need not determine whether lawyers in 2011 to 2012 were subject to a "stand-alone" obligation not to permit funds to be transacted through their trust accounts, except when related legal services were provided. The citation against the Respondent alleges that *one or more* of the Respondent's failures to caution unrepresented parties, and to provide substantial legal services in connection with the trust transactions, constitutes professional misconduct. In the agreed statement of facts, the Respondent admits that his conduct in respect of *both* omissions constitutes misconduct. Counsel for the Respondent explained at the Hearing that it is the "two things together" that constitute the misconduct in this case.

[64] We are satisfied that the Respondent's global admission of misconduct is correct. The Respondent's decision to allow the Client to process three transactions through the Trust Account, although he did *no* legal work in connection with those transactions, is an element of his professional misconduct in respect of the Depositor 1, 2 and 3 transactions.

[65] Lawyers' trust accounts are not the same as ordinary bank accounts. They exist to allow lawyers to complete transactions in which the lawyer acts as legal adviser and facilitator: *Skogstad* facts. Transactions that flow through a lawyer's trust account are, therefore, cloaked by solicitor-client privilege. Solicitor-client privilege is stringently protected. It has been described "as close to absolute as possible": *Canada (Attorney General) v. Federation of Law Societies*, 2015 SCC 7 at para. 44.

[66] It has long been understood that lawyers must guard against potential misuse of their trust accounts precisely because solicitor-client privilege applies to lawyers' trust transactions for clients. The principle that a lawyer's trust account should be used only in connection with the lawyer's legal work for the client is the profession's basic firewall against the abusive use of trust accounts. *Skogstad* facts affirmed the importance of maintaining this firewall.

[67] In *Skogstad* facts, the hearing panel found that the respondent had committed professional misconduct by failing to provide the caution required by Chapter 4, Rule 1 of the *Handbook.* In the course of so finding, the hearing panel dealt with the respondent's decision to allow his firm's trust account to be used as a means for investors to funnel investment proceeds to the lawyer's client. The hearing panel said at para. 61:

> Trust accounts must only be used for the legitimate commercial purposes for which they are established, namely to aid in the completion of a transaction in which the lawyer or law firm plays a role as legal advisor and facilitator. The Respondent … was merely a convenient and apparently legitimate conduit for funds from the individual investors to the various schemes decided upon by F for V. The trust account served no legitimate role in these events and should not have been so employed.

[68] This passage was later adopted and applied by the hearing panel in *Law Society of BC v. Gurney*, 2017 LSBC 15 at para. 79.

[69] The facts at issue in *Skogstad* facts are distinguishable from the instant case, in as much as the lawyer's client in *Skogstad* 2008 was involved in fraud. There is no evidence of fraud in this case. Nonetheless, the lawyer's duty to ensure that their trust account is used for the purposes for which it was intended does not depend on whether the client's eventual use of money paid through the trust account proves to be illicit. To maintain public confidence in the profession, a trust account must only be used for the legitimate commercial purpose for which it was established; it must "not be used as a convenient conduit": *Gurney* at para. 79.

[70] In 2011 to 2012, the Respondent ought to have known that he was professionally obliged not to permit his trust account to be used for transactions that were unconnected to legal work. We therefore find that the Respondent's failure to provide any substantial legal services in connection with the Depositor 1, 2 and 3 trust transactions is part and parcel of his professional misconduct in respect of those transactions.

## DISCIPLINARY ACTION

[71] Having found the Respondent culpable for professional misconduct under s. 38(4) of the *Act*, the Hearing Panel is required to impose disciplinary action: s. 38(5) of the *Act*. By statute, penalties may range from a reprimand to disbarment. The hearing panel has a measure of discretion in determining the appropriate disciplinary action: *Law Society of BC v. Lessing*, 2013 LSBC 29 at paras. 49 to 51.

Our paramount concern is to uphold and protect the public interest in the administration of justice: s. 3 of the *Act*.

[72] The parties jointly submit that a two-week suspension is an appropriate disciplinary action for the Respondent's misconduct. Having regard to the particular facts of the case, we agree.

**The legal framework**

[73] The legal framework for determining an appropriate disciplinary action where professional misconduct is proven is elaborated in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, in *Lessing* and in *Law Society of BC v. Faminoff*, 2017 LSBC 04.

[74] The imposition of disciplinary action is an individualized process: *Faminoff* at para. 84. Generally speaking, however, the hearing panel will aim to balance the protection of the public interest and allowing the lawyer to practise. In the event of conflict between these two factors, however, the protection of the public will prevail: *Lessing.*

[75] *Ogilvie* sets out a range of factors that may be considered in disciplinary dispositions:

(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 on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed disciplinary action 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.

[76] The *Ogilvie* factors are guidelines and not a straightjacket. They are to be applied through the lens of what is required to protect the public interest in the circumstances of the given case: *Law Society of BC v Straith*, 2020 LSBC 11 at para. 95. Accordingly, not all *Ogilvie* factors will come into play in every case, and the relative weight of the applicable factors may vary from case to case: *Lessing* at para. 56.

**Factors and considerations applicable in the present case**

[77] The relevant *Ogilvie* factors may be conveniently grouped as follows.

**Circumstances related to the proven misconduct**

[78] The Respondent's misconduct in relation to the Depositor 1, 2 and 3 transactions was serious. The Hearing Panel is struck by the fundamental nature of the Respondent's failings and the repetitive nature of the misconduct. The duty to caution under Chapter 4, Rule 1 of the *Handbook* and the requirement to act as gatekeeper to one's trust account are elemental professional obligations. The Respondent's failures to meet these basic standards of professional conduct in three different transactions supports the imposition of a suspension, rather than a lesser penalty.

[79] There is no evidence of loss in the Depositor 2 and 3 transactions, although the Respondent's misconduct certainly created conditions where loss could have occurred. The facts do not disclose whether Depositor 1 or anyone connected with him sustained loss. We do, however, harbour serious doubts about Depositor 1's credibility. His conviction for money laundering and his false claim that the funds he deposited into the Trust Account were subject to an escrow agreement do not inspire confidence in the veracity of his complaint that he suffered loss in the Depositor 1 transaction.

[80] The Hearing Panel also appreciates that there is no evidence of fraud in the Depositor 1, 2 and 3 transactions, and that the Respondent's misconduct in respect of them was not dishonest. He neither sought nor enjoyed gain from his

misconduct. Inattention, rather than intention, lay at the root of the Respondent's culpable acts and omissions.

[81] We consider that the mitigating factors in the circumstances of the proven misconduct are relevant to the appropriate length of suspension, rather than to whether a suspension is warranted.

**The Respondent's circumstances**

[82] The Respondent has been in practice since 1993. He has no disciplinary history.

[83] The Respondent admitted to his misconduct after the amended citation was issued. He expressed regret that his acts and omissions gave rise to a complaint and investigation against him. He has also given his written commitment to the Tribunal to strictly comply with his professional obligations under the Law Society Rules and the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

[84] The Law Society and counsel for the Respondent submit that specific deterrence is not a factor in this case, but both submit that a two-week suspension is necessary. We accept that, in all the circumstances, a suspension of two weeks is required.

**Guidance from prior cases**

[85] Prior cases provide limited guidance with respect to the appropriate disciplinary action in this case.

[86] There are numerous cases in which a lawyer has been disciplined for failing to provide the caution required by Chapter 4, Rule 1 of the *Handbook.* Some of these are cases in which the disciplinary action was determined pursuant to the consent resolution process provided for in Rule 4-30. Three examples of Chapter 4, Rule 1 decisions are: *Law Society of BC v. Ebrahim*, 2010 LSBC 14; *Law Society of BC v. Jensen*, 2015 LSBC 10; and *Law Society of BC v. Dent*, 2016 LSBC 05 ("*Dent* DA"). In those cases, the respondents were subject to a fine and a reprimand or a fine and costs. It is important to note, however, that *Ebrahim*, *Jensen* and *Dent* 2016 did not involve an additional allegation that the respondent received and disbursed trust funds without providing substantial legal services in connection with the trust transactions.

[87] *Hops*, *Skogstad* DA and *Gurney* were decisions involving use of the respondent's trust fund in the absence of the respondent providing significant legal services to the client.

[88] In *Hops*, various misconduct allegations were made in relation to the receipt into the respondent's trust account of approximately $300,000. The money was sent in a series of wire transfers by an unrepresented third party intending to make investments in a client's investment scheme. The scheme was fraudulent. The only part of the citation that was proved was the respondent's failure to give the caution required by Chapter 4, Rule 1 of the *Handbook*. The hearing panel ordered a reprimand, a fine of $10,000 and costs of $7,500. In arriving at the disciplinary action, the hearing panel noted that the respondent was not involved in the investment transactions and had permitted his trust account to be used as a vehicle for a fraud. On review, the Benchers reduced the fine and costs to $3,000 each, on the footing that the respondent's conduct should not be described as "dishonourable or disgraceful" but was better described as "unbecoming as being contrary to both the best interests of the public and the legal profession, and tended to harm the standing of the legal profession": *Hops* at para. 59.

[89] We find *Hops* to be of limited assistance in assessing the appropriate disciplinary action in this case. The penalty in *Hops* turned on the "peculiar nature" of the transactions through the respondent's trust account, and the respondent's failure to question the business efficacy of their underlying transactions: *Hops* at paras. 53 and 59. Those circumstances are different from the circumstances prevailing in the present case.

[90] In *Skogstad* DA (which is the disciplinary action decision in the proceedings at issue in *Skogstad* facts), the respondent was found to have committed misconduct by failing to give the Chapter 4, Rule 1 caution and by failing to record the source of all funds he received, contrary to Rule 3-60 of the Law Society Rules then in effect. The hearing panel heard joint submissions on penalty and accepted them. The panel imposed a three-month suspension and ordered the respondent to pay $20,000 in costs. As discussed above, the respondent's client in *Skogstad* facts and DA was engaged in fraud.

[91] *Gurney* involved misconduct arising from the respondent receiving into and disbursing from trust more than $25 million over the course of seven months in 2013. The funds were received and paid out in relation to the client's credit and lending scheme. The circumstances of the transactions were suspicious. The hearing panel found that the respondent had failed to make reasonable inquiries about the circumstances of the transactions, including the subject matter and objectives of his retainer, and had failed to provide any substantial legal services in connection with the trust matters. The hearing panel ordered a six-month suspension, with conditions on return to practice, and disgorgement of the $25,845 fee that the respondent had earned as a result of his misconduct. In assessing the

disciplinary action, the hearing panel treated the amounts and frequency of the transactions as aggravating factors. The panel also took into account the respondent's lack of understanding of the nature and extent of his misconduct, his age and his long experience as a solicitor, having been called to the bar in 1968. The panel expressed concern about the respondent's prospects for rehabilitation.

[92] *Skogstad* DA and *Gurney* offer limited guidance to determine the appropriate disciplinary action in this case. The conduct at issue in those cases was considerably more severe than in the present case, and the circumstances of the disciplined lawyers are distinguishable from the Respondent's circumstances.

**Other public interest considerations**

[93] In considering the appropriate disciplinary action, we have considered what is required to maintain public confidence in the legal profession and to offer general deterrence against similar misconduct in the future.

[94] The misconduct proven in this case is dated. It occurred more than eight years ago. A suspension of two weeks for misconduct that occurred so long ago is sufficient to maintain confidence in the profession now.

[95] Moreover, since the time of the events at issue, the *Handbook* has been repealed and replaced by the *BC Code*.

[96] Section 7.2-9 of the *BC Code* has replaced Chapter 4, Rule 1 of the *Handbook.* The substantive content of section 7.2-9 differs to some extent from the version of Chapter 4, Rule 1 in effect at the time of the Depositor 1, 2 and 3 transactions. Section 7.2-9 now provides:

> When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

[97] The *BC Code* also now contains the following commentaries in respect of section 3.2-7, which provides that a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud:

> [3.1] The lawyer should also make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.
>
> [3.2] The lawyer should make a record of the results of these inquiries.

[98] The development of the *BC Code* since the Respondent's misconduct attenuates the need to factor general deterrence into the length of the suspension called for in this case. The *BC Code* gives contemporary guidance to lawyers on their professional obligations when dealing with unrepresented persons, and in relation to transactions through lawyers' trust accounts.

**Delay**

[99] As noted in para. 30 above, the Law Society's investigation into the Respondent's practice started in February 2013 and continued until the original citation was issued some five and a half years later, on October 25, 2018. The amended citation was issued on February 19, 2020.

[100] Simply put, the investigation into the Respondent and his practice was of extremely long duration. It does not foster public confidence in the Law Society's regulatory process for an investigation into the type of conduct at issue in the Respondent's case to take five and a half years. Counsel for the Respondent did not argue that delay is a defence to the citation, but did argue that it should be taken into account in deciding the length of suspension that ought to apply in this case. The Law Society agreed that it would be appropriate to take delay into account.

[101] Unreasonable delay may be considered in mitigation of penalty: *Christie v. Law Society of BC*, 2010 BCCA 195 at para. 31. We have taken delay into account in finding that a two-week suspension is appropriate in this case.

**DECISION ON DISCIPLINARY ACTION:**

[102] For the reasons set out above, we conclude that a two-week suspension is the appropriate disciplinary action.

[103] At the Hearing of the citation, the Respondent submitted that, if ordered by the Hearing Panel, he would be prepared to start a suspension on May 1, 2020. The Law Society submitted that the "usual order" is that a suspension will commence in the month following the Tribunal's decision. That said, the Law Society did not oppose a May 1, 2020 start date. The Hearing Panel notes that May 1, 2020 is a Friday.

[104] A new consideration has arisen since the citation was heard: the effects of the Covid-19 pandemic. It is unknown to us whether and, if so, how, the Respondent's clients and the public may be affected by the pandemic and this suspension. It is unknown how long British Columbia's state of emergency may persist.

[105] In light of changed circumstances since March 12, 2020, we order that the Respondent be suspended from the practice of law for two weeks beginning May 4, 2020 or such other date as the parties may agree. The Hearing Panel strongly encourages the parties to use best efforts to determine an appropriate date for the Respondent to start his suspension, should May 4, 2020 prove to be unsuitable. If the parties are unable to agree, one of them may apply to vary the start date under Rule 5-12(1)(c).

**COSTS**

[106] Section 46 of the *Act* and Rule 5-11 give the hearing panel jurisdiction over the matter of costs. Rule 5-11(4) provides that the hearing panel may order that no party recover costs.

[107] The parties in this case submit that costs should not be paid by either party. We agree. Although the Law Society has been successful in proving the elements of the first allegation of the amended citation brought to hearing, numerous allegations made in the original citation were withdrawn in the amended citation and the Law Society did not proceed with the second allegation of the amended citation. Moreover, the Law Society abandoned the second allegation of the amended citation, which concerned transactions relating to the non-arms-length company.

[108] In the circumstances, it is appropriate that neither party should have costs.

[109] The Hearing Panel has considered Rule 5-11 and the parties' submissions on costs. We order that no costs are payable by either party.

## CONFIDENTIALITY ORDER

[110] The Client, the Principal and the non-arms-length company have not expressly or impliedly waived solicitor-client privilege over their communications with the Respondent. Likewise, they have not released the Respondent from his duty to keep confidential the details of their affairs. The Respondent therefore seeks, and the Law Society consents to, an order to protect privilege and confidentiality, pursuant to Rule 5-8(2). We order as follows:

(a) If any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any other information that is protected by client confidentiality and solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person;

(b) If any person, other than a party, applies for a copy of the transcript of these proceedings, client names, identifying information, and any other information that is protected by client confidentiality or solicitor-client privilege must be redacted from the transcript before it is disclosed to that person;

(c) No person is permitted to broadcast or publish any client names, identifying information, or any other information protected by client confidentiality or solicitor-client privilege, that was stated in the course of the hearing; and

(d) These redactions also apply to the original citation and the amended citation.

2017 LSBC 15
Decision issued: May 18, 2017
Citation issued: May 9, 2016

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**DONALD FRANKLIN GURNEY**

**RESPONDENT**



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# DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

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| | |
|---|---|
| Hearing dates: | November 29, 30, and December 1, 2016<br>January 20, 2017 |
| Panel: | Phil Riddell, Chair<br>Glenys Blackadder, Public Representative[1]<br>Gillian Dougans, Lawyer |
| Discipline Counsel: | J. Kenneth McEwan, QC and Trevor Bant |
| Counsel for the Respondent: | Paul E. Jaffe |

## INTRODUCTION

[1] Donald Franklin Gurney (the "Respondent") is a practising member of the Law Society of British Columbia (the "Law Society"). The citation was authorized on May 5, 2016 and issued on May 9, 2016. The citation states:

> Between May 2013 and November 2013, you [the Respondent] used your trust account to receive and disburse a total of $25,845,489.87[2] on behalf

[1] Ms. Blackadder did not participate in the preparation of these reasons, and was not a member of the panel of January 20, 2017.

of your client, C Inc. without making reasonable inquiries about the circumstances, including the subject matter and objectives of your retainer, and without providing any substantial legal services in connection with the trust matters. In particular, you did one or more of the following:

(a) in May 2013, you received and disbursed $5,849,970 in connection with your client's matter with G Capital;

(b) between July 2013 and August 2013, you received and disbursed $6,361,121.67 in connection with your client's matter with I Ltd.;

(c) in July 2013, you received and disbursed $7,439,445 in connection with your client's matter with A LLC or in the alternative with D Inc.;

(d) in November 2013, you received and disbursed $6,239,953.20 in connection with your client's matter with Q Group.

This conduct constitutes professional misconduct, pursuant to section 38(4) of the *Legal Profession Act*.

[2] The Law Society case was entered by way of a Notice to Admit, and the Respondent's case was entered by way of a Notice to Admit and the *viva voce* evidence of the Respondent.

[3] The authorization and service of the citation were admitted by the Respondent.

[4] The Respondent made a preliminary application to have the citation quashed on the basis of vagueness and abuse of process. That application was dismissed and our reasons follow.

## COMPOSITION OF THE HEARING PANEL

[5] Ms. Blackadder was a member of the hearing panel for the first three days of the hearing, but had to withdraw not only from this hearing panel, but also from the hearing panel pool as a result of health issues. On January 5, 2017 the President of the Law Society made an order pursuant to Rule 5-3(1) that the hearing continue with the remaining panel members. Ms. Blackadder did not participate in this decision.

[2] All references to specific amounts of money are in Canadian funds unless otherwise indicated.

**RULING ON APPLICATION TO QUASH CITATION**

[6] When the matter came on for hearing before us, the Respondent advised that he was making a preliminary motion to quash the citation.

[7] Counsel for the Respondent advised that notice of this application was not required, but in fact he had advised counsel for the Law Society that he was bringing this application. Both parties were prepared to argue it on the first day of the hearing.

[8] The hearing of the application to quash occupied the first day of the hearing.

[9] On the second day of the hearing we dismissed the application to quash the citation with reasons to follow. These are the reasons for dismissing the application to quash the citation.

[10] The Respondent sought to have the citation quashed on the basis of vagueness and abuse of process and violation of the Respondent's rights under section 7 of the *Canadian Charter of Rights and Freedoms*.

[11] In respect of the *Charter* argument, the Panel determined that the Respondent was required to give notice to the Attorney General pursuant to the *Constitutional Question Act*, RSBC 1996, c. 68, section 8(2), which states:

> If in a cause, matter or other proceeding
>
> (a) the constitutional validity or constitutional applicability of any law is challenged, or
>
> (b) *an application is made for a constitutional remedy*,
>
> the law must not be held to be invalid or inapplicable *and the remedy must not be granted* until after notice of the challenge or application has been served on the Attorney General of Canada and the Attorney General of British Columbia in accordance with this section.
>
> [emphasis added]

[12] The Respondent advised the Panel that he would not proceed with the *Charter* argument at that time. We ruled that the Respondent could raise the *Charter* argument at some later point in the hearing, if he elected to, but he did not and so the *Charter* argument was not made.

**Submissions of the Respondent**

[13] Counsel for the Respondent posed several questions: What is the Respondent obliged to defend? What is the evil? What is the underlying social protection? What did he do wrong?

[14] The Respondent argued that the purpose of this hearing should be to make a legal determination of professional misconduct based on specific criteria and not a policy debate.

[15] The Respondent quoted the test for professional misconduct from *Law Society of BC v. Martin,*[3] as set out in *Law Society of BC v. Derksen*[4] at para. 13:

> What constitutes professional misconduct is not defined in the Act or the Rules or described in the *Code of Professional Conduct*. Since the decision by the hearing panel in *Law Society of BC v. Martin*, the vast majority of panels have adopted as a test for professional misconduct whether the conduct of the lawyer in question exhibited a "marked departure" from the standard of conduct the Law Society expects of lawyers. This is a subjective test that must be applied after taking into account *decisions of other hearing panels, publications by the Law Society, the accepted standards for practice* currently accepted by the members of the legal profession in British Columbia and what, at the relevant time, is required for *protection of the public interest*.
>
> [emphasis added]

[16] The Respondent submits that, without any parameters for the test in *Martin* the hearing will be a "standardless sweep". The Respondent says money laundering was suggested by the Law Society, but the citation does not allege money laundering or any particular misuse of the trust account.

[17] The Respondent argued that the standard of conduct must not be the subjective view of what the Panel members personally think is a best practice and they must exercise their authority within a legal framework. Put another way, the Panel must not legislate standards for practice after the fact but must adjudicate using standards that are known or ascertainable in advance.

[18] The Respondent says there are three problems with the citation:

[3] 2005 LSBC 16
[4] 2015 LSBC 24

(a) First, the wording of the citation does not specify the specific acts and/or omissions constituting the alleged misconduct. The specific phrases in the citation that are at issue are "without making reasonable inquiries" and "without providing any substantial legal services." No specific misconduct is alleged and none is evident from the wording of the citation;

(b) Second, it is not clear if the citation alleges one or two offences; i.e. is the word "and" conjunctive or disjunctive; and

(c) Third, the citation is void of any context in which to understand the charge and does not refer to a breach of a particular rule. The term "professional misconduct" is not defined in Rule 38(4).

[19] The Respondent argues that the citation is an abuse of process if the alleged evil is money laundering or terrorist financing activity. The Respondent says that issue was decided in the *Federation of Law Societies*[5] case in which the Supreme Court of Canada decided that the rules enacted by the law societies across Canada reflected an effective standard of practice in response to the risk of money laundering and/or terrorist activity financing. The Respondent claims it is an abuse of process to revisit the findings in the *Federation of Law Societies* case.

[20] The Respondent argues that he does not know the case he faces and that is a violation of procedural fairness. The Respondent says he is unable to make a full answer and defence.

**The decision of the President's designate on an application for the disclosure of the circumstances**

[21] On September 30, 2016 the Respondent made an application for disclosure of details of the misconduct alleged in the citation pursuant to Rule 4-35. That application was dismissed on November 3, 2016 with reasons issued on November 23, 2016 by the President's Designate. Those reasons set out the following:

(a) The Respondent made a request for particulars on June 29, 2016 and, by letter of the same date, counsel for the Law Society referred counsel for the Respondent to the disclosure of the Law Society's case and provided examples to support the allegation that the Respondent provided no substantial legal services in connection with the subject transactions;

[5] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401

(b) On July 20, 2016 the Law Society served a Notice to Admit on the Respondent, and the Respondent provided his Response on August 8, 2016;

(c) The President's Designate found that further particulars had been delivered by the Law Society, both in the letter to counsel for the Respondent of June 29, 2016 and in the extensive Notice to Admit dated July 20, 2016;

(d) There is no requirement to allege that a respondent has contravened a specific provision of the *Act*, Rules or *Handbook* and that professional misconduct may be found in conduct outside the scope of any specific provision of the *Act*, Rules or *Handbook* as set out in *Law Society of BC v. Christie*;[6]

(e) The Respondent's application for particulars was dismissed and the President's Designate found that the allegations contained in the citation, together with the letter of June 29, 2016 and the Notice to Admit dated July 20, 2016 provided the Respondent with sufficient details of the circumstances of the alleged misconduct and reasonable information about the act or omission to be proven.

**Submissions of the Law Society**

[22] The Law Society's position on this preliminary application is that the President's Delegate has already found the citation to be valid; that the citation and the correspondence between counsel has provided the Respondent with sufficient details of the alleged misconduct; and that whether the Respondent's conduct amounts to professional misconduct is a question of law that depends on whether it represents a "marked departure from that conduct the Law Society expects of its members": *Martin*.

[23] The Law Society's letter of June 29, 2016 advised the Respondent of the following:

(a) That the Respondent had already been provided with disclosure of the Law Society's case including the four complete client files and the transcript of Mr. Gurney's interview with Mr. Wedel, which together provided a complete picture of the services rendered by the Respondent in connection with the four transactions set out in the citation;

[6] 2006 LSBC 38

(b) That the allegation of "no substantive legal services" was based on the Respondent's services that consisted solely of receiving and immediately disbursing $26 million in offshore funds by converting the funds into bank drafts. In particular:

(i) That the Respondent made only pro forma inquiries about the transactions,

(ii) That the Respondent knew little about the borrower, its business, its principal, the purpose of the loans, the relationship between the borrower and B House, the lenders, their businesses, their principals, their relationship to B House or C Inc.;

(c) That the above services were done in circumstances that should have raised the Respondent's concerns about the transactions for the following reasons, which would form the basis for "reasonable inquiries":

(i) newly incorporated borrower,

(ii) substantial offshore funds,

(iii) unknown lenders,

(iv) lack of security,

(v) mistakes in the line of credit agreements,

(vi) loans arranged through a former lawyer involved with past securities fraudsters,

(vii) short turn-around time, and

(viii) the legal fee was based on a percentage of the money flowing through the Respondent's trust account;

(d) That the Respondent made only pro forma inquiries about the transactions. "In other words, anything to explain why companies in Nevis/Marshall Islands/Belize would lend a total of $26 million to a newly incorporated BC company with, as far as he knew, no assets and no plans."

[24] The Law Society's Notice to Admit dated July 20, 2016 set out the evidence on which the Law Society would rely to prove the citation. This provided the Respondent with further particulars of the case he would have to meet. Forty-three

documents and 184 facts that included hypothetical inquiries the Law Society would allege the Respondent could have made as "reasonable inquiries": paras. 85 to 95, 99,101, 140, 141, 149, 157 and 158.

[25] The Respondent's counsel, Mr. Jaffe, wrote to the Law Society on August 8, 2016. In that letter Mr. Jaffe rejected the Law Society's letter of June 29, 2016 as argument and repeated his complaint that the citation did not refer to any specific rule(s) that the Respondent allegedly broke and asked if the use of the word "and" in the citation was disjunctive (meaning that there were two separate charges in the citation – use of the trust account without providing substantial legal services and a failure to make reasonable inquiries). The Law Society responded in a letter dated September 6, 2016, referring Mr. Jaffe to the Commentary to rule 3.2-7 and making clear that the Respondent was alleged to have done one thing wrong – he allowed his trust account to be used without making reasonable inquiries and without rendering any substantial legal services.

[26] In response to the argument that this hearing would be an abuse of process as a re-litigation of the *Federation of Law Societies* case, counsel for the Law Society said that it would be an astounding proposition if the Respondent was saying that he only needs to meet the no-cash and client ID requirements for the use of his trust account.

[27] The Law Society's case is that the Respondent failed to exercise his role as a gatekeeper for his trust account. The Law Society does not have to prove that any particular use was made of the Respondent's trust account.[7]

[28] The Respondent's preliminary application to quash the citation is essentially the same complaint as the demand for particulars except that he asks that the citation be set aside as a nullity.

[29] The Panel is not bound by the decision of the President's Delegate, nor was the Panel was asked to review the decision. We were free to come to our own decision.

[30] Rule 4-18 of the Law Society Rules provides as follows:

### Contents of citation

**4-18** (1) A citation may contain one or more allegations.

(2) Each allegation in a citation must

(a) be clear and specific enough to give the respondent notice of the misconduct alleged, and

[7] *Elias v. Law Society of British Columbia* (1996), 26 BCLR (3d) 359, 1996 CanLII 1359 (CA)

(b) contain enough detail of the circumstances of the alleged misconduct to give the respondent reasonable information about the act or omission to be proven against the respondent and to identify the transaction referred to.

[31] The Respondent was previously advised that the use of the word "and" in the citation was conjunctive and therefore the citation referred to one act of misconduct – that of using his trust account to receive and disburse a total of $25,845,489.87 on behalf of one client without making reasonable inquiries about the circumstances and without providing any substantial legal services.

[32] The Respondent was given several hypothetical examples of "reasonable inquiries".

[33] The case the Respondent must meet is clear. In respect of the four transactions listed, the Law Society must prove that he failed to make reasonable inquiries, which will depend on the Respondent's evidence of what he did or did not do; and that he did not provide any substantial legal services, which, again, will depend on the Respondent's evidence of what he did or did not do. After that, it is a legal issue as to the sufficiency of the inquiries and the substance of the legal services provided and whether the Respondent's conduct represents a "marked departure from that conduct the Law Society expects of its members."

[34] We reject the argument that this hearing would be an abuse of process as a re-litigation of the issues decided in the *Federation of Law Societies* case. That case examined the right of the federal government to enact legislation requiring lawyers to report on trust account activity involving their clients and the issues were solicitor client privilege and section 7 rights under the *Charter*. This hearing is to decide if the Respondent committed professional misconduct in respect to four transactions involving his trust account.

[35] In the *Federation of Law Societies* case, the Supreme Court of Canada specifically decided that the FINTRAC rules did not apply to lawyers or law firms (and their trust accounts) because the legal profession has developed practice standards relating to the subject of the federal legislation that are evidence of a strong consensus in the profession as to what ethical practices are required. The trial judge stated, "Given the law societies' ongoing mandate and commitment to regulate their members in the public interest, including through specific measures to combat money laundering and terrorist financing, further intrusion has not been demonstrated to be necessary or appropriate."[8]

[8] *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2011 BCSC 1270, at para. 209

[36] It is clear from the decisions in the *Federation of Law Societies* case[9] that the ability of a law society to regulate lawyers' use of trust accounts has been preserved and not limited to the no-cash and client identification rules.

[37] We find that the citation, together with the disclosure made by the Law Society, meets both parts of the test in Rule 4-18. The citation is clear and specific enough to give the Respondent notice of the misconduct alleged, which is that he used his trust account to receive and disburse a sum of money without making reasonable inquiries about the circumstances including the subject matter and objectives of his retainer, and that he did so without providing any substantial legal services in connection with the trust matters.

[38] The Respondent has been given enough further detail of the circumstances of the alleged misconduct so as to have reasonable information about the act or omission to be proved and the citation sets out the four particular trust transactions in issue.

[39] The Respondent's application to quash the citation is dismissed.

**FACTS**

[40] The case for the Law Society was put in by way a Notice to Admit; the Respondent also filed a Notice to Admit. The findings of fact are divided into facts from the Notices to Admit and the facts found from the *viva voce* evidence. The findings of fact based upon the Notices to Admit are set out below.

[41] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 15, 1968.

[42] The Respondent practised with a lawyer, EF, from 1982 to 1989 at the law firm of GH. EF left the law firm of GH in 1989. In 1995 EF was suspended from the practice of law for one year after being found to have committed professional misconduct. In 1999 the Respondent acted for EF with regard to his application for reinstatement and wrote a letter of recommendation to the Law Society Credentials Committee dated February 17, 1999 stating that he had known EF for 18 years, that he had known him to be a person of good character and that he displayed a good grasp of legal matters referred to the Respondent over the four years since EF ceased to be a member of the Law Society.[10] EF's application for reinstatement was subsequently withdrawn.

[9] See also *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2013 BCCA 147
[10] Exhibit #2 Law Society Notice to Admit, Tab 9

[43] EF is currently the sole director of B House. Since EF's suspension, EF had instructed the Respondent with regard to a number of legal matters involving businesses in which EF was involved.

[44] B House is an entity that provides private banking services and some managerial advisory services. Private banking was understood by the Respondent to mean offshore banking that is having "corporations set up offshore that hold assets, money belonging to individuals rather than holding that money with your financial institutions in the country."

[45] The Respondent has no background in securities law or offshore banking. The Respondent's practice experience is in commercial real estate, business law, conveyancing and a "smattering" of foreclosures. He has currently an active commercial lending practice acting for mortgagors and mortgagees and acting for three mortgage investment corporations. The mortgage investment corporations are winding up, having had $30 to $35 million to loan out to the private sector at their peak.

[46] C Inc. is a British Columbia company that was incorporated in December, 2012 and whose sole shareholder as of May 1, 2013 is IJ.

[47] The transactions that form the basis of the citation can be summarized as the Respondent acting for C Inc. to receive funds through his trust account in regard to four line of credit agreements in which C Inc. was the borrower. The line of credit agreements were all unsecured, and the agreements were executed by all contracting parties when received by the Respondent. The agreements were all one page in length and were remarkably similar, except for the parties, the loan value and the choice of forum in the jurisdictional clause. The total amount received and disbursed by the Respondent was $25,845,489.87 as a result of the four line of credit agreements.

**May 2013 Client File [number] re: G Capital**

[48] On May 15, 2013 the Respondent received an email, purportedly from IJ, seeking to retain him to prepare a demand loan in the amount $850,000 between B House and K Equity as the lender to receive and disburse the loan proceeds. The domain name from which the email was sent is one known to the Respondent as being used by EF, his brother and a number of people at B House. The Respondent did not know if the email came from IJ or EF, and it did not matter to the Respondent as he assumed EF was giving instructions on behalf of C Inc. Later on that date the Respondent received a telephone call from EF about the loan between C Inc. and K Equity. The Respondent advised that his fees would be 0.1 per cent of the net

funds received and disbursed through his trust account. The Respondent understood that EF had arranged the loan for C Inc. The Respondent advised EF that the lender (K Equity) would be preparing the loan documentation.

[49] On May 16, 2013 the Respondent received an email from C Inc. attaching an executed line of credit agreement in the amount of $9 million between C Inc. and K Equity with an execution date of May 15, 2013, and copies of C Inc.'s certificate of incorporation, register of directors, register of shareholders, directors resolutions and IJ's driver's licence. The line of credit agreement was a one-page document that showed that K Equity was based in Nevis, it was an unsecured demand loan, C Inc. could borrow up to $9 million, interest was payable at 5 per cent per annum, and the court of Nevis would have jurisdiction over any legal action. On May 24, 2013 the Respondent received an email from C Inc. attaching a new line of credit agreement in the amount of $9 million between C Inc. and G Capital. This agreement had an execution date of May 15, 2013 and was identical in terms to the previous agreement, but for the parties.

[50] On May 28, 2013 the Respondent received a wire transfer in the amount of $5,849,970 into his trust account on behalf of C Inc. The ordering customer was G Capital. The Respondent then purchased a bank draft in the amount of $5,843,418 payable to C Inc., from the funds held on behalf of C Inc. in his trust account.

[51] On May 29, 2013 the Respondent met with EF and IJ at the offices of B House, which are also the registered office of C Inc. Prior to attending at the meeting, the Respondent had reviewed the executed line of credit agreement between C Inc. and G Capital. The Respondent reviewed the minute book of C Inc., viewed IJ's driver's licence, obtained a business card and confirmed his contact information. The Respondent was told that the source of the loan monies was "stocks" and that there was "no illegal purpose." The Respondent had IJ sign, in his personal capacity and in his capacity as a signatory of C Inc., an indemnity agreement indemnifying the Respondent in the event the wire transfer of the loan proceeds was reversed. The Respondent then delivered the bank draft in the amount of $5,843,418 to IJ with his statement of account in the amount of $6,552.

[52] Prior to the Respondent meeting IJ on May 29, 2013, he had met IJ at a few Christmas parties held at the offices of B House, and had not done any prior work for him. The Respondent knew that IJ operated a printing business but "basically knew nothing about him." He did not know anything about the printing business or any of IJ's other business ventures.

[53] It was not until the meeting of May 29, 2013 that the Respondent considered C Inc. to be his client. C Inc. was not the Respondent's client prior to that date.

**June - August 2013 Client File [number] re: I Ltd.**

[54] On June 27 or 28, 2013 the Respondent received a telephone call from EF in relation to a line of credit agreement between C Inc. and I Ltd., a Belize company. The Respondent then opened a file in relation to the matter. On either June 27 or 28, 2013 the Respondent met with EF and IJ at the offices of B House. At that meeting IJ told the Respondent that the line of credit was for "corporate business purposes including investments and the making of loan," "startup loans debt financing to startup companies in the oil and gas and resource industry," and for "no illegal purpose." EF told the Respondent that the loan was arranged by him, and that he provided "banking services to the lender and he was aware of the source of proceeds of the loan, where the money came from and he indicated that it came from stocks and he confirmed that there was no illegal purpose involved in connection with it." The Respondent asked EF and IJ if the funds had anything to do with money laundering or were the proceeds of crime, and was advised that they did not and were not. The Respondent made no other inquiries about I Ltd. such as who the principals or owners were, the status of its incorporation, the identity of the authorized signatories, the source of funds or the existence of additional agreement or guarantees associated with the line of credit agreement.

[55] On June 29, 2013 the Respondent received an email from C Inc. attaching a one-page executed line of credit agreement with an execution date of May 15, 2013 between C Inc. and I Ltd. in the principal amount of $7.6 million. The email advised that the Respondent would be receiving $1,750,000 USD to the Respondent's trust account on July 2, 2013. The Respondent was asked to deliver a bank draft to C Inc. at the offices of B House, less his fees. On July 2, 2013 the Respondent prepared a statement of account in the amount of $2,049.60. On July 3, 2013 the Respondent received a wire transfer in the amount of $1,831,359.30 in his trust account for the benefit of C Inc. On July 3, 2013 the Respondent issued a trust cheque and used it to purchase a bank draft payable to C Inc. in the amount of $1,829,309.70. On that day the Respondent delivered the bank draft and his account to C Inc. care of B House. On July 4, 2013 the Respondent issued a trust cheque to pay his account.

[56] On July 19, 2013 the Respondent received an email from C Inc. stating that he would receive $1.5 million USD to the benefit of C Inc. in his trust account. These funds were to be advanced by I Ltd. on July 22, 2013. On July 22, 2013 C Inc. advised the Respondent by email that the advance would be increased to $1.6 million USD. On July 22, 2013 the Respondent received a wire transfer of $1,637,584.65 into his trust account. On that date the Respondent issued a trust cheque in the amount on $1,635,736.65 to C Inc., which he used on July 23, 2013

to purchase a bank draft payable to C Inc. The Respondent prepared his statement of account in the amount of $1,848 on July 23, 2013. The Respondent delivered the bank draft to C Inc. care of B House and issued a trust cheque to pay his account on July 23, 2013.

[57] On August 5, 2013 the Respondent received an email from C Inc. advising that there would be a further advance in the amount of $1.75 million USD to C Inc. from I Ltd. The funds were advanced on August 6, 2013. On August 7, 2013 the Respondent received a wire transfer into his trust account in the amount of $1,799,859.57 to the benefit of C Inc. The Respondent then prepared his account in the amount of $2,016. On August 7, 2013 the Respondent prepared two trust cheques, one to satisfy his account and one in the amount of $1,797,843.57 payable to C Inc., which he immediately converted into a bank draft. On August 7, 2013 the Respondent delivered the bank draft and his account to C Inc. care of B House.

[58] On August 20, 2013 the Respondent received an email from C Inc. advising that there would be a further advance in the amount of $1.01 million USD to C Inc. from I Ltd. on August 21, 2013. On August 21, 2013 the Respondent received a wire transfer to his trust account in the amount of $1,047,318.15 to the benefit of C Inc. On that date the Respondent prepared his account to C Inc. in the amount of $1,176, issued a trust cheque to satisfy his account, and a trust cheque in the amount of $1,046,142.15 payable to C Inc., which he immediately converted to a bank draft payable to C Inc. On August 22, 2013 the Respondent delivered to C Inc. care of B House his account and the bank draft payable to C Inc.

**July 2013 Client File [number] re: A LLC**

[59] On July 25, 2013 the Respondent received an email from B House attaching a one-page line of credit agreement in the amount of $8.9 million between C Inc. and A LLC of Nevis, and advising that $7.29 million USD would be wired to his trust account on July 26, 2013. On July 25, 2013 the Respondent spoke to IJ and EF about the A LLC transaction. The Respondent made no inquiries regarding the source of funds or inquiries regarding A LLC. The Respondent opened a file regarding A LLC on this date. On July 29, 2013 the Respondent received a wire transfer in the amount of $7,439,445 in his trust account to the credit of C Inc. On July 29, 2013 the Respondent issued his account in the amount of $8,344 to C Inc. On July 30, 2013 the Respondent issued three trust cheques: one to pay his account; one in the amount of $6,441,101 payable to C Inc., which he immediately converted to a bank draft payable to C Inc.; and one in the amount of $990,000 payable to C Inc., which he immediately converted to a bank draft payable to C Inc.

Later on that date he delivered the two bank drafts payable to C Inc. and his account to C Inc. care of B House.

**November 2013 Client File [number] re: Q Group**

[60] On November 13, 2013 the Respondent received an email from C Inc. attaching a one-page line of credit agreement between C Inc. and Q Group of Nevis, executed on November 8, 2013, in the amount of $6.4 million. $6 million USD would be wire-transferred to the Respondent's trust account on November 14, 2013. The proceeds were to be disbursed to pay the Respondent's fees and the balance to be issued in two "cheques/bank drafts" payable to C Inc., divided one-third, two-thirds and delivered to C Inc. care of B House. The Respondent spoke to IJ and EF on the phone regarding the transaction. The Respondent made no inquiries regarding the source or use of the funds. The Respondent opened a file on November 13, 2013.

[61] On November 15, 2013 $6,239,953.20 was received by wire transfer into the Respondent's trust account to the benefit of C Inc. On the same date the Respondent prepared an account in the amount of $7,056 to C Inc. The Respondent then issued three trust cheques: a cheque in the amount of $7,056 to satisfy his account; a cheque in the amount of $2,077,632.40 payable to C Inc., which he immediately converted to a bank draft payable to C Inc., and a cheque in the amount of $4,155,264.80 payable to C Inc., which he immediately converted to a bank draft payable to C Inc. On November 15, 2013 the Respondent delivered his account and the two bank drafts to C Inc. care of B House.

[62] The fee arrangement that was in place for each of these transactions was 0.1 per cent of the value of funds passing through the Respondent's trust account. The Respondent justified this fee based upon "the amount involved and the risk involved."

[63] On a review of the Notices to Admit of the Law Society and of the Respondent, there is no dispute as to the mechanics of the transactions that are subject to the citation in that there is no issue as to when emails were received, when meetings took place, the nature of the documents exchanged, and the amounts involved in and the timing of the financial transactions. The matter at issue is the nature of the inquiries conducted by the Respondent regarding the parties to the transaction, and the sources and uses of the funds that flowed through his trust account. As mentioned in these reasons, the Respondent gave *viva voce* evidence at the hearing, and he was also interviewed as a part of the Law Society investigation on July 11, 2014 (the "Interview"). The Interview was tendered as an admission against interest by the Law Society.

[64] A review of the Interview reveals the following:

(a) The Respondent met IJ a few times at the B House Christmas party eight to ten years previously and had seen him at the party over the years;

(b) The Respondent knew nothing about IJ's business except that he owned a printing company;

(c) The Respondent had no dealings with IJ outside of his dealings with B House and those dealings began in May 2013;

(d) A month prior to the Interview the Respondent was advised by EF that B House had made loans in the oil and gas industry;

(e) The Respondent did not "follow up with what they've [B House] done with the money (the loan proceeds). I [the Respondent] had no personal knowledge of that";[11]

(f) The Respondent has known EF for approximately 30 years. When EF was a lawyer, they had practised together for five to six years at the firm of GH. The Respondent knew that EF had been suspended by the Law Society for breach of an undertaking in 1995, and was aware EF was no longer a lawyer;

(g) The Respondent described his relationship with EF as being "a friend, at least more of an acquaintance, we don't get together socially";[12]

(h) The Respondent understood that B House "provides private banking services and also I understand also it provides some managerial advisory services to various companies and individuals. Other than that I can't tell you in detail …";[13]

(i) The Respondent understood EF to be a principal of B House, but he was unaware of the involvement of others, if any, in the entity;

(j) The Respondent claimed that neither B House nor EF had ever been his client;

(k) The Respondent understood B House to provide "private banking" services, which he understood to mean "I'm referring to offshore

[11] Interview, p. 10
[12] Interview p. 19
[13] Interview p. 19

banking, have corporations set up offshore that hold the assets, the money belonging to individuals rather than holding that money with your financial institution in the country";[14]

(l) The Respondent could not provide examples of the services he understood B House to provide. He had not been involved in offshore banking, and had no training or practice experience in the area of securities law;

(m) C Inc. was the Respondent's client at all material times;

(n) EF advised the Respondent that I Ltd. was "an investment company and that its assets are liquid are basically the result of dealings in the stock market and that EF is aware of the nature of those proceeds and where they come from by reason that he provides banking services to I Ltd."[15] He did not know who the principals or owners of I Ltd. were or its place of operation. The Respondent was not aware of the corporate business purpose apart from making loans that caused C Inc. to enter into the line of credit agreement.

(o) The Respondent's role in the four files that are subject of the citation involved the following:

(i) He did what he "was requested to do," which was to "[r]eceive funds and disburse them primarily,"[16]

(ii) He did not recall providing any specific legal advice, but he would have provided legal advice if asked to;

(iii) He described his role as facilitating the receipt and disbursement of loan advances, and converting the funds from US dollars to Canadian dollars;

(iv) In response to questions as to whether there needed to be a lawyer involved in the transactions, the Respondent stated: "From my point of view, it could have been structured in a different way where a lawyer did not need to be involved, different clients, but that client so desired";[17]

[14] Interview p. 22
[15] Interview p. 27
[16] Interview p. 31
[17] Interview p. 33

(v) The Respondent wondered why he was involved in the transactions. He was not necessarily suspicious of the transactions, but he thought that he had to ask a few questions. This was due to the fact that the transactions were offshore transactions and to their size. He was not uncomfortable about acting after his "due diligence," which consisted of the in-person meetings with EF and IJ and the questions he asked;

(vi) The Respondent's "due diligence" captured in his file notes and consisted of obtaining client verification documents, asking about beneficial ownership and asking if there were any illegal purposes. Specifically he asked IJ and EF if the money was proceeds of crime or from any illegal activity. Both replied that it was not. When asked where the money come from, EF said it was from stocks, and the Respondent did not ask for any further details.

(p) The Respondent acknowledged that the loan transactions were "not a conventional type of loan transaction," but he thought about it and "if the parties agreed to it, private parties, there was not much I was going to say about it";[18]

(q) The Respondent purchased bank drafts from the net loan proceeds from each transaction to avoid the eventuality that the bank might reverse the wire transfer. The purchasing of the bank draft removed the funds from his trust account, so if the wire transfer were reversed the funds were no longer in his trust account;

(r) The Respondent had not been involved in files similar to the transaction involving B House previously in his legal career.[19]

[65] In addition to the Notices to Admit filed by the Law Society and the Respondent, the Respondent gave *viva voce* evidence, and based upon that evidence we make these additional findings of fact.

[66] The Respondent in his *viva voce* evidence stated:

(a) "If you were dealing in offshore money, you would obviously ... have a concern too that money isn't tainted by illegality";[20]

[18] Interview p. 48
[19] Interview p. 61
[20] Transcript Day 1, p. 9

(b) Through the years a number of people who have used the services of EF have become the Respondent's clients;

(c) Prior to 2013 the Respondent had not been involved in any dealings with EF involving offshore money;

(d) In 2013 the Respondent was involved in a couple of real estate transactions involving offshore money. He assumed that EF was involved in the transactions;

(e) Due to his knowledge of EF through the years, the Respondent understood that EF was involved in placing money earned offshore in offshore financial institutions based in countries where there are minimal tax implications;

(f) The Respondent had no concerns regarding the money coming from offshore in that EF was involved. He had known EF for years, all the dealings were positive and there had been no problem. He had no reason to disbelieve EF;

(g) Through the years EF would phone the Respondent with regard to various issues. There would be the occasional lunch;

(h) In 1999, EF had had the Respondent assist him in his dealings with the Law Society, after EF's suspension in 1995. The Respondent dealt with the possible reinstatement of EF, and the possible unauthorized practice of law. This is the evidence that he gave in his evidence in chief, and that should be contrasted against his evidence in cross-examination where his recollection of his dealings with EF and his recollection of his representation of EF was much less precise and the Respondent appeared reluctant to repeat the evidence he had given in chief on this point;

(i) The Respondent in his Notice to Admit included an article from a magazine that showed IJ receiving an award on November 25, 2013 which post-dates the last transaction that is the subject of the citation. The Respondent was not aware of the article until he saw it as part of the Law Society disclosure in this proceeding. The article was irrelevant to the Respondent's knowledge of IJ at the time of the subject matter of the citation;

(j) The Respondent stated that C Inc. did not ask to use his trust account for any of these transactions. As was pointed out in cross-examination,

since the Respondent was being asked to receive and disburse funds on behalf of C Inc., then the only way that he could do that and comply with the accounting rules was to do so through his trust account. The Respondent was also directed to various emails in which he was asking how much would be deposited to his trust account and when those deposits would be made. The position of the Respondent on this point reflects adversely on his credibility. The Respondent also resisted suggestions that his fees were based upon the amount of funds that passed through his trust account. He acknowledged the fee was based upon the amount of money that he received and disbursed. The only way in which he could deal with the funds he received was via his trust account. Despite the Respondent's resistance, we find that the fee structure was based on one tenth of one per cent of the funds passing through his trust account; it is clear that this was the basis of his fee. We find the Respondent's resistance to the proposition adversely affects his credibility. The Respondent continually emphasized in his evidence that he complied with the Law Society client verification rules. It should be noted that the Law Society did not take a contrary position on this issue;

(k) The Respondent's stated concerns about the transactions was the "issue of large sums of money coming from offshore by wire transfer," a concern that there would be no suspicious activity, and to ensure the money would arrive and the transaction would not be reversed. He was concerned about the risk he was taking with regard to the amount of the transaction being in excess of his insurance. He had not stated that he knew the parties and was satisfied of the circumstances involving the transaction;

(l) The Respondent carried out what he repeatedly called his "due diligence" in an essentially identical manner with regard to all four transactions, which included obtaining copies of various portions of minute books of C Inc., obtaining client identification and verification information from IJ, recording EF's phone number and obtaining the following information:

    (i) That there were no illegal purposes or activity involved in transactions;

    (ii) EF advised the source of the funds were "stocks" without any specifics; and

(iii) IJ at one point advised the funds were going to be used for investment in the petroleum industry.

(m) The Respondent made no inquiries into the principals behind the various lenders. He did not know the state of C Inc.'s assets on May 24, 2013. He did not know when various documents were drawn. He did not know anything of IJ's printing business other than it was "successful", or of his other business activities;

(n) The Respondent acknowledged that the transactions that are the subject of the citation were "unconventional";

(o) The Respondent was confident that EF would tell him if there was anything wrong or tainted with the transactions. He relied upon IJ, whom he had only met three or four times at Christmas parties prior to the first transaction, to reply to him accurately when he asked if there was anything "illegal" involved in the transaction;

(p) The Respondent refused to acknowledge an obvious proposition that, once he issued a trust cheque to purchase a bank draft, the funds had left his trust account. He continually took the position that he could reverse the bank draft and the funds would be returned to his trust account. His own evidence acknowledges implicitly that the funds had left his trust account when he purchased a bank draft with them. Otherwise, why would he have to reverse the purchase of the bank draft to return the funds to his trust account? The failure to acknowledge this obvious proposition we find adversely affects the Respondent's credibility;

(q) The Respondent did not participate in the negotiation of any of the transactions, but he said "I knew EF on the one side, and I knew that IJ on the other side, and that's the bargain that was struck";[21]

(r) The Respondent placed reliance upon EF and his previous dealings with EF. In his examination in chief he stated that, other than the disciplinary action with the Law Society, he knows of no other discreditable conduct on the part of EF. He was examined regarding the lawsuit that named the law firm in which he and EF were partners, and took the position that the lawsuit was not a concern of his or the firm given that the insurer was dealing with it. He said he would have been concerned with the firm's reputation. He said that he paid no attention to the lawsuit, which

[21] Transcript Day 2, pp. 162-63

revolved around EF's breach of undertaking. This is the same breach of undertaking that led to EF's one-year suspension from the practice of law. Given that the law firm had a relatively small partnership we find it difficult to accept that, in that environment, a partner would not take an interest in a lawsuit involving one of his partners for a breach of undertaking, even to the extent that such a lawsuit could adversely impact the reputation of the firm. EF resigned from the partnership in 1989 and subsequently applied to re-enter the partnership. The partners did not allow this to occur. We do not find the position taken by the Respondent to be reasonable in light of the size of the firm, and the nature of the allegations against EF. In light of these facts we do not accept the evidence of the Respondent that he had little or no knowledge of EF's actions as they dealt with the lawsuit and his subsequent suspension;

(s) The Respondent was vague with regard to his representation of EF in his attempts to obtain reinstatement to the Law Society after EF's suspension. He was evasive in cross-examination with regard to the nature of the activities of EF that were of interest to the Law Society at the time.

[67] We find that Respondent was not credible in his evidence to the Panel, in particular when it deal with issues of:

(a) His knowledge of EF's previous misconduct, and the fact that EF's previous misconduct did not make the Respondent suspicious of offshore dealings involving EF. We question how a partner in a small law firm that is being sued for the misconduct (the breach of an undertaking) of another partner would not take any interest in the litigation, leaving it in the hands of the insurer. This strains credibility, and we rely upon *Faryna v. Chorny*[22] and the comments of O'Hallaran, JA who stated: "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." The Respondent's evidence on this issue is not "in harmony with the preponderance of probabilities";

(b) We find that the Respondent was evasive in his evidence with regard to calculation of his fees based upon the amount of money flowing through his trust account;

[22] [1952] 2 DLR 354, 1951 CanLII 252 (BCCA)

(c) We note that, throughout portions of his evidence, particularly under cross-examination, he was evasive in that he would not answer questions put to him and was self-serving with regard to his knowledge of the Law Society accounting rules.

[68] Regardless of our findings on credibility the issue to now be decided is whether the Law Society has proved its case.



## SERVICE OF CITATION

[69] Rule 4-19 requires the Law Society to serve the Respondent with the citation. This was done on May 11, 2016.

## PRINCIPLES

[70] The Law Society bears the onus of proof on the balance of probabilities: *Law Society of BC v. Ben-Oliel*.[23]

[71] In determining if the Respondent's conduct constitutes professional misconduct the test was set out in *Martin*:

> The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.

## ANALYSIS

[72] The Respondent has argued that the citation issued in this matter deals with an issue of policy versus standards. He has relied upon the decision of the Newfoundland Court of Appeal in *Council for Licensed Practical Nurses v. Walsh*[24] to support this stated proposition that "[t]he applicable standard of conduct is not to be invented in response to the circumstances of any given case."[25] The difficulty with this argument is that the courts have confirmed that the legislature has delegated to the Law Society the power to determine whether a lawyer is guilty of professional misconduct or of conduct unbecoming.[26] There are provisions in

[23] 2016 LSBC 31, at para. 7
[24] 2010 NLCA 11, para. 43 to 45
[25] Respondent's Final Submissions at para. 35
[26] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at p. 889 and 890; *Elias*; *Foo v. Law Society of British Columbia*, 2017 BCCA 151.

the *Code of Professional Conduct for British Columbia* (the "*Code*") and case law that pre-existed the issuance of the citation that deal with the obligation on a lawyer regarding the use of trust accounts.

[73] Counsel for the Law Society set out the relevant provisions of the *Code* in his final submission, and we set out those sections below:

> 2.2-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> **Commentary**
>
> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> 3.2-7 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.
>
> **Commentary**
>
> [1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services ...
>
> [3] Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has

the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.

[3.1] The lawyer should also make inquiries of a client who:

(a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter ...

[74] The position of the Law Society regarding the duties of a lawyer regarding the use of his trust account was set out as follows:

(a) Trust accounts must only be used for the legitimate commercial purpose for which they are established, namely to aid in the completion of a transaction in which the lawyer or law firm plays a role as a legal advisor and facilitator. The Respondent had no such role; he was merely a convenient and apparently legitimate conduit for funds;[27]

(b) Where the circumstances of a proposed transaction are such that a lawyer should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the lawyer on an objective test that the transaction is legitimate;[28]

(c) A finding of professional misconduct can be established in the absence of a finding that the source of funds came from an illegitimate source. It is the objectively suspicious nature of the transaction that gives rise to the duty to carry out inquiries. A lawyer cannot delegate the duty to enquire to someone else;[29]

(d) A lawyer's duty of loyalty to his client requires him to take appropriate steps to ensure his services are not being used for "improper ends";[30]

(e) Solicitor-client privilege is available to foster open and candid communication between solicitor and client. The solicitor is bound by the privilege. It is said to be the only "absolute" privilege. This creates

[27] *Law Society of BC v. Skogstad*, 2008 LSBC 19 at para. 61
[28] *Elias*, at para. 9, quoting the Bencher review decision
[29] *Law Society of BC v. McCandless*, 2010 LSBC 03 para. 43, 51; *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD 44 para. 25-27; *Holy v. Law Society*, [2006] EWHC 1034 para. 23, 24, 35
[30] *Federation of Law Societies* (SCC), para. 93

a situation in which transactions flowing through a solicitor's trust account are cloaked in solicitor-client privilege.[31]

[75] The position taken by the Respondent in his submissions on the issues that have not been already discussed deal with the following issues, and we use the headings used by the Respondent in his final submission:

**The Irrational Charge**

(a) There has to be a causal connection between the use of a trust account and some kind of wrongdoing;

(b) The use of the trust account must facilitate the wrongdoing;

(c) How the funds being in the Respondent's trust account could possibly have enabled fraudulent or dishonest purpose remains a mystery;[32]

(d) There is no evidence the use of the Respondent's trust account could have facilitated wrongdoing;

(e) The use of the Respondent's trust account to receive and disburse funds could not obscure the use of funds;

(f) FINTRAC would have recorded the deposit of funds into the Respondent's trust account;

(g) The Respondent kept the accounting documents required by the Law Society trust accounting rule.

**The FLS (Federation of Law Societies) Litigation**

(a) The Respondent agrees with the Law Society that: "It would be perverse if the *Federation* cases, which affirmed the importance and effectiveness of robust self-regulation by the Law Society, had the effect of limiting the Law Society's power to regulate the legal profession in the public interest";

(b) The Law Society has acknowledged that the same rules that were in effect at the time the Supreme Court of Canada dealt with the FLS Litigation are in effect now;

[31] *R. v. McClure*, 2001 SCC 14, [2001] 1 SCR 445, para. 31-33; *Andrews v. Law Society of BC*, [1989] 1 SCR 143, at pp. 187-188.
[32] Respondent's final submission para. 39.

(c) Both directly and by adopting the FLS's position, the Law Society successfully asserted that the rules that it has enacted (which it admits the Respondent complied with) effectively ensured that lawyers are not a gateway for money laundering;[33]

(d) This is an abuse of process because the Law Society is now taking a position that, although the Respondent complied with the rules that were at issue in the FLS litigation, he has now professionally misconducted himself.

**Other Law Society Publications**

(a) Reference is made to a variety of Law Society publications that set out the effectiveness of the client identification and verification "scheme";

(b) A publication that states: "Our rules also specify that a lawyer can only accept electronic transfers from banks in countries that have adopted similar anti-money laundering measures." This publication must mean the source of funds in this case had already been subject to regulatory scrutiny before arriving in Canada.[34]

**"Suspicious" and "Use of your trust account"**

(a) The submissions dealing with these two headings which we have incorporated into one deal with an analysis of the evidence.

**Substantive legal services**

(a) The Respondent gave evidence that he used his trust account in conjunction with providing legal services;

(b) There is no definition of "legal services" in any British Columbia enactment or case law.

**Culpability principle**

(a) Does the Respondent's conduct display the degree of culpability that can be the basis for a finding of professional misconduct?

[33] Respondent's final submission para. 59
[34] Respondent's final submissions para. 68 and 69.

[76] The Respondent has repeatedly raised the effect of the decisions for the various courts in the *Federation of Law Societies* and has tried to use the argument of the decisions as they deal with the client identification and verification rules and the "no-cash" rule to argue that compliance with those rules in conjunction with the Law Society trust accounting rules are the full scope of a lawyer's obligation with respect to the use of his trust account. The underlying difficulty with this argument is that these rules (client identification and verification and the "no-cash" rule) were found "to augment long-standing law society rules prohibiting lawyers from engaging in illegal activity by preventing lawyers from being unwittingly involved in money laundering and terrorist financing, while maintaining the long-standing principles underlying the solicitor-client relationship."[35] Gerow J. then went on to say: "Given the law societies' ongoing mandate and commitment to regulate their members in the public interest, including through specific measures to combat money laundering and terrorist financing, further intrusion has not been demonstrated to be necessary or appropriate."[36]

[77] The *Federation of Law Societies* decision does not limit the ability of the Law Society to govern lawyers' professional conduct, in particular with regard to the use of a lawyer's trust account.

[78] We find that lawyers have a number of duties to fulfill before allowing their trust accounts to be used. We accept the submissions of the Law Society with regard to these duties. The Respondent's submissions with regard to these duties have been dealt with above, and we find that those submissions on the law limiting lawyers' duties to compliance with the client identification and verification, "no-cash" and trust accounting rules were not supported by the authorities cited in those submissions.

[79] We find lawyers' duties with regard to the use of their trust accounts are contained in the *Code* provisions that were set out above as part of the Law Society submission, and more particularly encompass the case law cited by the Law Society in its submissions. They are:

(a) A lawyer's trust accounts are to be used for legitimate commercial purposes for which they are established, the completion of a transaction, where the lawyer plays the role of legal advisor *and* facilitator. They are not to be used as a convenient conduit.[37] Even where other authorities, such as FINTRAC, may be aware of the source of the funds entering an

[35] At para. 23
[36] Para. 209. Quoted with approval by BCCA at para. 145
[37] *Skogstad*, at para. 61; *Code* 3.2-7

account, the effect of solicitor-client privilege is that the parties to whom the funds are disbursed and the purpose for which the funds are disbursed are shielded by the privilege. It is for this reason that a lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but the lawyer must also play a role as a legal advisor with regard to the transaction. This is the requirement to provide legal services.

(b) The Court of Appeal in *Elias*, quoted the Bencher review decision at para. 9: "where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an *objective* test that the transaction is legitimate." [emphasis added] It is clear that the duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction, and the lawyer must be satisfied on an objective basis that the transaction is legitimate.

(c) The lawyer's duty to investigate arises when, on an objective basis, he becomes suspicious that the transaction is illegitimate. Professional misconduct can be found even if the underlying transaction cannot be proved to be illegitimate. A lawyer cannot delegate the duty to inquire to a third party such as a client and rely upon the client's assurance as to the legitimacy of the transaction.[38]

[80] A lawyer has a gatekeeper function with regard to trust accounts. This function arises, in part, from the fact that transactions that occur through a lawyer's trust account are protected by solicitor-client privilege. The privilege means that, while the authorities may be aware of the source of funds entering into the trust account, the facts regarding to whom funds are disbursed, the amounts and the purposes are shielded from the authorities by the privilege. The purpose of the privilege is to allow open and candid communications between a lawyer and client. The purpose of the privilege is not to facilitate suspicious transactions. The gatekeeper function requires a lawyer to use trust accounts for legitimate commercial purposes for which the lawyer is a legal advisor and facilitator. Prior to the lawyer becoming involved in a transaction, if there is a reasonable suspicion that the transaction may involve illegal activities in Canada or abroad the lawyer has a duty to make reasonable inquires. An objective test is applied to the lawyer's conduct. In order for professional misconduct to be found, illegal activities do not have to be proved.

[38] *McCandless*, 2010 LSBC 3, at paras. 43; *Di Francesco*, at paras. 25-27; *Holy*, at paras. 23, 35

[81] We find that, in the case of the Respondent, there were a number of factors that gave rise to the series of transactions being objectively suspicious, including:

(a) The Respondent had no previous professional dealings with IJ or C Inc.;

(b) The Respondent's practice did not involve unsecured commercial lending;

(c) The Respondent's understanding of "private banking" was that monies were invested in jurisdictions with a more favourable tax rate than in Canada. The Respondent at no point turned his mind to the tax consequences of these funds coming into Canada;

(d) All of the transactions dealt with offshore lenders to a new client;

(e) The Respondent's fee was based upon a percentage of the funds received and disbursed through his trust account;

(f) All of the transactions involved the Respondent receiving executed, one-page line of credit agreements; no security;

(g) The transactions involved millions of dollars and did not require the use of a lawyer's trust account to complete;

(h) The lenders, in the case of some of the transactions, changed from one entity to another;

(i) The executed line of credit agreements did not identify the signatories;

(j) No legal advice was sought from the Respondent. The Respondent did testify that he reviewed the agreements and would have advised C Inc. if he had any concerns; and

(k) The first transaction involving G Capital was a transaction in which the funds were deposited to the Respondent's trust account, and the Respondent had issued a statement of account, purchased a bank draft payable to C Inc., issued a trust cheque to himself to satisfy his account before he was retained by C Inc.

[82] These are illustrations of some of the flags that were present when the Respondent became involved in these transactions. On a review of all of the evidence we are satisfied that there was an objective basis to suspect the transactions set out in the citation were suspicious.

[83] The next issue to address is did the Respondent made reasonable inquiries to satisfy himself that he was not becoming involved in some form of illegal transaction. On a review of the evidence we find that he did not. The basis for this conclusion includes:

(a) On the transaction involving G Capital, funds were deposited into and disbursed from the Respondent's trust account before he considered himself retained. Prior to his first meeting with his client, the Respondent obtained by facsimile a copy of documents from the minute book of C Inc. and a copy of IJ's driver's licence. Not only did the Respondent know nothing of his client's business prior to entering into this transaction, but he also knew nothing of the source of the lender's funds. His inquiry upon meeting this client was to ask if the funds came from an "illegal source", to ask as to the ownership of his client and the use the client was going to make of the money, and to deal with client verification information. He asked EF about the lender's source of funds and was told that the funds came from "stocks".

(b) On the other three transactions particularized in the citation, the Respondent obtained client verification information and engaged in the same questioning regarding whether the funds would be used for "illegal purposes". The questioning embarked upon by the Respondent in no way could be considered probing and was no more than superficial. The questioning was described by counsel for the Law Society as "pro forma", and that is an apt description.

(c) The Respondent relies on his inquiries of EF to say that he made reasonable inquiries. This is fraught with difficulties in that it depends upon EF being a reliable and credible source of information and on EF having made the reasonable inquiry. We do not have to deal with the character and reliability of EF because the law is clear that the Respondent cannot delegate his duty to make reasonable inquiries to a third party.

[84] This is a case in which the nature of the transactions raises a reasonable suspicion that the transactions may involve illegality. A review of the facts causes an objective observer to be suspicious. This is one of those circumstances in which one would have to ignore the sea of red flags that were raised by these transactions.

[85] In assessing if a reasonable inquiry has been made, the first step to be taken is an examination of the Respondent's file and the notes contained in that file. The notes for all four transactions are remarkably similar and include client verification and

identification information and the answers to the pro forma questions, including who is the beneficial owner of the client and are funds for an illegal purpose. No inquiry regarding who the principals of the lender are, the source of their funds, and the use of the funds by the client are made and recorded. The Respondent failed to make reasonable inquiries.

[86] The Respondent provided no substantial legal services.

[87] It is not a defence for the Respondent to argue that the Law Society has not proved the existence of an illegal purpose. The Law Society is not required to prove this to prove professional misconduct.

[88] The test to determine if a lawyer has committed professional misconduct is found in *Martin*: "The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer." For a lawyer to ignore the flags that raise a reasonable suspicion and to make minimal inquiries beyond dealing with client verification and the asking of "pro forma" questions in the circumstances of this case leads to the inexorable conclusion that the Respondent has committed professional misconduct. This is a case in which the Respondent has shown a gross culpable neglect to his duties to make reasonable inquiries, and we also find that the Respondent used his trust account in the absence of providing legal services.

[89] We find that the Law Society has proved on a balance of probabilities that the Respondent committed professional misconduct in the manner set out in the citation.

2017 LSBC 32
Decision issued: September 1, 2017
Citation issued: May 9, 2016

**CORRECTED DECISION: PARAGRAPH [65](1) OF THE DECISION WAS AMENDED ON SEPTEMBER 6, 2017**

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**DONALD FRANKLIN GURNEY**

**RESPONDENT**

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

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|---|---|
| Hearing date: | July 11, 2017 |
| Written Submissions received: | July 27, 2017 |
| Panel: | Phil Riddell, Chair<br>Gillian M. Dougans, Lawyer |
| Discipline Counsel: | J. Kenneth McEwan, QC<br>Trevor Bant |
| Counsel for the Respondent | Paul E. Jaffe |

## INTRODUCTION

[1] The Respondent was found to have committed professional misconduct in the following manner:

> Between May 2013 and November 2013, you [the Respondent] used your trust account to receive and disburse a total of $25,845,489.87 on behalf of your client C Inc. without making reasonable inquiries about the circumstances, including the subject matter and objectives of your retainer, and without providing any

substantial legal services in connection with the trust matters. In particular, you did one or more of the following:

(a) in May 2013, you received and disbursed $5,849,970 in connection with your client's matter with G Capital;

(b) between July 2013 and August 2013, you received and disbursed $6,361,121.67 in connection with your client's matter with I Ltd.;

(c) in July 2013, you received and disbursed $7,439,445 in connection with your client's matter with A LLC or in the alternative with D Inc.;

(d) in November 2013, you received and disbursed $6,239,953.20 in connection with your client's matter with Q Group.

[2] The reasons of the Panel dealing with Facts and Determination, 2017 LSBC 15 ("F&D"), set out the basis for the factual background and the manner in which the Respondent committed professional misconduct.

**POSITION OF THE LAW SOCIETY AND THE RESPONDENT WITH REGARD TO THE APPROPRIATE DISCIPLINARY ACTION.**

[3] The Law Society submits that the appropriate disciplinary action is:

(a) a six-month suspension;

(b) disgorgement of $25,845, representing the fees earned by the Respondent, payable to the Law Society; and

(c) imposition of conditions on the use of a trust account.

[4] The Respondent submits that the appropriate disciplinary action is the imposition of the conditions sought by the Law Society with regard to the operation of the Respondent's trust account and no further sanction. The Respondent further submits that he has suffered from adverse publicity since the Panel's decision on F&D and that his reputation has been destroyed because the media have referred to this as a money laundering case. Money laundering was not proved, but the Respondent is now being viewed in that context by the public.

**PRINCIPLES**

[5] The purpose of disciplinary action was set out in *Law Society of BC v. Hill*, 2011 LSBC 16, where the panel stated at paragraph 3:

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.

[6] Section 38 of the *Legal Profession Act* sets out the powers of a panel to impose sanctions and states:

> (5) If an adverse determination is made against a respondent other than an articled student, under subsection (4), the panel must do one or more of the following:
>
> (a) reprimand the respondent;
>
> (b) fine the respondent an amount not exceeding $50 000;
>
> (c) impose conditions or limitations on the respondent's practice;
>
> (d) suspend the respondent from the practice of law or from practice in one or more fields of law
>
> (i) for a specified period of time,
>
> (ii) until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection,
>
> (iii) from a specified date until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection, or
>
> (iv) for a specific minimum period of time and until the respondent fulfills a condition imposed under paragraph (c) or subsection (7) or complies with a requirement under paragraph (f) of this subsection;
>
> (e) disbar the respondent;
>
> (f) require the respondent to do one or more of the following:
>
> (i) complete a remedial program to the satisfaction of the practice standards committee;
>
> (ii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the respondent is competent to practise law or to practise in one or more fields of law;
>
> (iii) appear before a board of examiners appointed by the panel or by the practice standards committee and satisfy the board that the

respondent's competence to practise law is not adversely affected by a physical or mental disability, or dependency on alcohol or drugs;

(iv) practise law only as a partner, employee or associate of one or more other lawyers;

(g) prohibit a respondent who is not a member but who is permitted to practise law under a rule made under section 16 (2) (a) or 17 (1) (a) from practising law in British Columbia indefinitely or for a specified period of time.

...

(7) *In addition to its powers under subsections (5) and (6), a panel may make any other orders and declarations and impose any conditions it considers appropriate.*

[emphasis added]

[7] The leading case in dealing with the principles to be upheld in applying sanctions is *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45. The panel in that case set out a list of factors to be considered in imposing sanctions. The list is neither exhaustive, nor are all the factors applicable in each case. The factors in *Ogilvie* are set out in paragraph 10:

(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 on 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.

## RESPONDENT'S BACKGROUND

[8] The Respondent was called to the Bar in BC in 1969. He is a sole practitioner who has a solicitor's practice. He is 74 years of age. He has no prior discipline record.

[9] The Panel asked counsel for the Respondent if he wished to provide any additional information about the Respondent other than what had come out in the evidence at the F&D stage of the hearing, and counsel declined.

## ANALYSIS OF THE *OGILVIE* FACTORS

### Nature and Gravity of the Conduct Proved

[10] The Respondent was found to have breached his duty as a gatekeeper of his trust account. Given the fact that a lawyer's trust account is subject to solicitor-client privilege, a lawyer has a positive obligation to ensure that it is not misused. The Respondent failed in his duty to make reasonable inquiries with regard to the source of the excess of $25 million in Canadian funds deposited into his trust account. This is in conjunction with the fact that the Respondent did not provide any substantial legal services.

[11] The Law Society takes the position that the failure on the part of the Respondent in his duty posed a serious risk to the public interest.

[12] The Respondent takes the position that, while the Respondent is the gatekeeper of his trust account, and must be on guard to ensure he is not a dupe, the Respondent did not breach any written rules of the Law Society. Furthermore, the Respondent argues that all he did was fail to make reasonable inquiries.

[13] The Respondent's conduct is serious in that it involved the breach of one the fundamental obligations of a lawyer in the operation of his trust account, and that is to make reasonable inquiries as to the source of the funds being deposited into his trust account. A lawyer's trust account is impressed with solicitor-client privilege, and the failure of the Respondent in his duty to act as a gatekeeper of his trust account creates serious risk to the public interest. The Respondent's breach of his professional obligations is serious.

### Age and Experience of the Respondent

[14] The Respondent was called to the bar in 1968. During the hearing of F&D there was evidence that the Respondent had practised in small to medium firm settings, and latterly as a sole practitioner. He was an experienced solicitor, and had an active solicitor's practice at the time of the incidents that led to the citation.

[15] The Respondent argued that schemes such as money laundering were relatively new and had not been a risk during much of his career and so his age and experience would lead him to be less suspicious. The Panel rejects this reasoning. The Respondent's experience at the bar, in particular the fact that he was an experienced solicitor, is an aggravating factor because those years of experience should have given him an appropriate appreciation of the importance of maintaining a trust account with integrity. To put it simply, with his experience at the Bar the Respondent should have known better.

**Previous Character**

[16] The Respondent has no professional conduct history. This is a mitigating factor.

**Impact Upon the Victim**

[17] There is no defined victim, as one would generally find in the case of professional misconduct, in that there is not an aggrieved party. In this case the conduct of the Respondent exposed the public to the risk of the misuse of a lawyer's trust account.

[18] The schemes that could give rise to the misuse of a lawyer's trust account may not involve an obvious victim if both the sender and receiver of funds are involved in the scheme. That is why the gatekeeper role is so important, and it is so even in the absence of a complaint from a victim.

**Number of Times the Offending Conduct Occurred**

[19] There were four transactions between May and November 2013 involving seven deposits to the Respondent's trust account. A total of $25,845.489.87 flowed through the Respondent's trust account in these transactions.

[20] There was no evidence that the Respondent was becoming concerned about the similarity of the transactions and the fact that he was never asked to perform any substantial legal services.

[21] The Respondent submits that he only made one mistake on the first transaction, which was repeated in the next and that, since it is the same mistake with the same parties, then it is not a case of a systematic breach of the rules. We do not accept that argument.

[22] The frequency of the transactions and amount of money involved is an aggravating factor.

**Acknowledgement of Misconduct and Steps to Disclose and Redress the Wrong and Other Mitigating Factors**

[23] At all times during the F&D hearing and this disciplinary action hearing, the Respondent maintained that he had done nothing wrong and characterized the Law Society's case as unfair, abusive, a violation of the principles of natural justice and procedural fairness as well as a vendetta and a "protracted effort to smear EF."

[24] The Law Society tendered Exhibits 1 and 2, which were two affidavits. The substance of Exhibit 1 was a press release prepared on behalf of the Respondent and distributed after the decision on F&D. Exhibit 2 was a press report that referred to the press release set out in Exhibit 1.

[25] The Respondent tendered Exhibit 3, an affidavit of the Respondent (pages 1 to 3 of Exhibit A of the affidavit were found to be inadmissible). Exhibit C of the affidavit contained 14 press reports, of which three dealt with the Respondent by name.

[26] The Law Society argued that the press release of the Respondent is "worthy of rebuke" and shows that the Respondent fails to understand his gatekeeper function. The Respondent stated that the press report shows that the Respondent was trying to manage the adverse media reporting caused by the Panel's decision on F&D. We accept that the press release issued by the Respondent is not an aggravating factor. In the circumstances of the Respondent, we accept that the press release was an attempt at image management.

[27] We do not accept the position of the Respondent that the press reports set out in Exhibit C of the Respondent's affidavit are representative of the public interest. The legislature has delegated to the Benchers of the Law Society the jurisdiction to decide what amounts to conduct in the public interest.1

[28] In the course of submissions made on behalf of the Respondent, several submissions were made that raised a concern that the Respondent did not understand the severity of his conduct:

(a) The lack of a connection between the breach of the Respondent's gatekeeper function and the $25,845 earned as "fees". This displayed a lack of understanding that his professional misconduct made it possible for him to earn the "fee".

(b) The failure to understand the effect of solicitor-client privilege with regard to a lawyer's trust account. The Respondent, through his counsel, took the position with each of the transactions that are the subject of the citation that the banking documents associated with the electronic transfer of funds showed the source of the funds and the "client" to whom the funds were to be credited to. There was a

[1] *Elias v. Law Society of BC*, 26 BCLR (3d) 359, 1996 CanLII 1359 (CA), at para. 10.

failure to understand that, upon funds being deposited, the effect of solicitor-client privilege is that the privilege creates a veil of secrecy over to whom the funds are paid out.

(c) There was continued reference to the fact that the Law Society had not shown the existence of illegal activity. This is concerning in that the Respondent's professional misconduct was his failure to fulfill his gatekeeper function; it was not participation in illegal activity either knowingly or as a dupe.

(d) The Respondent is not required to acknowledge his misconduct. That requirement would lead to a situation in which a respondent might be required to prejudice potential appeals in order to mitigate the disciplinary action imposed. The failure of the Respondent to acknowledge his wrongdoing is not an aggravating factor, it is neutral. If the Respondent had acknowledged his misconduct that would be considered a mitigating factor.

(e) The Respondent has presented no evidence of other mitigating factors, or any information with regard to changes in his practice regarding the way in which he deals with making inquiries regarding the sources of funds deposited to his trust account or what would constitute substantial legal services.

**Remediation or Rehabilitation**

[29] The Law Society states the prospect of rehabilitation is unlikely given the Respondent's denial of wrongdoing. The Respondent states that the conditions on the Respondent's trust account jointly proposed by the parties deals with remediation and rehabilitation.

[30] The Panel is concerned not by the Respondent's denial of wrongdoing, but with the Respondent's lack of understanding of his obligation to make reasonable inquiries. The Respondent, through his counsel, repeatedly took the position that the Respondent breached no written rule.

[31] There is merit to the position that the imposition of the conditions under which the Respondent may operate his trust account will have some remedial effect.

**Impact on the Respondent of Criminal or other Sanctions or Penalties**

[32] There are no other sanctions or penalties visited upon the Respondent. The Respondent argued that the media attention, including inaccurate reporting, should be considered, but there was no evidence of any effect on the Respondent's practice or reputation. Inaccuracies in any media reports should be dealt with directly by the Respondent. It is not the Panel's responsibility to monitor the media.

**Impact of the Proposed Penalty on the Respondent**

[33] As referred to earlier, the Respondent chose not to provide us with any information as to his personal circumstances. Accordingly, we do not know the Respondent's ability to pay the disgorgement of $25,835 proposed by the Law Society, or the economic effect of the six-month suspension sought by the Law Society, or his ability to return to practice upon the end of any suspension.

[34] In considering the impact of a suspension, the fact that a lawyer may find it difficult or impossible to restart his practice after the suspension is irrelevant.

> [I]t can never be an objection to an order of suspension in any appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely to be, so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."[2]

**Specific and General Deterrence**

[35] The Law Society takes the position that, given the comments of the Respondent after the release of the decision, specific deterrence is required. The panel is of the view that, while the Respondent has expressed a view that he disagrees with the decision, a view that he is entitled to hold, we are satisfied that the Respondent in the future will comply with his obligations with regard to the operation of his trust account. This is particularly so given the conditions that he has consented to with regard to the operation of his trust account.

[36] Given the fact that lawyers have been constitutionally exempted from the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and Regulation (the "Proceeds of Crime Regime") as a result of the *Federation of Law Societies of Canada* decision,[3] the legal profession has the responsibility for policing itself with regard to the use of lawyers' trust accounts. This means that there is a need for lawyers to understand the importance of their role in acting as gatekeepers to their trust accounts and to ensure that they make the necessary inquiries with regard to transactions that reasonably appear to be suspicious prior to their allowing funds to be deposited into their trust accounts. General deterrence requires the profession to understand that the breach of that professional duty will be treated as a serious breach.

**The Public's Confidence in the Integrity of the Profession**

[2] *Law Society of BC v. Sas*, 2017 LSBC 8 at para. 109, quoting *Bolton v. The Law Society*, [1994] 2 All ER 486 (England and Wales CA).
[3] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401.

[37] For the reasons set out above dealing with the need for general deterrence, the fact that lawyers are constitutionally exempt from the Proceeds of Crime Regime requires breaches of the gatekeeper function with regard to lawyers' trust accounts be taken seriously to preserve the public confidence in the integrity of the profession.

[38] In order to preserve the public confidence, the Respondent's professional misconduct must be considered a serious breach.

**Range of Penalties Imposed in Similar Cases**

[39] The Law Society provided a number of cases showing a range of penalty from reprimand to a 12-month suspension. Those cases are:

(a) *Law Society of BC v. Bohun*, 2003 LSBC 8, [2003] LSDD No. 6

Twelve-month suspension for misconduct for permitting his trust account to be used to pool $148,000 from various lenders and recklessly making statements about the repayment of the loans. The lawyer made a conditional admission under Rule 4-22 consenting to a 12-month suspension. "Here the Respondent was a dupe who gained nothing other than the fees he charged for the work he stupidly did."

(b) *Law Society of BC v. Nielsen*, 2009 LSBC 08

Six-month suspension for misconduct for participating in a fraudulent scheme in which mortgage funds were obtained and dispersed under false pretenses, acting in a conflict of interest and failing to comply with various trust accounting rules. The lawyer made a conditional admission under Rule 4-22 consenting to a six-month suspension and an undertaking not to practise real estate law. The Respondent received some benefit from his misconduct in the form of higher than normal fees, which he justified on the short turnaround time on the conveyances; a $3,000 bonus was described as compensation for a transaction that did not proceed.

(c) *Law Society of BC v. Rai*, 2011 LSBC 02

Three-month suspension for failing to make reasonable inquiries about mortgage transactions that turned out to be fraudulent. The lawyer made a conditional admission consenting to a three-month suspension. The panel found this to be the lower end of the appropriate range. "[T]he misconduct was not motivated by greed or personal gain and did not result in any financial benefit to the Respondent beyond the modest fees billed for the work performed."

(d) *Law Society of BC v. Skogstad*, 2009 LSBC 16

Three-month suspension for permitting his trust account to be used to pool $1 million of investment monies in what turned out to be a Ponzi scheme and failing to advise the investors that he was not protecting their interests. The lawyer made a conditional admission consenting to the three-month suspension. "[W]hat distinguishes this case from other cases is that the Respondent was not a participant in the fraudulent schemes and did not personally profit from the investors' money."

(e) *Law Society of BC v. Elias* (1996), 26 BCLR (3d) 359 (CA)

A reprimand for a lawyer who asked a corporate client if it would be interested in acquiring the cash proceeds of a brothel business in the Philippines. The transaction did not go beyond this, but the Panel found that the lawyer should have made inquiries about the lawfulness to operate such a business and export $10 million in cash before even contacting a client and offering to assist.

(f) *Yungwirth v. Law Society of Upper Canada*, 2004 ONLSAP 1, [2004] LSDD No. 11

Twelve-month suspension for being an unknowing participant in a real estate fraud and for making misrepresentations to and misleading clients; failing to follow instructions and swearing false affidavits. The lawyer admitted professional misconduct.

(g) *Law Society of Upper Canada v. Tucciarone*, 2005 ONLSHP 20, [2005] LSDD No. 55

Six-month suspension for unknowing participation in 16 real estate transactions in which mortgage funds were fraudulently obtained. The Panel was convinced there would be no repetition of the conduct.

(h) *Law Society of Upper Canada v. Senjule*, 2008 ONLSHP 22, [2008] LSDD No. 15

Five-month suspension for carelessness that fell short of misconduct as a result of being a dupe. The lawyer was found to have acted in a conflict of interest, failing to disclose material facts, failing to follow instructions, failing to obtain informed consent, and failing to make reasonable inquiries. It is noted by the panel that Ms. Senjule did not profit or benefit in any way beyond modest fees with respect to the transactions that were the subject of the hearing. The panel noted the misconduct was entirely out of character, largely explained by inexperience and

the lack of a mentor. The panel also noted her tremendous remorse, which was genuine and heartfelt.

(i) *Law Society of Upper Canada v. Peddle*, [2001] LSDD No. 64

Three-month suspension and a fine of $5,000 for misconduct in becoming the tool or dupe of a client while acting as escrow agent for a group of investors. The lawyer pleaded guilty to misconduct and admitted that he ignored red flags and failed to take independent steps to confirm that the investment venture existed and functioned as represented to him and that investor interests were protected. He admitted that he failed to exercise due diligence and allowed himself to become a dupe. He had paid himself a fair legal fee out of the funds and disbursed $180,000 to his girlfriend (now wife) as a return on her investment before learning of the scheme. The lawyer made substantial efforts to obtain the return of the monies invested with the result that $950,500 of the $1.18 million invested was recouped.

(j) *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD 44

One-month suspension for misconduct in becoming a dupe of an unscrupulous client and allowing funds to pass through his trust account without due diligence. The lawyer did not profit from his client's fraud, and the panel found that the payment of fees and debts did not constitute a profit. The lawyer facilitated the laundering of $340,000. One month was considered the low end of the range.

[40] In addition to these, the Respondent relied upon:

(a) *Law Society of BC v. Ben-Oliel*, 2016 LSBC 35

The respondent was found guilty of misconduct for failing to comply with an order to provide complete and substantive responses to enquiries in Law Society letters.

> The breach of an order of a hearing panel requires a penalty that not only specifically deters the Respondent, but also provides a general deterrence to the profession as a whole. We find the Respondent's impugned conduct a grave case of professional misconduct.

A further two-month suspension was added to an existing four-month suspension, and the suspension was to continue after that until the respondent complied with the previous order of the hearing panel.

At paragraph 23 the panel stated:

> The purpose of the discipline process is not to punish or exact retribution; it is to discharge the law Society's statutory obligation as set out in s. 3 of the Legal Profession Act to protect the public interests in the administration of justice: *Hill*.

(b) *Law Society of BC v. Jensen*, 2015 LSBC 10

Although not referred to by counsel, this decision was overturned on a review under s. 47. That decision is indexed at 2016 LSBC 37. Counsel relied upon the decision of the hearing panel.

The respondent was found to have committed professional misconduct for failing to advise two unrepresented parties that he was not protecting their interests in a share transaction. The respondent was an exemplary lawyer who erred; there was no need for specific deterrence. The respondent did not financially gain and was motivated to help his friends. A reprimand and payment of a fine of $2000 plus costs of $30,000.

> The Respondent has consistently believed he made no error and what occurred did not amount to not [sic] professional misconduct. He is entitled to such belief. We came to a different conclusion. Although Mr. Jensen was obdurate and single minded, it was his belief. In these circumstances we do not consider this an aggravating factor. Sometimes there is a need for a hearing. In other words, the case was no [sic] so clear that the lawyer should be sanctioned for defending the citation.

[41] The Law Society relies upon *Bohun*, *Nielsen* and *Tucciarone* to support a suspension of six months. In doing so it says that, while in those three cases there were fraudulent schemes involved, no significance should be given to this factor because in the case of the Respondent there were four highly suspicious transactions of unknown legality. The Respondent's delict was the failure to make reasonable inquiries in circumstances that were reasonably suspicious, and it did not matter whether the underlying transactions were legal or not.

[42] The Respondent takes the position that no sanction should be imposed in addition to the conditions on the operation of his trust account that the Respondent has agreed to.

[43] Of the cases provided *Elias* is the only case where the sanction imposed was not a suspension and was in fact a reprimand. *Elias* is not a case in which the lawyer had put money into his trust account. It is a case in which the lawyer contacted a client to determine if the client would be interested in acquiring an interest in $10 million acquired from a brothel business in the Philippines. The lawyer should have been reasonably

suspicious that the funds came from illegal activities. Monies were not transferred, and the lawyer had not profited from the transaction.

## DECISION

[44] Section 38(5) of the *Legal Profession Act* sets out the sanctions that may be imposed after an adverse determination at a disciplinary hearing.

[45] We accept the joint position of the Law Society and the Respondent that an order should be made under s. 38(5)(c) to impose the following limitation on the Respondent's practice:

(a) the Respondent must report to the Senior Forensic Accountant of the Trust Regulation Department within five business days after becoming aware of any trust transaction involving a remitter, remitting institution, beneficiary or receiving financial institution not located in Canada; and

(b) on request by the Law Society, the Respondent must immediately produce and permit the Law Society to copy all files, vouchers, records, accounts, books and any other evidence and must provide any explanations required by the person requesting on behalf of the Law Society for the purpose of reviewing the Respondent's trust transactions.

[46] Given an analysis of the applicable *Ogilvie* factors, we find that the public interest is served by the Respondent being suspended from the practice of law for six months with the suspension to begin no sooner than on the last day of the month following the month in which these reasons are released, or on some earlier date as agreed to by the Law Society and the Respondent.

[47] The professional misconduct of the Respondent constituted a serious breach of his professional obligation. It was a breach in which he ignored the fundamental obligations of a lawyer to act as the gatekeeper of his trust account. The fact that lawyers are constitutionally excluded from the Proceeds of Crime Regime means that the profession must ensure that all of its members comply with their duty to make reasonable inquiries in objectively suspicious circumstances.

## DISGORGEMENT OF FEES

[48] The Respondent allowed approximately $25 million Canadian to flow through his trust account when not only did he provide no substantial legal services, but he also failed to make reasonable inquiries as to the source of the funds in objectively suspicious circumstances. He profited from this by charging one tenth of one per cent of the value of all funds that passed through his trust account as a "fee". In the particular circumstances of

this case the amount received has been described as a "fee", but it should not be characterized as a fee for legal services, since no substantial legal services were provided. It was a "fee" for the use of the Respondent's trust account.

[49] The Law Society has sought disgorgement of the $25,845 (the "fee" charged less applicable taxes) to the Law Society. There is no specific authority in s. 38(5) of the *Legal Profession Act* that deals with disgorgement. The Law Society says the power to order disgorgement arises as a result of s. 35(7), which states: "In addition to its powers under subsections (5) and (6), a panel may make any other orders and declarations and impose any conditions it considers appropriate."

[50] The Respondent argues that there is no causal connection between the misconduct and the fees; that there is no evidence the receipt of the fees was based on a failure to make reasonable inquiries; and no evidence that, had the Respondent "gone the distance" of making reasonable inquiries, he would not have earned those fees.

[51] The Respondent argues that disgorgement is really a fine, which should not be made in addition to a suspension and should not be made where there is no loss to a client that results in the enrichment of a lawyer.

[52] There are no cases in BC in which disgorgement has been ordered in a case of this sort; in fact it would appear that it has never been considered as a sanction before.

[53] There have been cases in which hearing panels have ordered restitution.4 A panel can order a suspension and a monetary penalty (be it a fine or restitution). "However, imposing both types of penalty in a single case should be limited to instances where doing so can reasonably be seen as necessary to further the principles underlying the discipline process."5

[54] In *Abrametz* (currently under appeal) a lawyer was required to pay to the Law Society the amount of profit he made on a real estate transaction for remittance to his client when he acted in a conflict of interest. The hearing committee found that the lawyer was guilty of conduct unbecoming for taking advantage of a vulnerable client by purchasing her home at a low price and selling it for a profit of $17,000. The lawyer offered to pay back to his client the sum of $14,000 being the profit less $3,000 tax paid. The hearing committee ordered, at paragraph 141, restitution to the Law Society for remittance to the client in the amount of $14,000. The payment was ordered to be made to the Law Society in order to be sure that the client received it.

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[4] *Law Society of Saskatchewan v. Abrametz,* 2017 SKLSS 4; *Law Society of BC v. Coutlee,* [1997] LSDD 196; *Law Society of BC v. Thomson,* [1998] LSDD 129; *Law Society of Manitoba v. Carroll,* 2008 MBLS 11.
[5] *Nguyen v. Law Society of BC*, 2016 LSBC 21 (review board) at para. 46.

[55] In *Abrametz* there was no discussion of disgorgement, and the amount being remitted to the client was not actually lost by the client, so it was not a case of true restitution. The amount did represent the profit the lawyer made from acting in a conflict of interest.

[56] The hearing committee relied on section 55(2)(c) of the *Legal Profession Act, 1990,* SS c L-10.1, as it existed at the time of the conduct in question, which gave it authority to make "any other order that the committee considers appropriate." This section was similar to section 38(7) of our *Legal Profession Act*, which states that a panel may make "any other orders and declarations and impose any conditions it considers appropriate." Six other provinces have an open-ended provision empowering hearing panels to craft orders that are appropriate in the circumstances: Ontario, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island.

[57] It is worth noting that Law Society hearing committees in Saskatchewan can fine a respondent "in any amount that the committee may specify," per section 53(3)(a)(iv) of the *Legal Profession Act, 1990*.

[58] Section 38(7) of the *Legal Profession Act* has been commented upon lately in decisions in British Columbia to encourage the use of this subsection creatively and to further the purpose of disciplinary action – "to protect the public, maintain high professional standards and preserve public confidence in the legal profession."6

[59] In British Columbia, a panel cannot impose a fine of more than $50,000. To simply fine a lawyer in the amount of fees received for the improper use of his trust account creates a situation where a lawyer paid more than $50,000 would be entitled to keep the excess. That would not uphold and protect the public interest in the administration of justice or preserve public confidence in the legal profession. A fine is not the best remedy in these circumstances.

[60] Restitution requires a party to return the money to a victim. That will not be possible when, as here, there is no victim complaining about the lawyer's conduct. Restitution is not the best remedy in these circumstances.

[61] Compensation also requires that a party who has suffered damages be made whole. Here it is the public in general who suffers when lawyers do not discharge their gatekeeper function. Compensation is not an available remedy in these circumstances.

[62] Disgorgement is not about punishment; it is about deterrence. It is about not allowing a lawyer to gain from his or her misconduct. We are satisfied that s. 38(7) of the *Legal Profession Act* allows us to order disgorgement of the funds received by the Respondent as

[6] *Hill* at para. 3

a result of his professional misconduct. The amount to be disgorged should be the gross amount received without reduction for taxes or other expenses.

[63] The $25,845 received by the Respondent as a "fee" arose directly from his professional misconduct. His failure to make the reasonable inquiries in circumstances in which he should have been objectively suspicious and in a case in which the "fee" was earned without the provision of any substantial legal services leads to a conclusion that the Respondent's professional misconduct led to his "fee" being paid. The nature of the transactions the Respondent became involved in did not require his skills as a lawyer or the use of his trust account. The use of his trust account was a convenience for his "clients". The "fee" received by the Respondent was nothing more than a service charge to use his trust account. Counsel for the Law Society described this as the Respondent renting his trust account, which is an apt description.

[64] The Respondent should not be allowed to benefit financially from his misconduct. His client is not owed restitution as a result of the misconduct. This is an appropriate case for the Respondent to be ordered to disgorge the $25,845 received as his "fee" to the Law Society of British Columbia. Since we have not been provided any information regarding the Respondent's personal circumstances, that payment must be made within 60 days of the release of this decision.

**ORDER**

[65] We order that:

1. The Respondent be suspended from the practice of law for a period of six months to commence November 1, 2017 or on some earlier date as agreed to by the Law Society and the Respondent.

2. Following the Respondent's suspension he will be subject to the following conditions:

    (a) The Respondent must report to the Senior Forensic Accountant of the Trust Regulation Department within five business days after becoming aware of any trust transaction involving a remitter, remitting institution, beneficiary or receiving financial institution not located in Canada; and,

    (b) On request by the Law Society, the Respondent must immediately produce and permit the Law Society to copy all files, vouchers, records, accounts, books and any other evidence and must provide any explanations required by the person requesting on behalf of the Law Society for the purpose of reviewing the Respondent's trust transactions.

3. The Respondent pay to the Law Society the amount of $25,845, representing the disgorgement of the "fee" paid as a result of his professional misconduct, within 60 days of the release of this decision.

**COSTS**

[66] The parties have indicated that they wish to make submissions with regard to costs. Unless there is some reason that submissions on costs cannot be in writing, delivery of submissions will be on the following schedule:

(a) submissions of the Law Society on costs 30 days after the release of this decision;

(b) submissions of the Respondent on costs 21 days after the delivery of the Law Society submissions; and

(c) reply of the Law Society within 10 days of the delivery of the Respondent's submissions.

[67] Either party may make application to have an oral hearing on costs.

Citation Authorized: April 4, 2019
Citation Issued: April 16, 2019
Citation Amended: March 20, 2020

**THE LAW SOCIETY OF BRITISH COLUMBIA**

IN THE MATTER OF THE *LEGAL PROFESSION ACT*, SBC 1998, C. 9

AND

A HEARING CONCERNING

**KONRAD MALIK**

RESPONDENT

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# RULE 4-29 ADMISSION OF MISCONDUCT

# AND UNDERTAKING TO DISCIPLINE COMMITTEE

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1. On March 30, 2020, the Discipline Committee considered and accepted a proposal submitted by the Respondent under Rule 4-29 of the Law Society Rules.

2. Under the proposal, the Respondent admitted misconduct as alleged in the citation authorized April 4, 2019 and amended March 20, 2020 (the "Citation").

3. Under the proposal, the Respondent undertook to the Law Society of British Columbia ("Law Society") for a period of nine (9) months commencing March 31, 2020, as follows:

   (a) not to engage in the practice of law in British Columbia with or without the expectation of a fee, gain or reward, whether directly or indirectly;

   (b) not to apply for re-instatement to the Law Society of British Columbia;

   (c) not to apply for membership in any other law society (or like governing body regulating the practice of law) without first advising in writing the Law Society of British Columbia; and

(d) not to permit his name to appear on the letterhead of, or work in any capacity whatsoever, for any lawyer or law firm in British Columbia, without obtaining the prior written consent of the Discipline Committee of the Law Society.

4. In making its decision, the Discipline Committee considered an Agreed Statement of Facts dated March 20, 2020. The Discipline Committee also considered the Respondent's residence overseas, that he has not been an active Law Society member for seven years, his willingness to make admissions and his absence of a disciplinary record.

5. The Citation is resolved, and the Respondent's admission of professional misconduct will be recorded on his professional conduct record.

6. The Respondent has acknowledged that pursuant to Rule 4-29(5) of the Rules, his undertaking not to practise law means that he is a person who has ceased to be a member of the Law Society as a result of disciplinary proceedings, and that section 15(3) of the *Legal Profession Act* (the "*Act*") applies to him.

7. The admitted facts were set out in an Agreed Statement of Facts dated March 20, 2020. The facts in relation to the Citation are summarized below.

## I. Member Background

8. The Respondent was called and admitted as a member of the Law Society on October 22, 2008. From October 22, 2008 to February 2013, the Respondent practiced law in Vancouver.

9. At all material times, the Respondent's primary area of practice was securities and corporate law on behalf of junior issuers.

10. In and around February 2013, the Respondent relocated to Europe to work as a business consultant. The Respondent continues to reside in Europe. The Respondent was a non-practising member of the Law Society from December 2013 until January 2020, when he became a former member.

11. The Respondent has no disciplinary history.

## II. Background Facts

12. On February 3, 2010, G Inc. was incorporated in the State of Nevada, United States.

13. A year and half prior to any involvement by the Respondent, two Alberta residents, VG and JB, were installed as nominee officers and directors of G Inc.

14. In October 2011, BL contacted the Respondent to request his legal services on behalf of G Inc. In particular, BL informed the Respondent that G Inc. was looking for legal assistance to draft a Form 8A to be filed with securities regulators in the United States.

15. The Respondent agreed and waited to be contacted by G Inc.

16. BL and the Respondent were friends who had been personally acquainted since 2008. It was the Respondent's understanding from BL that BL was helping to locate counsel to assist G Inc.

17. By engagement letter dated October 12, 2011, G Inc. retained the Respondent to act as its counsel.

18. The engagement letter was signed by the Respondent and appeared to be counter-signed by VG and JB. The Respondent reviewed the biographies of VG and JB using documents filed with the SEC. The Respondent did not contact VG and JB directly.

19. On October 27, 2011, G Inc. obtained its ticker symbol.

20. The Respondent did not meet with or speak with VG or JB despite them being the listed directors and officers of G Inc. at the time and their purported signing of the engagement letter.

21. The Respondent did not confirm with VG or JB specifically that they wanted the Respondent to prepare documents on behalf of G Inc. to be filed with the securities regulators in the United States.

22. In and around May 2012, the outstanding shares of G Inc. were sold. BL located the buyer and organized the sale.

23. Prior to the sale, BL provided referrals for a number of professional service providers who assisted US public companies with their various regulatory requirements. The Respondent was one such service provider.

24. In the spring of 2012, the Respondent received a phone call from MM. MM advised the Respondent that he was involved in talks with G Inc. and that MC would be taking over control of the company. The Respondent confirmed this information with BL. The Respondent did not confirm this information with VG or JB.

25. The Respondent received his instructions regarding the change of control and management of G Inc. from MM, MC and BL. The Respondent did not have any communication with VG or JB regarding the change of control and management of G Inc. away from them to MC.

26. During May 2012, the Respondent assisted G Inc. with the drafting and filing of documents with securities regulators in the United States related to the change in control and management of the company from VG and JB to MC.

27. On April 18, 2017, the BCSC issued a notice of hearing alleging that MH and BL engaged in conduct contrary to the public interest by creating a publicly trading shell company that was ideal for the use in a securities manipulation by deceiving foreign regulators and the public.

28. The Respondent was not a respondent in the BCSC's enforcement action and the notice of hearing did not contain any allegations against the Respondent.

29. On October 9, 2018, the BCSC issued liability findings which held that MH engaged in conduct contrary to the public interest in relation to G Inc. No liability findings were made against BL.

## III. Admissions

30. The Respondent admitted that between October 11, 2011 and May 14, 2012, in the course of representing his client G Inc., he failed to make reasonable inquiries or otherwise exercise due diligence regarding the legitimacy of the business, affairs or transactions in respect of which he was engaged, by doing one or more of the following:

    (a) failing to make reasonable inquiries to obtain information about G. Inc.'s purported directors and officers, VG and JB, or their purported consultants BL, MH and MC (the "Consultants"), or both;

    (b) failing to confirm directly with G Inc. that the Consultants or any of them could retain him and provide him with instructions on behalf of G Inc.;

    (c) preparing and filing documents to effect a change of control in G Inc. from VG and JB to MC without confirming those instructions with G Inc. or reporting to G Inc. or both; and

    (d) preparing and filing documents to effect the sale and transfer of 100% of the shares owned by VG and JB to MC without confirming those instructions with VG and JB or reporting to G Inc. or both.

31. The Respondent admitted that this conduct constituted professional misconduct, contrary to section 38(4) of the *Act*.

2020 LSBC 30
Decision issued: June 22, 2020
Citation issued: March 8, 2019

**CORRECTED DECISION: PARAGRAPH [73] SUB-PARAGRAPH (c) WAS AMENDED ON JULY 20, 2020**



**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**DOUGLAS JOSEPH WILLIAM HAMMOND**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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| Written materials: | May 21, 2020 |
| Panel: | Brook Greenberg, Chair<br>Don Amos, Public representative<br>H. William Veenstra, QC, Lawyer |
| Discipline Counsel: | J. Kenneth McEwan, QC and Laésha J. Smith |
| Counsel for the Respondent: | Patrick F. Lewis |

## BACKGROUND

[1] On March 8, 2019, the Discipline Committee of the Law Society of British Columbia (the "Law Society") issued a citation alleging that the Respondent had committed professional misconduct in using his firm's trust account to receive and disburse funds without:

(a) providing substantial, or any legal services in connection with the matter;

(b) making reasonable inquiries in respect of the circumstances of the matter; or

(c) recording the results of any inquiries made in respect of the circumstances of the matter.

[2] The Respondent made a proposal in this proceeding pursuant to Rule 4-30 of the Law Society Rules (the "Rules"), conditionally admitting a discipline violation and consenting to a specified disciplinary action (the "Disciplinary Action") as follows:

(a) the Respondent is to be suspended for two weeks; and

(b) the Respondent will pay costs in the amount of $1,000.

It was understood that a summary of the circumstances giving rise to the Disciplinary Action would be published, including the identity of the Respondent.

[3] On March 5, 2020, the Discipline Committee considered and accepted the conditional admission and proposed Disciplinary Action and instructed counsel for the Law Society to recommend acceptance of the proposal to this Panel.

[4] Both the Law Society and the Respondent requested that this matter proceed by way of a hearing in writing. The Panel considered and granted that application on May 26, 2020.

[5] For the reasons set out below, the Panel accepts that the admission and Disciplinary Action proposed by the Respondent and the Law Society are appropriate.

## ISSUES

[6] There are two issues to be determined by this Panel:

(a) Does the Respondent's conduct constitute professional misconduct?

(b) Is the proposed Disciplinary Action appropriate in the circumstances?

## FACTS

[7] The parties provided the Panel with an Agreed Statement of Facts (the "ASF") contained within a Joint Book of Exhibits. The Joint Book of Exhibits was marked as Exhibit 1, and formed the evidentiary basis for this hearing.

[8] The ASF included the following admitted facts.

### The Respondent's background

[9] The Respondent was called to the bar on May 20, 1988.

[10] He practised between his call date and April 2019, sometimes as a sole practitioner and at other times within a law firm.

[11] At the times material to this matter, the Respondent was a sole practitioner, practising primarily in the areas of corporate, commercial and real estate law.

[12] In April 2019, the Respondent left private practice to take on a general counsel position.

[13] The Respondent has no prior disciplinary history.

### The transactions and services provided

[14] Between 2014 and 2016, the Respondent provided various legal work for investors, officers and consultants of a British Columbia company ("X Corp."). Some of this legal work was referred to the Respondent by another lawyer (the "Other Lawyer") who acted as corporate counsel for X Corp.

[15] The Respondent has known the Other Lawyer for around 30 years, including having practised at the same law firm in the early 1990s. The Respondent considered and continues to consider the Other Lawyer to be trustworthy and reputable counsel.

[16] In mid-2016, the Other Lawyer advised the Respondent that an X Corp. investor ("TL") wished to make a further investment of US$474,000 in X Corp. in tranches, which were to be based on achievement of performance milestones agreed to by TL and X Corp.

[17] The Respondent understood from both TL and the Other Lawyer that TL and X Corp. wanted the investment funds to be held in a lawyer's trust account to provide certainty that the funds were in place and to assure timely payment.

[18] The Other Lawyer advised the Respondent that, because there was a conflict between X Corp. and TL, he could not act on behalf of both parties and needed other counsel to be involved.

[19] On October 26, 2016, a Vice President of X Corp. sent an email introducing the Respondent and TL to each other and advised that the Respondent could assist "on the $500,000 USD escrow."

[20] On October 28, 2016, the Respondent spoke with TL by telephone, at which time he requested identification documents from TL. The Respondent subsequently received, by email, scanned pictures of the requested documents. He did not meet with TL to verify his identity.

[21] On October 31, 2016, the Respondent caused a US dollar trust account (the "Trust Account") to be opened with a Canadian bank.

[22] On that same date, the Respondent emailed terms of engagement to TL, which included that the Respondent:

(a) would hold funds in trust and would pay amounts out as directed;

(b) would charge $200 for processing each payment;

(c) was acting for a company ("BC Ltd.") of which TL was the sole officer and director;

(d) was not acting in any capacity for TL or X Corp.; and

(e) was "merely facilitating the transfer of money" and was not advising or determining whether the performance milestones had been met.

[23] On November 1, 2016, TL deposited a bank draft in the amount of US$474,000 directly into the Trust Account.

[24] On the same day, TL instructed the Respondent to make a payment to another British Columbia company ("M Corp."). The Other Lawyer had advised the Respondent that M Corp. was a subsidiary of X Corp.

[25] Between November 2, 2016 and January 11, 2017, the Respondent caused US$473,000 to be paid to M Corp. through five payments made out of the Trust Account in accordance with directions provided by TL.

[26] The Respondent took a fee of US$200 from the funds held in the Trust Account for each of the five payments made, resulting in a total net payment after bank fees of $1,040 (Canadian) to the Respondent.

[27] The Respondent did not provide any other services.

[28] The Respondent did not make or record any inquiries with respect to the performance milestones or the other terms relating to TL's further investment in X Corp. or the payments to M Corp.

### Admissions of the Respondent

[29] In the ASF, the Respondent admits that he was served with the Citation on March 11, 2019.

[30] The Respondent also admits that his conduct as set out above and in the ASF constitutes professional misconduct pursuant to s. 38(4) of the *Legal Profession Act*.

## ANALYSIS AND DISCUSSION

### Professional misconduct

[31] The test for professional misconduct is set out in *Law Society of BC v. Martin*, 2005 LSBC 16, paragraphs 154 and 171, as follows:

> … The real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer.
>
> The test that this Panel finds is appropriate is whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.

[32] In *Law Society of BC v. Kim*, 2019 LSBC 43, paragraph 45, the panel held in respect of this test:

> The *Martin* test is not a subjective test. A panel must consider the appropriate standard of conduct expected of a lawyer, and then determine if the lawyer falls markedly below that standard.

[33] The Respondent has admitted that his conduct comprises professional misconduct.

[34] Applying the test described above, the Panel accepts that the Respondent's admission of professional misconduct is warranted.

[35] Lawyers have long been expected and required to take steps to ensure that their trust accounts are used only for the legitimate commercial purposes for which they are established.

[36] In particular, the *Code of Professional Conduct for British Columbia* (the "*BC Code*") provides as follows:

**3.2-7** A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

**Commentary**

[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

…

[3.1] The lawyer should also make inquiries of a client who:

(a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter …

[3.2] The lawyer should make a record of the results of these inquiries.

[37] In *Law Society of BC v. Skogstad,* 2008 LSBC 19, paragraphs 60 and 61, the panel held that it was inappropriate for a lawyer to allow a trust account to be used as a mere conduit, without providing legal services:

> The Panel wonders what role the Respondent was playing in these transactions if not to provide an air of legitimacy to an otherwise risk-filled and purportedly extraordinarily high yield investment program that drew in hundreds of individual investors. Once the V offshore trust had been established, there was very little in the nature of legal services provided to that client. The flow of funds from investors could as easily have been accomplished by a direct deposit to an account in the name of V in any bank in Nelson or elsewhere.
>
> *It is the view of this Panel that this use of a trust account by the Respondent is entirely inappropriate. Trust accounts must only be used for the legitimate commercial purposes for which they are established, namely to aid in the completion of a transaction in which the lawyer or law firm plays a role as legal advisor and facilitator*. The Respondent had no such role in either the Railway Bond Program or the Bank Debenture Program — he was merely a convenient and apparently legitimate conduit for funds from the individual investors to the various schemes decided upon by F for V. *The trust account served no legitimate role in these events and should not have been so employed*.

> [emphasis added]

[38] The panel in *Law Society of BC v. Gurney*, 2017 LSBC 15 cited *Skogstad* in concluding, at paragraph 79(a):

> … Even where other authorities, such as FINTRAC, may be aware of the source of the funds entering an account, the effect of solicitor-client privilege is that the parties to whom the funds are disbursed and the purpose for which the funds are disbursed are shielded by the privilege. It is for this reason that *a lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but the lawyer must also play a role as a legal advisor with regard to the transaction. This is the requirement to provide legal services*.
>
> [emphasis added]

[39] In *Gurney*, the panel went on to conclude, at paragraph 79(c), that a finding of breach of the lawyer's duty to investigate does not require proof that the underlying transaction is illegitimate.

[40] At paragraph 80, the panel aptly described the responsibilities lawyers bear with respect to their trust accounts as a "gatekeeper function."

[41] Recently, the panel in *Law Society of BC v. Daignault*, 2020 LSBC 18, concluded that a lawyer accepting funds into a trust account without performing legal work warranted, at least in part, the acceptance of a "global" admission of misconduct. In that case, the panel held as follows at paragraphs 69 and 70:

> The facts at issue in *Skogstad* facts are distinguishable from the instant case, in as much as the lawyer's client in *Skogstad* 2008 was involved in fraud. There is no evidence of fraud in this case. Nonetheless, the lawyer's duty to ensure that their trust account is used for the purposes for which it was intended does not depend on whether the client's eventual use of money paid through the trust account proves to be illicit. To maintain public confidence in the profession, a trust account must only be used for the legitimate commercial purpose for which it was established; it must "not be used as a convenient conduit": *Gurney* at paragraph 79.
>
> In 2011 to 2012, the Respondent ought to have known that he was professionally obliged not to permit his trust account to be used for transactions that were unconnected to legal work. We therefore find that the Respondent's failure to provide any substantial legal services in

> connection with the Depositor 1, 2 and 3 trust transactions is part and parcel of his professional misconduct in respect of those transactions.

[42] Both the *BC Code* and prior decisions make clear that lawyers in British Columbia have long been obliged to act as gatekeepers of their trust accounts and to take active steps to ensure that those accounts are used only for the legitimate commercial purposes for which they are established.

[43] It is important to note that the Respondent's conduct in this matter pre-dated the adoption of Rule 3-58.1(1) which now provides:

> Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

[44] Therefore, the Respondent's dealings with the Trust Account were not subject to the qualified prohibition in Rule 3-58.1(1) against lawyers allowing funds to be deposited into or disbursed from a trust account where related legal services were not provided.

[45] Nevertheless, prior to the introduction of Rule 3-58.1(1), lawyers in British Columbia were obligated, as described above, not to allow their trust accounts to be used merely as a conduit without making and recording inquiries of any client who sought the use of a trust account without requiring any substantial legal advice.

[46] The Respondent admits that he did not make or record any inquiries about the underlying transactions in circumstances where use of the Trust Account was sought without any substantial legal services from the Respondent.

[47] As a result, the Respondent's admission of professional misconduct is appropriate, and the Panel accepts that admission.

**Appropriateness of the specified disciplinary action**

[48] In this case, the Respondent and the Law Society have agreed to a specified disciplinary action. The test to be applied in considering whether a proposed specified disciplinary action is appropriate is set out in *Law Society of BC v. Rai*, 2011 LSBC 02 at paragraph 7 as follows:

> … The Panel must also be satisfied that the proposed disciplinary action is "acceptable". What does that mean? This Panel believes that a disciplinary action is acceptable if it is within the range of a fair and

> reasonable disciplinary action in all the circumstances. The Panel thus has a limited role. The question the Panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of a fair and reasonable disciplinary action?"

[49] The factors that should be considered in determining a disciplinary penalty are set out in *Law Society of BC v Ogilvie*, 1999 LSBC 17. In *Law Society of BC v. Faminoff*, 2017 LSBC 04, paragraphs 84 and 85, the review panel confirmed that a panel should consider those factors and apply the following approach:

> In determining a disciplinary penalty, it is only necessary to identify those circumstances and principles that are important to the disciplinary decision. Decisions on penalty are an individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings.
>
> In addition, disciplinary action must be appropriate based on the particular circumstances of the case. Although consistency and lack of arbitrariness are important in a self-regulated profession, the *Ogilvie* factors are designed to help to select the appropriate disciplinary action to best rehabilitate the Respondent and also to promote public confidence in the legal profession. This means that hearing panels will attempt to impose penalties that are appropriate for that particular individual.

[50] In the matter at hand, the Law Society submits, and the Respondent agrees, that the most relevant factors to the assessment of the appropriateness of the proposed Disciplinary Action are:

(a) the need to ensure the public's confidence in the integrity of the profession and the need for general deterrence;

(b) the nature and gravity of the conduct;

(c) the advantage gained by the Respondent;

(d) the previous character of the Respondent, including details of prior discipline;

(e) the Respondent's acknowledgement of the misconduct and the presence of other mitigating factors; and

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

[51] We address these factors below.

**Public confidence and general deterrence**

[52] The Law Society submits, and there is no question, that the Respondent's conduct relates to areas of "vital importance to the Law Society: ensuring the appropriate use of trust accounts and combatting money laundering."

[53] As a result, the need to ensure the public's confidence in the integrity of the profession and the requirement for deterrence are directly engaged here.

**Nature and gravity of the conduct**

[54] According to the Law Society, the Respondent's failure to perform the gatekeeper role in respect of the Trust Account comprises serious misconduct which poses a risk to the public interest.

[55] Those submissions are clearly apposite.

[56] Furthermore, the Law Society submits that there were additional factors present that should have prompted the Respondent to refuse to allow his trust account to be used without making further inquiries about the underlying transactions, including that the Respondent:

(a) did not meet TL in-person;

(b) was not asked to perform services other than receiving and disbursing funds from the Trust Account;

(c) was not asked to provide advice with respect to the agreement related to the funds received into and disbursed from the Trust Account; and

(d) was not provided information related to the performance milestones that were the basis for the payments from the Trust Account.

[57] The ASF discloses other aspects of the transactions that ought to have prompted the Respondent to make further inquiries, including that:

(a) the Respondent did not confirm or verify the identity of TL;

(b) the funds were deposited in the Trust Account via a bank draft purchased by TL; however, the terms of engagement provided that the Respondent acted only for BC Ltd., not TL;

(c) the underlying transaction was described as a further investment by TL in X Corp.; however, all of the payments were made to M Corp.; and

(d) the introductory email referred to a US$500,000 escrow, but only US$474,000 was deposited and US$473,000 was paid out.

[58] As referred to in *Gurney*, the issue is not whether aspects of the transactions, such as the involvement of multiple corporate entities, were ultimately determined to be problematic.

[59] Rather, the issue is the lack of information necessary for the Respondent to have a reasonable understanding of the material features of the transactions, including the role of the various participants. The Respondent's failure to make inquiries about the parties and the underlying transactions created an unacceptable risk of inadvertently allowing the Trust Account to be utilized in money laundering or other nefarious dealings.

**Advantage gained by the Respondent**

[60] The Law Society noted in its submissions that the Respondent received CAD$1,040 as payment for his services.

**Record of the Respondent**

[61] The Respondent has no prior discipline history.

**Respondent's acknowledgement of misconduct and other mitigating factors**

[62] In its submissions, the Law Society described the Respondent as having expressed remorse and accepted full responsibility for his conduct early in the investigation. Additionally, the Respondent fully co-operated with the investigative process and admitted the facts set-out in the ASF.

[63] According to the Law Society, there is no evidence of actual losses or fraudulent activity related to the transactions at issue. The Law Society submits this is another mitigating factor.

[64] The Panel agrees that evidence of fraud or loss would have been a significantly aggravating factor. However, that does not make the lack of evidence of fraud or loss a mitigating circumstance.

[65] As the panel held in *Gurney*, lawyers are required to act as gatekeepers of their trust accounts. In that regard, the provisions of the *BC Code*, and now the Rules, are intended to impose effective preventive measures to ensure lawyers' trust accounts are not conscripted into money laundering activities.

[66] The deleterious effect of a lawyer's failure to fulfil the gatekeeping role occurs by exposing the public to heightened risk of mischief, not just in cases where that risk materializes. That said, the presence or absence of evidence of fraud or loss is an important part of the factual context to be considered in determining an appropriate penalty.

[67] The Law Society submits that additional mitigating circumstances exist including:

(a) The Respondent became involved in this matter as a result of a referral from the Other Lawyer, whom he had known and trusted for 30 years.

(b) The Respondent had done prior work related to X Corp. and had some familiarity with it, its business and its investors, including TL.

(c) The Respondent understood that the Other Lawyer was representing X Corp. in respect of the transaction, and the Respondent's peripheral role was only required due to a conflict.

(d) The Respondent accurately set out his understanding of the transaction and his role in the engagement email.

(e) The Respondent has now left private practice and is unlikely to operate a trust account in the near future.

[68] The Respondent does not take issue with any of the Law Society's submissions, and provides the following additional considerations:

(a) The Respondent understood the investment funds were provided from one Canadian bank and were deposited in the Trust Account held at another Canadian bank.

(b) As a result of this matter, the Respondent now has a heightened sensitivity to the risk of mischief and has correspondingly heightened vigilance.

**Range of penalties imposed in similar cases**

[69] Both the Law Society and the Respondent made submissions with respect to penalties imposed in similar cases.

[70] In its submissions, the Law Society reviewed three decisions involving the use of a lawyer's trust account in the absence of significant legal services. However, both the Law Society and the Respondent submitted that neither *Gurney* nor *Law Society of BC v. Hsu*, 2019 LSBC 29 were particularly helpful given the substantially different circumstances at issue.

[71] On the other hand, the parties contended that the circumstances in *Daignault* were most similar to those in this matter and that the penalty imposed in that case demonstrates that the proposed Discipline Action falls within the range of reasonableness.

[72] In *Gurney*, the panel ordered the respondent to be suspended for six months and to disgorge $25,845 in fees received. The panel also placed conditions on the respondent's future operation of any trust accounts.

[73] The parties submit that the circumstances that resulted in that disciplinary action are distinguishable from the matter at hand. In particular they note that, in *Gurney*:

(a) approximately $25 million was deposited and paid out of the respondent's trust account in respect of clients with whom the respondent had no prior dealings or knowledge;

(b) the funds were transferred from outside of Canada;

(c) the matter was referred to the respondent from a former lawyer previously suspended by the Law Society for misconduct;

(d) the respondent received fees of $25,845 based on a percentage of the funds received and disbursed from his trust account; and

(e) the respondent did not acknowledge his misconduct, but rather took the position that the Law Society was acting abusively in issuing and proceeding with the citation.

[74] In *Hsu*, the panel ordered the respondent to be suspended for three months and to pay costs of $1,000. In addition, the panel ordered certain restrictions on the respondent's practice.

[75] Again, the parties submit that the circumstances are distinguishable from this matter. In particular in *Hsu*:

(a) approximately $14 million of investor's funds flowed through the respondent's trust account;

(b) the respondent was dealing with securities transactions in respect of which she was not competent to act;

(c) the respondent took no steps to determine whether any laws or regulations applied to the security transactions in respect of which she was engaged;

(d) the respondent's conduct facilitated fraud and the misappropriation of millions of dollars; and

(e) the respondent had received fees of $29,000 for her services.

[76] In contrast, the parties submit that the respondent's conduct in *Daignault,* while more serious than the Respondent's conduct, is more analogous than the circumstances in *Gurney* or *Hsu.*

[77] In *Daignault,* the respondent had both allowed his trust account to be used to process three transactions without providing substantial legal services, and failed to caution an unrepresented person that he was not protecting that person's interests in the transactions.

[78] The panel ordered the respondent to be suspended for two weeks, and made no order as to costs.

[79] As in the case at hand, the respondent in *Daignault* had no prior disciplinary history and had admitted to his misconduct and expressed regret.

[80] Additionally, the panel there concluded that the respondent had "neither sought nor enjoyed gain from his misconduct."

[81] At paragraph 79 of *Daignault,* the panel held that there was no evidence of loss in respect of two of the three transactions, but went on to note:

> … although the Respondent's misconduct certainly created conditions where loss could have occurred.

[82] We agree that the approach to the absence of loss adopted by the panel in *Daignault* is also applicable here. It is a significant consideration that there is no evidence of loss, fraud, or money laundering as a result of the Respondent's

conduct. However, the Respondent's conduct still created risk to the public interest. As a result, we do not consider this factor to be either aggravating or particularly mitigating.

[83] The panel in *Daignault* reviewed both *Skogstad* and *Gurney* and concluded that those decisions offered limited guidance as to an appropriate disciplinary action because the misconduct in those matters had been considerably more severe.

[84] One matter in issue in *Daignault* that was not raised here was investigative delay. The panel in *Daignault* held that the investigation of the respondent was of extremely long duration and, at paragraph 101 of the decision, the panel took that delay into account as a mitigating factor in determining the appropriate outcome.

[85] The circumstances in *Daignault* and the matter at hand differ in a number of ways including that:

(a) the Respondent in this case did not fail to provide the requisite warnings to an unrepresented party as was the case in *Daignault;*

(b) the Respondent received a modest gain from his conduct, rather than "no gain";

(c) the panel in *Daignault* took account of substantial delay in the investigation of the respondent in determining that a two-week suspension was appropriate. There was no similar investigative delay alleged here; and

(d) as set out below, the Law Society seeks an order for costs against the Respondent. In *Daignault* no costs were sought.

[86] Although there are distinguishing features between the two matters, the Panel accepts the submission of both parties that *Daignault* is more similar to this matter than *Gurney* and *Hsu,* which are distinguishable. Those decisions involved significantly more serious misconduct and aggravating circumstances than either *Daignault* or this matter.

[87] Consequently, an outcome in the range of that ordered in *Daignault* is more reasonable than those ordered in *Gurney* or *Hsu*.

[88] In light of all of the factors set out above, including the disciplinary action ordered in *Daignault,* we conclude that the proposed two-week suspension falls within the range of a fair and reasonable disciplinary action.

**Costs**

[89] As noted above, the Law Society seeks an order for costs of $1,000 on the basis that Rule 5-11 provides that the Panel must have regard to the tariff of costs in Schedule 4 to the Rules, unless in our discretion we consider that no costs, or costs in an amount other than that provided for in the tariff, should be ordered.

[90] The Law Society submits that there is no reason to depart from the tariff of costs and seeks an order at the "low end" of the range provided for in the tariff. For this matter the tariff range is $1,000 to $3,500, exclusive of disbursements.

[91] The Law Society submits that an order for costs at the low end is appropriate given that the Respondent admitted his misconduct and cooperated with the Law Society.

[92] The Respondent consents to the proposed order for costs of $1,000.

[93] In light of the Law Society's submissions and the Respondent's consent, the Panel accepts the parties' position that an order for costs of $1,000 is appropriate.

**Non-Disclosure**

[94] The Law Society applies for an order pursuant to Rule 5-8(2) that the portions of exhibit 1 that contain confidential client information or privileged information not be disclosed to members of the public.

[95] In particular, the Law Society asks that, if a member of the public requests copies of the exhibit marked in this proceeding, any confidential or privileged information must be redacted prior to being provided, including any client names, identifying information or other information to which these principles are applicable.

[96] The Respondent took no position in respect of the Law Society's application.

[97] The Panel accepts that an order preserving confidential or privileged client information is appropriate.

**Commencement of the suspension**

[98] The Respondent requested that his suspension commence on July 1, 2020 or later.

[99] The Law Society took no position with respect to the commencement date of the suspension.

[100] As noted in *Daignault*, as a matter of practice, a suspension usually commences in the month following a panel's decision.

[101] Since July 1 is a statutory holiday, the Respondent's suspension will commence on July 2, 2020, or such other date as the Law Society and the Respondent may agree.

**ORDERS**

[102] For the reasons set out above, the Panel makes the following orders:

(a) The Respondent is suspended from the practice of law for a period of two weeks commencing July 2, 2020 or such other date agreed to by the parties;

(b) The Respondent must pay costs of $1,000 to the Law Society on or before September 1, 2020 or such other date agreed to by the parties.

(c) If any person, other than a party, seeks to obtain a copy of the exhibit filed in these proceedings, all client names, identifying information and any other information that is protected by client confidentiality or solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person.

2019 LSBC 29
Decision issued: August 1, 2019
Oral reasons: July 26, 2019
Citation issued: June 14, 2018

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**YVONNE YE WAH HSU**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**

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|---|---|
| Hearing date: | July 26, 2019 |
| Panel: | Phil Riddell, QC, Chair<br>Lindsay R. LeBlanc, Lawyer<br>Brendan Matthews, Public representative |
| Discipline Counsel: | William B. Smart, QC and Trevor Bant |
| Counsel for the Respondent: | William G. McLeod, QC |

## BACKGROUND

[1] On June 14, 2018 a citation was issued against the Respondent alleging:

1. Between approximately May 2009 and February 2014, in the course of acting for one or both of PO and CM Inc. in a finance and securities matter, you did not perform all legal services to the standard of a competent lawyer, contrary to one or more of Chapter 3, Rules 1, 2 and 3 of the *Professional Conduct Handbook* in force until December 31, 2012 and thereafter contrary to one or more of rules 3.1-2 and 3.2-1 of the *Code of Professional Conduct for British Columbia*, and in particular you failed to do one or more of the following:

(a) acquire and apply relevant knowledge or skills of securities law and regulatory requirements (collectively, the "Regulatory Requirements") and the practices and procedures by which the Regulatory Requirements can be effectively applied;

(b) make reasonable inquiries to obtain information regarding exemptions to the Regulatory Requirements which information was necessary to provide legal services to your clients;

(c) make reasonable inquiries of your clients to obtain sufficient information to prepare documents to be used in raising funds and issuing securities in compliance with the Regulatory Requirements;

(d) keep your clients reasonably informed about their obligations to comply with the Regulatory Requirements and how to do so; and

(e) prepare documents competently or in compliance with the Regulatory Requirements.

2. Between approximately May 2009 and February 2014, in the course of acting for one or both of PO and CM Inc. in a finance and securities matter, you engaged in activities that you ought to have known assisted in or encouraged dishonesty or fraud, contrary to Chapter 4, Rule 6 of the *Professional Conduct Handbook* in force until December 31, 2012 and thereafter contrary to rule 3.2-7 of the Code of *Professional Conduct for British Columbia*, and in particular you did one or more of the following:

(a) made changes to disclosure documents used to solicit funds from investors (the "Disclosure Documents") requested by your client PO, including the removal of information regarding commissions payable to PO;

(b) prepared investment documentation for your client CC Corp. in which:

(i) investors seeking to invest in CC Corp. would not acquire CC Corp. shares directly, but would receive shares of Newco. as security for their interests in CC Corp. shares, which CC Corp. shares were to be held in trust for the investors by CM Inc., when the shares of Newco had no value; and

(ii) investors seeking to invest in CROF Corp. would not acquire CROF Corp. shares directly, but would receive shares of NewCo2 as security for their interests in CROF Corp. shares, which CROF

Corp. shares were to be held in trust for the investors by CM Inc., when the shares of NewCo2 had no value;

(c) allowed trust accounts at the law firm through which you provided legal services to be used to receive and disburse investor funds;

(d) failed to make any or reasonable inquiries with respect to one or more of the following:

(i) whether your clients were registered to sell securities;

(ii) the companies to receive investor funds, CC Corp. and CROF Corp., including the directors, officers and share structures of those companies;

(iii) significant differences among versions of Disclosure Documents given to investors;

(iv) whether CM Inc. owned the shares that it purported to sell to investors;

(v) whether the shares issued to investors as security for their investments were validly issued;

(vi) the rates and forms of returns described to investors;

(vii) the levels of investment risk described to investors; and

(viii) whether investor funds were paid to CC Corp. or CROF Corp., the entities for which the funds were purportedly raised.

[2] The conduct alleged in each allegation was stated to constitute professional misconduct pursuant to section 38(4) of the *Legal Profession Act*.

[3] This citation comes before us as a conditional admission by the Respondent that she committed professional misconduct in the manner set out in the citation, and a consent to a specified disciplinary action pursuant to Rule 4-30. The Respondent, through her counsel, executed the Agreed Statement of Facts, entered as Exhibit 2 at the hearing, in which the facts that form the basis for the citation were admitted as proven. The Respondent admitted that her conduct as set out in the Agreed Statement of Facts constituted professional misconduct. The Respondent consented to the following disciplinary action:

(a) a suspension of three months commencing August 1, 2019;

(b) a restriction from practising securities law; and

(c) costs in the amount of $1,000 plus disbursements to be paid by November 15, 2019.

[4] The Discipline Committee accepted the Respondent's conditional admission and the proposed disciplinary action. The disposition was recommended by counsel for the Law Society on the instructions of the Discipline Committee.

[5] An oral decision was provided on July 26, 2019 in which we:

(a) found that the Respondent committed professional misconduct in the manner set out in the citation;

(b) ordered the following disciplinary action:

(i) the Respondent be suspended from the practice of law for three months commencing on August 1, 2019; and

(ii) the Respondent be restricted from practising in the area of securities law until relieved of that condition by the Discipline Committee.

(c) ordered the Respondent to pay costs in the amount of $1,000 plus taxable disbursements by November 15, 2019;

(d) made a non-disclosure order pursuant to Rule 5-8(2) over all information in the exhibits filed in the proceedings or the transcript of these proceedings that is protected by client confidentiality and/or solicitor client privilege; and

(e) made a non-disclosure order over information in the exhibits filed in the proceedings, the written submission of the Law Society or the transcripts of these proceedings that disclose the Respondent's personal financial situation.

## AGREED STATEMENT OF FACTS

[6] Counsel for the Law Society filed written submissions, and counsel for the Respondent adopted the submissions of the Law Society. Counsel for the Law Society in their written submissions set out a summary of the Agreed Statement of Facts, and we extracted much of that summary and have adopted it as follows:

(a) In May 2009, PO retained the Respondent in connection with his role in raising funds on behalf of CC Corp. PO provided the Respondent with a letter of engagement signed by CC Corp. that indicated:

(i) CC Corp. had engaged PO to raise $5 million from investors;

(ii) the investors would receive 60 per cent of the equity in a new venture relating to a planned composting plant in the Fraser Valley; and

(iii) PO would be paid a $700,000 commission from the $5 million and also receive a 21.25 per cent equity stake in CC Corp.

(b) The Respondent drafted an "offering summary" for PO to give to prospective investors. On PO's instructions, it stated that CC Corp. was seeking to raise $8 million and did not include any information about PO's compensation. The Respondent was not aware and took no steps to determine whether there were any laws or regulations applicable to the content or form of such a document, nor did she take any steps to determine whether PO was registered under the *Securities Act* to sell securities.

(c) In July 2009, the Respondent began receiving offering summaries that had been signed by various individuals (the "Signed Summaries"). The Signed Summaries have substantive differences among them, including in the description of the terms of the offering. The Respondent did not notice the differences among the Signed Summaries or realize that someone was making changes from time to time to the document she had drafted.

(d) In August 2009, the Respondent began receiving investor funds into her trust account. Investors provided funds by cheque payable to her firm in trust or by electronically transferring the funds into her trust account using account details provided to them by PO.

(e) Investor funds were withdrawn by the Respondent from her trust account at the direction of PO. With few exceptions, the investor funds the Respondent withdrew from her trust account were paid to PO or to CM Inc., a company the Respondent knew to be controlled by PO. Investor funds were typically withdrawn from trust within a few days of being deposited.

(f) In April February 2010, the Respondent and PO met to discuss how investors would receive their shares. At this point, investors had deposited funds into her trust account, and in most cases the funds had then been paid out, but none of the investors had received anything in return. In April 2010, the Respondent and PO met again and came up with an investment structure pursuant to which investors would not receive shares of CC Corp.; rather, CM Inc. would hold shares of CC Corp. in trust for the investors. A new company would be incorporated and shares from that newly incorporated company would be issued to investors as "security" in proportion to the number of shares of CC Corp. that CM Inc. was holding in trust for them.

(g) The Respondent incorporated a company, NewCo, to issue shares to investors as "security". She also drafted a form of investment agreement to be entered into between each investor, CM Inc. and NewCo (the "Form of Investment Agreement").

(h) Thereafter, from time to time PO would tell the Respondent or one of the Respondent's legal assistants that investor funds were forthcoming. PO would provide the Respondent or her legal assistant with the name of the investor and tell the Respondent or her legal assistant how many shares should be issued to that investor. The Respondent or her legal assistant would then:

(i) revise the Form of Investment Agreement to include the date, the investor's name, investment amount and number of shares, thereby creating a final investment agreement specific to that investor;

(ii) draft a subscription agreement for the relevant number of shares of NewCo; and

(iii) create a share certificate for the relevant number of shares of NewCo,

(collectively, a "Document Package").

(i) The Respondent or her legal assistant would then provide the Document Package to PO to provide to the investor. Where the Respondent's legal assistant was the one to prepare the Document Package, the Respondent did not review it before her legal assistant sent it to PO. The Respondent did not advise investors who received a Document Package that she acted only for PO and was not representing them.

(j) In March 2011, the Respondent began receiving Signed Summaries which referred to CROF Corp. instead of CC Corp. The Respondent had not drafted these documents.

(k) PO told the Respondent that CROF Corp. had been incorporated after CC Corp.'s CEO had been caught embezzling funds. He said that CROF Corp. was going to carry on the business begun by CC Corp. and that he was now raising funds for CROF Corp. The Respondent did not ask PO for details of the alleged embezzlement, take any steps to determine whether what PO had told her was true or consider whether the alleged embezzlement affected the transactions she was facilitating.

(l) The Respondent incorporated a company, NewCo2, to issue shares to investors as "security" and she revised the Form of Investment Agreement to refer instead to CROF Corp. and NewCo2.

(m) From mid-August 2011 until approximately September 2012, the Respondent was away from the office on parental leave. During this time her firm continued to receive investor funds into trust and pay them out to PO or CM Inc. as directed by PO. The Respondent thought her employer was overseeing the file while she was away. He was not in fact overseeing the file and mistakenly believed that the Respondent was continuing to work on the file remotely. During this year-long period, all Document Packages were prepared by legal assistants with no supervision by a lawyer.

(n) In May 2013, CC Corp. filed an assignment into bankruptcy. PO told the Respondent that he wanted to try to save the composting project by buying the assets of CC Corp. out of bankruptcy and that he wanted to ask investors to provide a 15 per cent top-up on their investments in order for him to be able to do so.

(o) In December 2013, PO sent the Respondent a draft letter she understood that he wished to send to certain investors in CC Corp. The Respondent reviewed the draft letter and provided her suggested revisions to PO. The revised letter, which PO sent to investors, includes the following passages:

> Because of the problem of corruption and the failure to fulfil their duties and responsibilities on the part of the Directors, we have sought for [sic] legal advice for solutions to this problem. ... Because of our passion for this recycling project and a duty

> towards our shareholders, the lawyer suggested we first close down CC Corp. and then reorganize a new company by purchasing some or all of CC Corp.'s machinery.
>
> …
>
> To be fair to every shareholder, the lawyer advised us to ask interested investors to provide a 15% top-up to their original investment.
>
> To be fair to all existing shareholders of [CC Corp.], whomever intends to continue to cooperate with us must inject a 15% top-up of their principal investment by June 21, 2013. Investors will receive shares equivalent to their principal investment plus the 15% top-up in the newly restructured company. … Consequently, there will be no losses to any investor who intends to continue to cooperate with us.
>
> …
>
> To protect your interests, please wire-transfer your 15% top-up funds to the lawyer's trust account on or before June 21, 2013. Information on the trust account is as follows:
>
> Payable to: [the Respondent's firm]
>
> [The Respondent's trust account bank details]

(p) The Respondent did not know who the "the lawyer" was and did not recognize that investors might understand that she was the lawyer. It had not occurred to the Respondent that the letter might give a false sense of reassurance to investors.

(q) PO sent the letter to the investors. The Respondent took no steps to advise investors who received the letter that she acted only for PO and was not representing them or protecting their interests.

(r) On PO's instructions, the Respondent incorporated a new company, EC Corp., to receive the "top-up" investments and attempt to purchase CC Corp.'s assets out of bankruptcy. The Respondent received "top-up" funds from numerous CC Corp. and CROF Corp. investors. These funds were deposited into the Respondent's law firm's trust account and subsequently paid out at PO's direction to CM Inc. As far as the

Respondent is aware, none of these transactions was documented in any manner.

(s) No investors received any shares of CC Corp., CROF Corp or EC Corp.

(t) The Respondent understood that different investors were receiving different numbers of shares per dollar invested.

(u) The Respondent believed that investors were receiving shares of NewCo and NewCo2 as "security" for an equivalent proportion (10 or 100 times as many, respectively) shares in CC Corp. or CROF Corp. However, the Respondent did not:

(i) keep track of how many shares of NewCo and NewCo2 her assistants were issuing to investors from time to time; or

(ii) take any steps to determine whether CM Inc. held any shares of CC Corp. and CROF Corp., let alone enough shares at any given time to cover (at the relevant ratio) the shares of NewCo and NewCo2 that the Respondent's assistants were issuing to investors.

(v) Authorized share structure of NewCo permitted 100,000 class A common non-voting shares to be issued but the Respondent's legal assistants ultimately issued 154,258 class A common non-voting shares to investors.

(w) The Respondent was not aware and did not take any steps to determine whether any laws or regulations governed the transactions she was facilitating. She was not aware and did not consider whether PO, CM Inc., NewCo or NewCo2 were trading in securities within the meaning of the *Securities Act*.

(x) PO terminated his retainer with the Respondent in or around February 2014.

(y) In total, the Respondent received approximately $12.5 million into her trust account from persons who intended to invest in CC Corp. or CROF Corp. and approximately $1.8 million from persons who intended to invest in EC Corp.

(z) The Respondent paid out from her trust account approximately $12.3 million to CM Inc., $1.4 million to PO personally and $350,000 to CC Corp.

(aa) The Respondent likely believed there was a reason for her to be paying the investor funds to CM Inc. or PO rather than to the CC Corp. or CROF Corp.: investors were not purchasing shares of the CC Corp. or CROF Corp.; CM Inc. was supposed to be purchasing shares of the CC Corp. and CROF Corp. to hold in trust for the investors. However, the Respondent was not aware of what happened to the investor funds after they were paid out of her trust account to PO or CM Inc. and she did not take any independent steps to determine whether CM Inc. was using the investor funds to purchase shares of the CC Corp. or CROF Corp.

(bb) In December 2017, the Securities Commission held that PO, CM Inc., NewCo and NewCo2 had each committed fraud contrary to s 57(b) of the *Securities Act*.

(cc) Specifically, the Securities Commission found that PO had fraudulently misappropriated approximately $5 million from persons who intended to invest in CC Corp. or CROF Corp.

(dd) The Respondent was not aware of PO's fraud and it was not her intention to facilitate his fraud.

[7] The Respondent expressed remorse for her actions, not only in the Agreed Statement of Facts, but also in a statement that she made to the Panel.

[8] Counsel for the Law Society characterized the conduct of the Respondent through the investigation as forthright and cooperative.

[9] The Respondent did not act with malice or for personal gain. This was an example of a lawyer practising in an area to which she was not familiar and not identifying the red flags that presented themselves throughout the Respondent's conduct of the file.

[10] The Respondent admitted that her conduct constituted professional misconduct.

## DECISION

[11] Rule 4-30(1) permits the Respondent to make a conditional admission of a discipline violation, conditional on the imposition of a specified disciplinary action.

[12] The panel may either reject or accept the conditional admission and the proposed disciplinary action. If the panel does not accept the admission or the proposed disciplinary action it must advise the chair of the Discipline Committee of its

decision and proceed no further with the hearing of the citation. The chair of the Discipline Committee must then instruct discipline counsel to proceed to set a date for the hearing of the citation.

[13] We have no difficulty in finding that the evidence contained in the Agreed Statement of Facts leads us to the finding that the Law Society has met the burden of proof upon it, on the balance of probabilities, that the Respondent professionally misconducted herself in the manner set out in the citation in that her conduct constituted a "marked departure" from what the Law Society expects of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 154).

[14] In assessing the appropriate disciplinary action we have to consider the purpose of disciplinary action. In *Law Society of BC v. Hill*, 2011 LSBC 16 the panel stated at paragraph 3:

> 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.

[15] *Law Society of BC v. Ogilvie*, 1999 LSBC 17 is the leading case that sets out the principles to by applied by a panel in determining disciplinary action. At paragraph 10 of *Ogilvie* the panel set out a series of factors to be considered:

(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 on 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.

[16] In *Law Society of BC v. MacGregor,* 2019 LSBC 26 the panel made the following observations regarding the application of the *Ogilivie* factors at paras. 6 and 7:

> Those factors have been considered in many discipline decisions. In *Law Society of BC v. Dent,* 2016 LSBC 05 at para. 16, the panel stated:
>
> > It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing,* which talks about different factors having different weight.
>
> The panel in *Dent* also endorsed an approach of identifying any additional *Ogilvie* factors that, while not primary, may tip the scales one way or the other and described them as secondary factors. This Panel agrees that it is appropriate to mention in decisions any such secondary factors.

[17] Counsel for the Law Society, in reviewing the *Ogilvie* factors, emphasized the following factors.

[18] Nature, gravity and consequences of the misconduct:

(a) The misconduct was serious and had the consequences of enabling the wrongdoing of PO;

(b) The Respondent took no steps to determine whether there were any laws or regulations applicable to the documents she drafted. She took no steps to determine if PO was registered under the *Securities Act* to sell securities;

(c) The documents created by the Respondent were incoherent;

(d) The Respondent failed to adequately supervise her staff;

(e) The Respondent neglected the file for approximately a year when she was on leave, and mistakenly believed her employer was overseeing the file;

(f) The Respondent failed to advise investors that she only acted for PO and was not representing them;

(g) The Respondent allowed her trust account to be used when there was no need for her trust account to be used;

(h) The Respondent accepted a retainer in an area of law which she had no experience;

(i) The Respondent took no steps to develop her competence in the area of law in which she had no experience; and

(j) As a result of the Respondent's misconduct:

(i) The investors did not receive any shares in CC Corp. or CROF Corp.; and

(ii) Approximately $5 million of the funds deposited by investors in the Respondent's trust account were misappropriated by PO.

[19] Character and professional conduct record of the Respondent:

(a) The Respondent was a five year call when she was initially retained by PO and she has no record of any professional misconduct.

[20] Whether the Respondent has acknowledged the misconduct and has taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances:

(a) The Respondent was cooperative and forthright with the Law Society;

(b) The Respondent is a sole practitioner and restricts her practice to matters such as conveyancing and incorporations;

(c) The Respondent is of modest financial means;

(d) The Respondent did not gain significantly from her misconduct. She received approximately $29,000 in fees, disbursements and taxes over a five-year period;

(e) The Respondent admitted her professional misconduct in the Agreed Statement of Facts; and

(f) The Respondent feels "profound" remorse and has rehabilitated herself.

[21] Public confidence in the legal profession:

(a) Public confidence in the legal profession is a primary factor in determining the appropriate penalty; and

(b) The Respondent's involvement in the actions of PO and the use of her firm's trust account clothed the transactions with a veil of legitimacy.

[22] The Law Society has provided three cases that are of some assistance in determining the appropriate penalty. Those cases are: *Law Society of BC v. Gurney*, 2017 LSBC 15 and 2017 LSBC 32; *Law Society of BC v. Rai*, 2011 LSBC 2 and *Law Society of BC v. Skogstad*, 2008 LSBC 19. The range of penalty in those cases was from a three to six month suspension and in the case of *Gurney* the additional feature of a disgorgement order.

[23] The seriousness of the misconduct calls for a suspension. A fine is not an adequate penalty. This is a case where the Respondent acted on a matter on which she was not competent to act. She missed various red flags that led to her allowing her trust account to be used to funnel funds from the investors to PO, when there was no necessity for her trust account to be used.

[24] The Respondent, as has been said earlier, was cooperative and forthright with the Law Society, she admitted her wrongdoing by way of the Agreed Statement of Facts, has changed the nature of her practice and is remorseful. These are significant mitigating factors.

[25] There is no indication of dishonesty on the part of the Respondent. She appears to have been an unwitting dupe of PO.

[26] In examining the *Ogilive* factors we find that the sanctions that the Respondent has consented to and the Discipline Committee has accepted are appropriate sanctions in these circumstances.

**SEALING ORDERS**

[27] Counsel for the Respondent applied for and was granted a sealing order that:

(a) if any person, other than a party, seeks to obtain a copy of Exhibit 2 in these proceedings, paragraphs 102 and 104 shall be redacted from the exhibit before it is disclosed to that person;

(b) if any person, other than a party, seeks to obtain a copy of the Law Society's written submissions in these proceedings, the monetary amounts in paragraphs 42 and 70 shall be redacted before it is disclosed to that person

(c) if any person, other than a party, applies for a copy of the transcript of these proceedings, the monetary amounts of the Respondent's annual income shall be redacted before it is disclosed to that person; and

(d) no person shall broadcast or publish the monetary amounts of the Respondent's annual income that were stated in the course of the hearing.

[28] Counsel for the Law Society applied for and was granted a sealing order under Rule 5-8(2) that:

(a) if any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any other information that is protected by client confidentiality or solicitor-client privilege, shall be redacted from the exhibit before it is disclosed to that person;

(b) if any person, other than a party, applies for a copy of the transcript of these proceedings, client names, identifying information, and any other information that is protected by client confidentiality or solicitor-client privilege, shall be redacted from the transcript before it is disclosed to that person; and

(c) no person shall broadcast or publish any client names, identifying information, or any other information that is protected by client confidentiality or solicitor-client privilege, that was stated in the course of the hearing.

**ORDER**

[29] We order that the Respondent:

(a) is suspended from the practice of law for three months commencing August 1, 2019;

(b) is restricted from practising in the area of securities law until relieved of this restriction by the Discipline Committee; and

(c) pay costs in the amount of $1,000 plus taxable disbursement by November 15, 2019.

[30] The Panel instructs the Executive Director to record the Respondent's admission on her professional conduct record.

2020 LSBC 45
Decision issued: September 18, 2020
Citation issued: December 12, 2018

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**FLORENCE ESTHER LOUIE YEN**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL**
**ON FACTS AND DETERMINATION**

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| | |
|---|---|
| Hearing dates: | October 29, 30, 31, 2019 and March 4, 2020 |
| Panel: | Nancy Merrill, QC, Chair<br>John Lane, Public representative<br>Sandra Weafer, Lawyer |
| Discipline Counsel: | Mandana Namazi |
| Counsel for the Respondent: | Gerald Cuttler, QC |

## BACKGROUND

[1] This case involves the receipt and disbursement of over ten million dollars of trust money on behalf of an existing client over a two-year period. The issues involve what inquiries need to be made concerning the source of those deposits and what constitutes doing a "substantial amount of legal work in connection with the trust matter."

## THE CITATION

[2] The citation in this matter was authorized by the Discipline Committee on December 6, 2018 and issued on December 12, 2018. Essentially the citation sets out two allegations:

1. Between approximately May 20, 2015 and February 23, 2017, on behalf of her client PL, the Respondent used or permitted the use of her firm's trust accounts to receive approximately $10 million US and $1.27 million Canadian and disburse approximately the same amount in 15 separate deposits and 25 separate withdrawals or transfers , and failed to do any of the following in connection with these transactions:

    (a) provide any substantial legal services;

    (b) make reasonable inquiries about the circumstances of the transactions, including the subject matter and objectives of the retainer, the source of funds, the purpose of payment of the funds or the reason of the payment of the funds to or through the trust account; or

    (c) make a record of the results of any inquiries about the circumstances.

2. Between approximately May 20, 2015 and June 15, 2015, the Respondent received funds into her firm's trust accounts on behalf of her client PL but failed to record the source of funds in relation to one or more of the following transactions:

    (a) $500,000 US received on or about May 20, 2015;

    (b) $1,700,000 US received on or about June 10, 2105; and

    (c) $1,849,971.20 US received on or about June 15, 2015.

## FACTS

[3] The following are the salient facts for the purposes of our determination. The evidence consisted of lengthy notices to admit and responses from both parties, and testimony from the Respondent's employer KA, Kurt Wedel (the Law Society investigator), IG (the bookkeeper at the law firm), GB (KA's partner), and the Respondent. PL, the client, did not testify.

[4] The Respondent has been practising law since her call to the bar in 1995. The Respondent originally practised as an employee of the JW Law Corporation

(JWLC), from her call to the bar in September 1995 until JW sold his practice to KA. At that time, in or about November, 2011 the Respondent became an employee of KA Law Corporation (KALC), and she remained there until approximately March, 2019. At all times she was an employee and was never a partner, as she chose to remain an employee.

[5] Although an employee of KALC, the Respondent was a signatory on the trust accounts, although the trust reports were reviewed and certified by KA. The process for receiving wire transfers into trust was as follows:

(a) the Respondent and her assistant had wire instructions to provide to clients who wished to wire money to the trust account in issue;

(b) these instructions would be provided to a client when a client wished to wire funds to the firm;

(c) either the lawyer or the assistant would advise the accounting staff (who consisted of one full-time bookkeeper, who worked remotely four days and in the office one day a week, and other staff who were responsible for posting transactions to the KALC's accounting system and issuing trust cheques) who would look out for the funds that were expected;

(d) the accounting staff would confirm when the funds arrived;

(e) information about the incoming transfers would be provided to the bank by the accounting staff;

(f) the accounting staff would inform the assistant that the deposit had arrived;

(g) the lawyer or the assistant would then write a note and record the deposit on a green sheet that was placed in a client's paper file and advise the client that the funds had been received;

(h) the accounting staff would post the deposit, together with all relevant information required by the Law Society Rules, to the firm's accounting records.

[6] PL became a client of JWLC in August 2007. At that time he dealt with the Respondent, who incorporated a company for him ([numbered company] BC Ltd.) for the purpose of a restaurant business. At around the same time, she and JW acted for the same numbered company, on PL's instructions with respect to the purchase of the assets of a restaurant on West Broadway. During the course of the

Broadway restaurant purchase, the Respondent learned that PL and his partner were already operating a restaurant on Kingsway in Burnaby, that he had his serve it right certification, and that he had applied for and been granted a liquor licence for the Kingsway restaurant.

[7] Between 2007 and 2010 PL and his partner, or their corporate entities, retained JWLC to provide other legal services, including becoming the registered and records office for three other numbered companies, doing share transfers, and preparing and submitting liquor licence applications in connection with the expansion of the restaurant business. In order to obtain or transfer a liquor licence, it is necessary to have a criminal record check done. None of the criminal record checks done in connection with the application or transfer of any liquor licence involving PL or any of his companies revealed any record of criminal activity.

[8] In January 2012, PL told the Respondent that he was thinking of relocating to Asia to assist with his father's business. As a result of this, he would transfer all of his shares in his various restaurants to his business partner. PL retained KALC to prepare the share purchase agreement for the sale of his shares.

[9] During 2012 and 2013, PL and the Respondent had communications about a variety of matters – PL wanted a company incorporated for the purpose of purchasing licensed merchandise for resale; there were questions about the residency of PL's father and questions about trusts and foundations, for which the Respondent referred PL to a tax accountant for advice. In 2014, the Respondent acted for PL's family and prepared a trust agreement transferring title to the parents' Vancouver house to the mother's name. There was some indication that the family had some dealings in Panama, as PL asked the Respondent some questions about Panama's legal system as early as October, 2012.

[10] The transactions in issue in the citation began in May 2015. On May 1, PL contacted the Respondent from Hong Kong and advised that his uncle's foundation wanted to invest in Canada, that there was a property that he was looking at purchasing and that he would be receiving funds from his uncle as a gift or loan. He asked for instructions on how the uncle could wire monies into the firm's trust account.

[11] The Respondent's notes of that May conversation are as follows:

> TF [PL] May 1, 2015
>
> - Uncle's foundation to invest in Cda

- has a ppty he is looking at purchasing
    - borrowing $ from his Uncle's foundation
    - give $ to [PL] so he can go ahead w/a purchase

        $ in amt to $3-$4 million
    - concern re. gift of $
    - get a note from his Uncle it is a gift
    - what should he write re. gift?
- instructions on how to wire $ into our trust acct. [assistant] will email him the acct info.
- his Uncle will wire funds for potential purchase by [PL]

[12] The Respondent, with no further specifics, authorized her assistant to provide PL the deposit information for one of the firm's trust accounts.

[13] On May 18, 2015 $500,000 US was wired to the trust account of the Respondent's firm. PL sent an email to the Respondent indicating that his uncle was wiring $500,000 to the trust account. The wire record accompanying the email did not refer to the uncle, but instead indicated that the money was received from "Fundacion F" an entity with a Hong Kong address. The wire record included a note "Gift to [PL]". The money was received as $604,770.16 Canadian by the law firm trust account on May 20, 2015. At that time the Respondent opened file number 20968 ("File number 20968"), with PL as the client and the matter as "Gift from LKF".

[14] On May 20, the day the money arrived in the trust account, PL called the Respondent and said that the offer on the property he had been looking at was not accepted. The Respondent had never seen the offer on the property, despite asking for the contract of purchase and sale. PL also indicated at that time that he wanted to access the money that had been forwarded to the trust account.

[15] At that time, the Respondent was unsure if she was able to release the funds to PL, given that the funds had been forwarded to the trust account from the uncle for a transaction that was not proceeding. The Respondent asked the firm's bookkeeper if they could pay out the funds to the client's nephew in that circumstance. The bookkeeper indicated that she did not know the answer, so the Respondent

requested that the bookkeeper contact the Law Society to ascertain whether the funds could be paid out. The bookkeeper testified that she contacted the trust assurance department of the Law Society, as she had previously communicated with them.

[16] The Respondent did not inform the bookkeeper of some of the salient details of the circumstances, including the amount of the funds, any details about the client or the sender of the funds. The bookkeeper spoke with the trust assurance department, and made the general inquiry – that the funds were provided for a client by an uncle for a real estate transaction and the transaction did not proceed. When the Law Society called the bookkeeper back, she was told that if it was a client of the firm it would be fine. The bookkeeper then went and informed the Respondent that as it was an existing client, it should be fine to go ahead and pay out the funds. Present for that conversation were the Respondent, the bookkeeper and the Respondent's assistant. A note of that meeting was taken by the Respondent's assistant, who did not testify at the hearing. The note states, in its entirety:

> [bookkeeper] talked to auditor at the Law Society [auditor's name]
>
> we write lt to uncle saying that we are paying money to nephew (laundering issues only) - not necessary
>
> as far as we are concerned, we act for client and can pay to him

[17] This is the only note of the call or the meeting that was put in evidence. The Law Society had no note of the call, and neither the assistant nor the employee of the Law Society were called as witnesses. There was no explanation of the reference to money laundering, and neither the Respondent nor the bookkeeper had any recollection of money laundering being discussed at that meeting.

[18] In accordance with the advice received from the Law Society, the Respondent's legal assistant wrote an email to PL seeking the uncle's contact information (email and address) in order to confirm with the uncle that the firm had received the funds for PL. PL provided the uncle's email address as the company address of [xxco]@hotmail.com. The Respondent's assistant wrote to the uncle at that address:

> We confirm that we have received in our trust account your gift of USD 500,000.00 for [PL]. We will be paying these funds to P pursuant to his instructions.
>
> Can you please provide us with your mailing address for our records.

[19] In response the uncle provided his mailing address in Hong Kong.

[20] From the May 20, 2015 deposit, the following withdrawals were made upon the instructions of PL: May 21, 2015 – $300,000 Canadian to PL, and on June 8, 2015 three cheques to law firms in the amounts of approximately $18,500, $19,750 and $59,900 for purchase deposits. The Respondent was not acting for PL with respect to any of these purchases.

[21] On June 10, 2015 a further $1,700,000 US was wired to the trust account from [xxco] via Luxembourg. Two days later, a bank draft was prepared for essentially the same amount ($1,699,985) to A. Inc., one of PL's companies. There is no indication that the Respondent was providing any legal services to PL or to A. Inc. with respect to these funds. Further, there is no indication that the Respondent or her assistant knew either the date or the amount of funds or who the funds would be coming from, or even that they would be coming from a different source than the May 18 wire transfer.

[22] On June 15, 2015 a further $1,849,971.20 US was wired to the trust account from KF from Singapore. A US dollar bank draft of essentially the same amount was paid out on June 15 to A. Inc. on the instructions of PL. Again, there is no indication that the Respondent was providing any legal services with respect to these funds, nor was there any information in advance about the amount of money, the date of the deposit or the fact that the deposit would be coming from a different entity than had provided the first two deposits.

[23] Of the approximately $200,000 remaining in trust, amounts were paid out between June 15 and July 7 in varying amounts to law firms for purchase deposits, to investment funds, and almost $100,000 to PL, all on the instructions of PL. Again, there is no indication that the Respondent was providing any legal services to PL or any of his related companies with respect to the purchase deposits or the investments at that time.

[24] Over the next two years, funds continued to be deposited to the trust account, and in similar fashion, these monies were disbursed to a variety of other law firms, to investment entities, to currency exchange companies, to companies controlled by PL and to PL personally. In total, between May 20, 2015 and February 23, 2017, a total of $9,949,688.99 US and $1,274,764.96 Canadian was received in trust, and the same was paid out of trust in a total of 45 transactions. Of the amount paid out of trust, only approximately $1.5 million US was transferred directly to the credit of other legal files at KALC, where the Respondent was providing legal services. Those transfers were as follows:

(a) November 13, 2015 – $1,049,855.49 US transferred to the File (purchase of commercial property in Chilliwack);

(b) April 25, 2016 – $115,124.75 Canadian transferred to [number] E Holdings;

(c) May 10, 2016 $380.69 Canadian – transfer to [number] E Holdings for payment on account; and

(d) May 20, 2016 $455,004.36 – transfer to file [number] re: purchase of Vancouver City property.

[25] At no time did the Respondent ask any further questions of PL as to why the trust fund was being used to receive and disburse funds where the firm was not doing any legal work in connection with the disbursed funds. Notwithstanding that the funds were coming in as wire transfers from a variety of sources, including Panama, Singapore, a Singapore bank via Luxembourg, the Respondent did not ask further questions or ever meet or speak to the uncle who was providing the funds to PL. At no time after the initial call to the Law Society in May 2015 did the Respondent or anyone on her behalf contact the Law Society about the propriety of the activity in File 20968.

[26] The fact that these deposits raised red flags was not lost on the bankers involved in these transactions. In February 2016 the Royal Bank made inquiries about the source and purpose of the funds. In an email to PL from the Respondent's assistant, the assistant stated that the "Royal Bank has advised that it needs to know the purpose of these funds. 'Gift' is not a sufficient reason. "Investment may or may not work; probably best to have a more tangible reason." After PL responded, the assistant responded to the Royal Bank that "the reason for the funds is for investment into real estate assets. Also the pay down into investment property." In June 2016 the Royal Bank had further questions, including why a law firm was receiving funds that were intended as a gift between family members, and again the Respondent's assistant went to PL for responses. In August 2017 the Royal Bank had further questions about the trust activity, including why the money was coming in via wire transfers from Panama and wanted details about the Uncle's source of wealth in Panama. In response to that August 2017 query (which the Respondent passed on to her client, PL for answers) PL explained that the monies were dividend income from the Uncle's business as a registered and exclusive brand agent of China's number one brand of rice wine and for the China National Tobacco Co. There is no indication that the Respondent was aware of this level of detail, or had ever asked similar questions of her client as the Bank required, before August 2017.

[27] The Respondent has argued that she made appropriate inquiries, given that PL was a long-standing client. The Respondent testified that she made it a practice only to do work for existing clients or for referrals from friends, family or existing clients in order to avoid risk.

[28] She had acted for PL with respect to restaurant purchases, including the acquisition and transfer of liquor licences, which required criminal record checks. She knew he had relocated to Hong Kong in order to work with his father and uncle. She knew, through conversations with him from Hong Kong concerning various legal issues, including the residency status of his father, distributing and trademarking products, incorporating a company for the purpose of purchasing licensed merchandise for resale. She created a trust agreement to transfer the beneficial interest in PL's parents' Vancouver home to his mother as the sole beneficiary. In doing so, she met his parents. All of this, she testified, gave her a sufficient level of knowledge of the client such that she did not need to make further inquiries.

[29] The Respondent's evidence, through her testimony and Notice to Admit is that, in May 2015, PL contacted her by phone and indicated that his uncle's foundation wished to invest in property. PL indicated he would be receiving funds from the uncle as a gift or loan for this purpose. The Respondent testified that this made sense to her, as she knew the uncle had no children of his own. She also emphasized the amount of legal services that she was in fact providing to PL and his related companies during the time frame that the funds were being deposited into the trust account.

[30] The Respondent opened 16 files for PL or related companies during the material period. These included purchases of commercial buildings in Vancouver, Surrey and Chilliwack and on Vancouver Island and related lease matters. She created a family trust for PL, she incorporated companies and drafted a shareholders agreement, and she acted for him in connection with the purchase, joint venture and financing of property near Victoria.

[31] Her understanding was that she was performing substantial legal services for PL and his related companies with respect to property investments. Further, she believed that this was sufficient reason for her to receive funds into trust even if the funds deposited for File 20968 were not connected to any specific legal file at the time of the deposits or withdrawals from trust.

**OBLIGATIONS REGARDING TRUST FUNDS**

[32] There is no dispute about the test for professional misconduct. A lawyer will be found to have committed professional misconduct if the conduct is a marked departure from the conduct that the Law Society expects of lawyers. (*Law Society of BC v. Martin*, 2005 LSBC 16 at par. 171). What conduct the Law Society expects of its members can be found in the *Code of Professional Conduct* and commentary, the Law Society Rules, and the precedents that have applied them. This is not a dispute about what the test is – it is a dispute about whether the test has been met.

[33] Further, there is not a great deal of material dispute on the evidence in this case. The specific deposits and withdrawals from trust are not disputed. The fact that the Respondent was doing, and had done, a great deal of legal work for PL and related companies is not disputed. Although there are some minor disagreements about certain events, the major dispute is with respect to what obligations were on the Respondent with respect to the trust accounts and whether these obligations were met in the circumstances of this case.

[34] The starting point is rule 3.2-7 of the *Code of Professional Conduct*. The rule states:

> A lawyer must not engage in any activity that the lawyer knows or ought to know assists or encourages any dishonesty, crime or fraud.
>
> Commentary
>
> 1. A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> 2. A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities may be transactions for which lawyers commonly provide services …
>
> 3. Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in any dishonesty, crime or fraud, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include

making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature or purpose are not clear.

3.1 The lawyer should also make inquiries of a client who:

(a) *seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter,* or

(b) promises unrealistic returns on their investments to third parties who have placed money in trust with the lawyer or have been invited to do so.

3.2 The lawyer should make a record of the results of these inquiries.

[emphasis added]

[35] A lawyer's obligations concerning trust funds were succinctly set out in *Law Society of BC v. Gurney*, 2017 LSBC 15 at par 79:

…

(a) A lawyer's trust accounts are to be used for legitimate commercial purposes for which they are established, the completion of a transaction, where the lawyer plays the role of legal advisor and facilitator. They are not to be used as a convenient conduit. Even where other authorities, such as FINTRAC, may be aware of the source of the funds entering an account, the effect of solicitor-client privilege is that the parties to whom the funds are disbursed and the purpose for which the funds are disbursed are shielded by the privilege. *It is for this reason that a lawyer's trust account cannot be used only for the purpose of facilitating the completion of a transaction, but the lawyer must also play a role as a legal advisor with regard to the transaction.* This is the requirement to provide legal services.

(b) The Court of Appeal in *Elias v. Law Society of British Columbia* (1996), 26 BCLR (3d) 359, 1996 CanLII 1359, quoted the Bencher review decision at para. 9: "where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian

> law or laws of other jurisdictions, it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an *objective* test that the transaction is legitimate." [emphasis added by the *Gurney* panel] It is clear that the duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction, and the lawyer must be satisfied on an objective basis that the transaction is legitimate.
>
> (c) The lawyer's duty to investigate arises when, on an objective basis, he becomes suspicious that the transaction is illegitimate. Professional misconduct can be found even if the underlying transaction cannot be proved to be illegitimate. A lawyer cannot delegate the duty to inquire to a third party such as a client and rely upon the client's assurance as to the legitimacy of the transaction.
>
> [emphasis added, footnotes omitted]

[36] In 2019 the Law Society Rules were amended to include Rule 3-58.1, which provides that funds paid into or out of a trust account must be directly related to legal services provided by the lawyer or the law firm. The Respondent argues that this is a significant change with respect to a lawyer's obligations. However, there is nothing in the code, the commentary or the case law to support the Respondent's position. Effectively what she is saying is that it is acceptable to receive and disburse large amounts of money into and out of trust if there is some indirect linkage to some legal work that is being done or may be done for that client. She argues that she was providing legal services with respect to the "trust matter" in this case, and that the "trust matter" was "investments in BC Real Estate." With respect to the Respondent, that is simply too broad of a characterization and would absolve a lawyer of making inquiries provided they were doing some legal work for the client, regardless of whether there was a correlation between the work that was being done and the deposits and withdrawals from trust.

[37] The requirement that a lawyer be vigilant about the use of the trust account is not new. The Law Society put in evidence publications dating back as far as the late 1990's warning lawyers against getting unknowingly involved in illegal activities such as money laundering, and warning against becoming, in effect, a banker for the client. In 1999 a Notice to the Profession stated:

> For any transaction in which you are involved … it is always sound to think through the issues: Do you fully understand the transaction? Are you satisfied the investment is legitimate? ... Are you offering legal

> services and advice, and acting as a lawyer in the transaction? ... If the answer is "no" to any of these questions, why are you involved?

Similarly a 2002 *Benchers' Bulletin* stated:

> If you receive a request from a client for services that seem to mean that you are being retained to be the client's banker, or if you cannot precisely identify the legal services you are being retained to carry out, be vigilant to ensure that no person uses your trust account to deal with the proceeds of crime.

[38] In essence, that is what was occurring in this case. Of the 30 withdrawals from trust in issue in the citation, only four were transfers to other legal files where the Respondent was providing legal services. These transfers were to complete transactions or pay a small account. Other withdrawals were to the client or his related companies, to other law firms with respect to transactions with which the Respondent was not involved, to currency exchanges, or to other investment entities, again, where the Respondent was not providing legal services and was, in essence, being the banker.

**ALLEGATION 1**

[39] In order for the Law Society to prove the allegation 1 of the citation, it must prove, with clear, convincing and cogent evidence, on a balance of probabilities that:

(a) The Respondent permitted the use of her trust fund for the relevant deposits and withdrawals;

(b) She did not do substantial legal work in connection with the trust matter;

(c) She objectively had an obligation to make inquiries about the circumstances;

(d) She failed to make the necessary inquiries; and

(e) She failed to record the results of the inquiries.

[40] In this case, it is not disputed that the Respondent continued to do legal work for PL and his related companies. It is fair to characterize this work as substantial. However, it is not enough that a lawyer does legal work, even substantial legal work, for a client who deposits money into the lawyer's trust account. These legal services must be "in connection with the trust matter."

[41] In this case, although PL indicated that he wanted to invest in properties with money from his uncle, and although the Respondent ultimately did in fact act for PL in connection with the purchase of certain properties in BC, there is nothing (with the exception of the four transfers noted above) tying the deposits and withdrawals from trust with the legal work provided.

[42] As set out above, the Respondent did not have a contract for purchase and sale with respect to the first deposit (and, it appears that there never was a contract of purchase and sale as the offer was not accepted). The second deposit of $1.7 million US was disbursed via bank draft to a company controlled by PL within two days, again, with no evidence that this was connected to a specific retainer of the Respondent. That the Respondent was not providing any legal services with respect to this trust matter can be seen from the bill for legal services rendered in connection with File 20968 between May 2015 and December 2015. The bill refers to various receipts into trust and payments out of trust to the client and other parties but does not refer at all to the provision of any legal advice. We find that there were no substantial legal services provided with respect to the trust matter.

[43] It is not enough that, during the time frame in question, the Respondent was working on real estate transactions for PL. The deposits and transfers out of trust were not tied to specific real estate transactions (except for the four transfers noted above). Instead, PL was simply using the Respondent's trust fund as a bank account, to which he could make deposits when it suited him and from which he could transfer money out at will.

[44] For the allegation in the citation to be made out, however, it is not enough that no substantial work was done in connection with the trust matter. Where there is no connection to the provision of legal services by the lawyer relating to the use of the account, this requires that the lawyer make inquiries of the client.

[45] In this case, there were a number of troubling indicators or "red flags" that, particularly in connection with the lack of legal services provided with respect to the trust funds, should have been troubling to the Respondent. Among the things that made these transactions questionable, if not outright suspicious, are:

(a) there was no reason given for the funds to come through the trust account when, although property investment was contemplated, the Respondent had not seen any contracts of purchase and sale;

(b) the Respondent did not know PL's uncle. At the time of the first deposit, she did not know his name, his foundation's name, whether the money would be coming from the uncle or his foundation, where the uncle lived,

or where he worked, his level of wealth or the origins of the money being "gifted" to her client;

(c) the money came from a variety of sources (from companies, from a foundation, from the uncle individually, and from different banks in Singapore and Panama) and at a variety of intervals without explanation as to why or when and often without notice that the money was coming at all;

(d) the value of the deposits was different than what was discussed at the time of the original deposit. Originally, PL indicated that the gift would be 3 to 4 million dollars. Originally only $500,000 US was deposited, and then ultimately over $10,000,000 US was deposited over the two-year period;

(e) PL asked that the first deposit be substantially paid out within a day of deposit. The explanation was that the purchase, the documentation for which the Respondent had never seen, had fallen through;

(f) there was no explanation as to why, if there was no specific purchase in the works, a further $3.5 million US was deposited into trust, in two separate amounts, less than a month later.

(g) although PL claimed to be concerned about exchange rates and maximizing his investments, there was no reason given, nor were questions asked, about why the money was being deposited into a non-interest bearing trust account rather than being deposited to a bank until the funds were needed for real estate purchases;

(h) although there may be many legitimate reasons for a Hong Kong businessman to have money in Panama accounts, it raises enough of a concern that questions concerning the source of funds should have been asked. This is particularly so when the Panama Papers were in the news during this time frame, highlighting the potential linkages between Panama and money laundering.

[46] Further evidence of the questionable nature of these transactions is that the Royal Bank, on four separate occasions between February 2016 and August 2017, had to make inquiries about the source of the funds, and that it was only in connection with the Royal Bank inquiries that specific questions were asked of PL about the source of funds.

[47] The Respondent says that there was no reasonable basis for the Respondent to be suspicious. She knew PL well, and he had been a client for approximately eight

years before the first deposit. There were enough red flags, however, as set out above, that should have alerted her to ask questions and record the answers to ensure that her trust account was not being used for any nefarious purpose. We find that there was an objective basis for suspicion such that the Respondent had a duty to make further inquiries.

[48] The extent of the information she obtained before allowing monies to be deposited to trust are contained in her note to file dated May 1, 2015, reproduced above at para. 11.

[49] Although she had her staff contact the Law Society about the first disbursement from trust, it is not at all clear that enough information was given to the Law Society for the Respondent to be able to rely on the response from the Law Society as absolving her of any further duty to be vigilant about the trust account. Although it appears that the Law Society was told that the Uncle provided monies for the nephew's use for a real estate transaction that did not complete, it is not clear that the Law Society was told that the money came in and out of the account in such a short time frame, or that the Respondent had provided no legal services and had in fact never seen the alleged contract or offer to purchase, or that the monies were wired from off shore. Neither the inquiry to the Law Society nor the information that she obtained from her client met the standard required of the Respondent to make inquiries about the subject matter and objectives of her retainer, the source of the funds, the purpose of the payment of the funds or the reason for the payment of the funds to or through the firm's trust accounts.

[50] For these reasons, we find that the Law Society has proven the first allegation in the citation.

**ALLEGATION 2**

[51] The second allegation in the citation is that the Respondent received funds into the firm's trust accounts but failed to record the source of the funds with respect to the following deposits:

> $500,000 US received as $604,770.16 on or about May 20, 2015;
>
> $1,700,000 US received on or about June 10, 2015; and
>
> $1,849,971.20 US received on or about June 15, 2015.

[52] The Rules clearly set out that a lawyer must maintain a book of entry or data source showing all trust transactions, including the source and form of the funds received.

In this case, although there were indications on the wire transfers or wire confirmations for the above deposits (albeit not in English), the source of funds were not recorded in the book of entry for these deposits.

[53] The Respondent argues that it is enough that the wire receipts were retained, that they could have been translated into English to ascertain the source of funds and, further, that it was not the Respondent's obligation, as an employee of the firm, to ensure that the appropriate records were kept.

[54] With respect to the first argument, the Law Society Rules differentiate between supporting documents and the book of entry or data source. It is not enough that there are supporting documents (although there must be), there must also be a book of entry or data source, which is, as the Law Society puts it – the "foundational accounting record" for trust accounts that allows lawyers, firms and the Law Society to review trust transactions.

[55] Secondly, it is not sufficient for the Respondent, who had signing authority on the trust account and was responsible for the file in which the transactions were taking place to absolve herself of responsibility by saying that she was not responsible for the accounting procedures in the law firm. Signing authority on a trust account comes with a responsibility to ensure that the account is used in accordance with the Law Society Rules for every transaction for which a lawyer is responsible.

[56] The Respondent further argues that this is a mere Rules breach and does not amount to professional misconduct. However, the failure to document the source of funds is not the only matter that brings the Respondent before this Panel. This is not an "insignificant breach of the Rules and arises from the Respondent paying little attention to the administrative side of practice" (*Law Society of BC v Smith*, 2004 LSBC 29). This Panel must take into account the totality of the circumstances and particularly the fact that the failure to record the source of funds takes place in the context of the marked departure of the Respondent failing to make sufficient inquiries about the source of funds, and the fact that this took place on three separate occasions within a month. In all the circumstances of this case, we find that the failure to record the source of funds in the book of entry constitutes professional misconduct.

**SUMMARY**

[57] This Panel finds the Law Society has established both allegations on the citation, and we find the Respondent committed professional misconduct in relation to both allegations.

**NON-DISCLOSURE ORDER**

[58] The Law Society seeks an order under Rule 5-8(2) excluding all confidential or privileged information from disclosure to the public. If a member of the public requests copies of the exhibits or transcripts of these proceedings, the exhibits and transcripts should be redacted for confidential or privileged information before being provided to the public.

[59] The Panel agrees with this request. In the course of this hearing a great deal of solicitor-client information was provided, and we agree that any portions of the transcript or exhibits that refer to confidential client or privileged information must not be disclosed to the public.