2022 LSBC 26
Hearing File No.: HE20200065
Decision Issued: August 5, 2022
Citation Issued: August 26, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

LUBOMIR IHOR HUCULAK

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	August 16, 17, 18 and 19, 2021
Additional written submissions:	December 13, 2021 February 1, 2022
Panel:	Jamie Maclaren, QC, Chair Michael Dungey, Public representative Andrew Mayes, Lawyer
Discipline Counsel:	Mandana Namazi
Appearing on his own behalf:	Lubomir “Mir” Huculak
Written reasons of the Panel by:	Jamie Maclaren, QC

DM3681939

INTRODUCTION

[1] This is a Facts and Determination decision on three allegations of misconduct by the Respondent — a part-time, sole practitioner who was called to the British Columbia bar in 1963. The Law Society alleges that the Respondent acted contrary to his obligations under the *Legal Profession Act* (the "*Act*") and the Law Society Rules (the "Rules") while facilitating financial transactions for the benefit of several acquaintances, including a convicted drug trafficker.

[2] The Law Society issued a citation against the Respondent on August 26, 2020 and then amended it to its final form on August 4, 2021 (the "Citation").

[3] The Citation sets out three discrete allegations of misconduct by the Respondent, each contrary to section 38(4) of the *Act*. They include one bare allegation of professional misconduct and two allegations of conduct constituting professional misconduct, or a breach of the *Act* or the Rules.

[4] The Citation first alleges that the Respondent committed professional misconduct by providing legal services in relation to one or more real estate transactions spanning from January 2011 to May 2015, or by using or permitting the use of his law firm's trust account in one or more of the same span of real estate transactions, where he failed to:

(a) be on guard against becoming the tool or dupe of an unscrupulous client or other persons;

(b) make reasonable inquiries prior to acting or continuing to act in circumstances that were objectively suspicious;

(c) make a record of inquiries made; and

(d) decline to act or continue to act until there was a reasonable basis for believing that the transactions were legitimate

(the "Allegation of Failure to Make Reasonable Inquiries").

[5] Secondly, the Citation alleges that the Respondent committed professional misconduct, or breached the *Act* or the Rules, by providing legal services in relation to a financial transaction, where he failed to:

(a) record all necessary information regarding the identity of one or more of his clients;

(a) take reasonable steps to verify the identity of one or more of his clients; and

(b) retain a copy of every document used to verify the identity of one or more of his clients

(the "Allegation of Failure to Verify Client Identities").

[6] Finally, the Citation alleges that the Respondent committed professional misconduct, or breached the *Act* or the Rules, by misappropriating, improperly withdrawing, or improperly authorizing the withdrawal of $4,711.58 in trust for a real estate matter when he was not entitled to the funds (the "Allegation of Misappropriation of Trust Funds").

ISSUES

[7] This Panel must determine:

(a) whether the Law Society has established the facts underlying each of its three allegations of misconduct; and

(b) for each allegation where the Law Society has established the underlying facts, whether the Respondent's conduct constitutes professional misconduct, or a breach of the *Act* or the Rules, contrary to section 38(4) of the *Act*.

ONUS AND BURDEN OF PROOF

[8] The Law Society carries the burden of proof to establish, on a balance of probabilities, the facts that it alleges constitute professional misconduct, or a breach of the *Act* or the Rules: *Foo v. Law Society of British Columbia*, 2017 BCCA 151, at para. 63. The evidence supporting these facts must be sufficiently clear, convincing and cogent.

EVIDENCE AND FINDINGS OF FACT

[9] The in-person hearing in this matter occupied four days — August 16 to 19, 2021. The Law Society tendered a 562-paragraph Notice to Admit dated May 13, 2021 (the "NTA") and the *viva voce* evidence of lawyer Alexandra Booth and Law Society investigator Tim Bottomer, as its evidence. Its case remained open until the conclusion of the Respondent's evidence.

[10] The Respondent testified at the hearing on his own behalf, and he was cross-examined by the Law Society on his evidence. The Respondent elected not to call further evidence, despite stating at various times that he intended to call his former client, EO (previously known as EA and referred to below as "EA"), and his former accountant as witnesses.

[11] The Respondent admitted a substantial portion of the facts asserted in the NTA, as well as the authenticity of all documents attached to the NTA, with the exception of emails dated September 19, 2012. He specifically denied the truth of some of the facts asserted in the NTA, and he offered alternative inferences and legal conclusions for other facts asserted in the NTA, that he neither denied nor admitted.

[12] In his opening statement at the hearing, the Respondent requested a dismissal of the Allegation of Failure to Make Reasonable Inquiries and the Allegation of Failure to Verify Client Identities on the grounds that both allegations raised issues already decided in a Conduct Review decision dated February 14, 2019 and were, therefore, "contrary to the law of double jeopardy".

[13] In response to questioning from this Panel on the first day of the hearing, the Respondent stated that he "was not advancing double jeopardy at this time." But in written reply to the Law Society's written submissions, the Respondent reasserted and expanded his request for a dismissal on the basis of double jeopardy to include the Allegation of Misappropriation of Trust Funds. The Respondent made his final written submissions on February 1, 2022. Consequently, this Panel provides written reasons on the expanded request for a dismissal at paras. 82 to 84 below.

Credibility

[14] In assessing the credibility of evidence presented by interested witnesses, this Panel is governed by the well-known principle established by the BC Court of Appeal in *Faryna v. Chorny*, [1952] 2 DLR 354 at p. 357: " … 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."

[15] This principle from *Faryna* has been accepted and applied by many courts and Law Society hearing panels over the past several decades, including the panel in *Law Society of BC v. Schauble*, 2009 LSBC 11. The BC Supreme Court elaborated on the principle in *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186:

> … The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory,

> the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally …

[16] When a party advances a positive defence, and fails without explanation to call a material witness over whom they have exclusive control, the finder of fact may draw an adverse inference that the evidence of the absent witness would be contrary to the party's case or, at least, would not support it: *Bronson v. Hewitt*, 2010 BCSC 169, at para. 323; *Nguyen v. British Columbia (Transportation and Infrastructure)*, 2018 BCSC 192, at para. 138.

Respondent's background

[17] The Respondent was called to the British Columbia bar in 1963. He has practised as a sole practitioner since November 1994. At the time of the hearing, he practised part-time out of a downtown Vancouver office in the areas of administrative law, criminal law, civil litigation, corporate law, family law, motor vehicle accident litigation, residential real estate law, creditors' remedies and wills and estates.

Law Society investigation

[18] The Law Society conducted a compliance audit of the Respondent's practice in July 2016. The audit raised concerns about the Respondent's fulfillment of his client identification and verification obligations under the Rules. The Law Society opened an investigation into those matters, with a focus on 15 real estate transactions between January 2011 and May 2015 (the "Transactions"), where the Respondent acted on the instructions of his acquaintance and former client, MK, who he knew had been convicted of conspiracy to traffic cocaine in the United States in 2009.

[19] In several of the Transactions, the Respondent acted for EA, on referral from MK. In some publicly available and accessible media reports of MK's 2009 criminal conviction, EA was identified as the leader of the "EA Drug Trafficking Organization". The same media reports alleged that the transnational drug trafficking organization was tied to money laundering and was based out of Vancouver.

[20] EA was a party to two of the Transactions as a purchaser and two of the Transactions as a vendor. In another of the Transactions, EA held power of attorney for one of the vendors. In yet another of the Transactions, EA received a payout from the sale proceeds, despite having no stated interest in the subject property.

[21] While investigating the Transactions, Mr. Bottomer came across several newspaper articles in the Vancouver Sun, the Victoria Times Colonist and the Vancouver Province that referred to details of MK's involvement in the drug trafficking and money laundering organization linked to EA. The circumstances of MK's criminal conviction were notable for involving the conviction of a former Canadian Olympian as his co-defendant. The newspaper articles were published prior to the Transactions and they would have been available to the Respondent by way of a simple online search of MK's name or EA's name.

[22] Mr. Bottomer interviewed the Respondent about the Transactions on November 5 and 28, 2019.

Evidence of the Allegation of Failure to Make Reasonable Inquiries

[23] The Law Society alleges that the circumstances surrounding MK, EA and the Transactions were objectively suspicious and that the Respondent ought to have ensured that he was not assisting in any dishonesty, crime or fraud by facilitating the Transactions. The Law Society argues that by failing to investigate the possibility of money laundering and other criminal ends, the Respondent gave the Transactions a veneer of legitimacy that they may not have merited.

MK

[24] MK served as a licensed real estate broker from September 1998 to June 2008. The Respondent admitted to first meeting MK in or around 1999 while working on some real estate transactions.

[25] On June 13, 2008, MK and two associates were arrested in California following an FBI investigation into money laundering and drug trafficking activities under EA's alleged direction. MK was indicted and pleaded guilty to conspiracy to distribute more than five kilograms of cocaine. In March 2009, MK was sentenced to 30 months in an American prison. He was released from prison in or around October 2010 and was subject to supervised release for three more years.

[26] MK referred the Transactions to the Respondent. The referrals occurred after he was released from prison and while he was no longer licensed as a realtor.

Although MK was not party to the Transactions, he gained some financial benefit from referring them to the Respondent.

[27] The Respondent admitted to knowing that MK had been convicted of drug trafficking and was no longer a licensed real estate broker when he facilitated the Transactions. He presented his view that MK had served his sentence and had "paid his dues to society". The Respondent did not think he was professionally or morally obliged to investigate the financial arrangements between MK and his clients for transactional work referred to his law practice.

[28] The Respondent further explained that MK had many real estate clients from Vancouver's Eastern European community before he served his prison sentence, and that many members of the community still valued his expertise on real estate and mortgage matters. He maintained that since MK had the knowledge and language skills to serve his clients well, there were "valid, known and discernible" reasons for him to be involved in the Transactions.

EA

[29] MK first referred EA to the Respondent in 2007 for assistance with a probate matter following the drug overdose death of EA's romantic partner, OR. The probate matter developed into an estate litigation matter (the "OR Estate Litigation"), with the Respondent agreeing to represent EA. Subsequently, but prior to the Transactions, the Respondent represented EA in an ICBC litigation matter and a mortgage refinancing of the downtown Vancouver condominium at the centre of the OR Estate Litigation (the "Drake Street Property").

[30] EA first appeared in one of the Transactions in or around February 2011 when the Respondent was acting for a married couple, GK and EK, who were referred to him by MK. The couple sought to sell their South Vancouver condominium (the "Southwest Marine Drive Property") to their daughter, NK, who was EA's girlfriend at the time. EA coincidentally held power of attorney for the mother, GK.

[31] In August 2011, the Respondent acted for EA in his purchase of a Port Coquitlam property. Next, he acted for EA in relation to the sale of the Drake Street Property, with a closing date in November 2011. Finally, in February 2012, the Respondent acted for EA and his girlfriend in their purchase of another downtown Vancouver condominium (the "Howe Street Property"), which they sold at a huge jump in price in April 2012 to another purchaser represented by the Respondent. The same property was sold again in May 2015, with EA receiving $10,000 from the purchase price without being a party to the Transaction.

[32] In his submissions to this Panel, the Respondent maintains that he never had any suspicions of EA as he had always been forthright as a client. He expresses having no prior knowledge of EA being charged with criminal acts or having a criminal record. He states emphatically: "In law, EA is presumed innocent unless proven guilty."

[33] The Respondent also maintains that, around the time of the Transactions, he did not conduct any online searches of EA's original name and he did not subscribe to any of the newspapers that referenced MK's involvement in the drug trafficking and money laundering organization linked to EA.

OR Estate Litigation

[34] In the Law Society's submission, the circumstances underlying the OR Estate Litigation should have caused the Respondent to investigate whether he would be assisting in dishonesty, crime or fraud by facilitating the Transactions.

[35] OR died of a drug overdose on June 11, 2007. She died intestate. Soon after her death, the Drake Street Property title was registered in EA's name on his claim that OR had been his common-law spouse. OR's grandmother quickly disputed his claim and she filed a certificate of pending litigation contesting his registration of title.

[36] The OR Estate Litigation lasted nearly four years, with the Respondent representing EA and Ms. Booth representing OR's grandmother. The matter proceeded to trial but ultimately resolved on June 7, 2011 by way of a settlement agreement.

[37] The Law Society called Ms. Booth to testify at the hearing. Ms. Booth testified about the difficulties she encountered throughout the OR Estate Litigation in determining the general nature of EA's self-employment and the sources of his income. In his examination for discovery, EA testified that, while the Drake Street Property was purchased solely in OR's name, he paid the down payment with funds he received from his father in Azerbaijan — funds in the range of several hundreds of thousands of dollars. The Respondent was present for EA's examination for discovery.

[38] Ms. Booth testified that her client brought her a newspaper article dated September 8, 2009, which named EA as the leader of an organization under investigation for drug trafficking and money laundering. The same article referred to MK pleading guilty to conspiracy to traffic cocaine. Ms. Booth testified to having included the article in a list of documents submitted to the Respondent prior to trial, but she

could not recall whether she put the article to EA in his examination for discovery. The contents of the civil file were not presented into evidence in this hearing. Thus, this Panel cannot determine whether its description in the list of documents would have alerted a reasonable lawyer to the allegations of EA's potential criminal conduct.

[39] Ms. Booth also testified to having discovered that EA took out mortgage insurance in the event of OR's death, just a few months prior to her death, despite the fact that she was 22 years old at the time, was healthy, was unemployed and had not contributed to the Drake Street Property down payment or mortgage payments.

[40] At trial, OR's grandmother gave sworn evidence in support of her belief that EA had killed her granddaughter in order to obtain a mortgage insurance payout on the Drake Street Property. The Respondent was present for this evidence.

[41] The judicial order made after trial, which reflected the terms of the settlement agreement, included a statement that EA had not been OR's common-law partner. It also confirmed transfer of the Drake Street Property title to EA in return for his payment of $75,000 to Ms. Booth's client.

[42] The Respondent could not produce evidence of having billed EA for legal services rendered throughout four years of the OR Estate Litigation. In a February 14, 2020 letter to the Law Society, the Respondent stated:

> I have gone through the OR v. EA file with a fine tooth comb and through my ledgers and bank statements and could not find that I billed or that I was paid by EA or that he even paid my disbursements.
>
> I suspect that I was so caught up in the litigation that I overlooked billing him and may have though [sic] that he had paid me after I e-mailed him on the 15th of December, 2009. I vaguely recollect that he told me that he had no money at that time and requested that I wait till after the trial. I believe that I won't win in Court if I sue him now due to the Statue [sic] of Limitations but I will try to phone him in this regard.

[43] The Respondent's December 15, 2009 email to EA read, in part:

> Also, on the 9th of January, I will need $10,000 plus GST and PST on the $10,000, all totaling $11,200 as the action is booked for 3 day trial and I nomally [sic] charge $2,500 for 3 days preparation and a 3 day trial. As you can see, I am giving you a substantial discount.

[44] When the Law Society asked the Respondent why he had intended to give EA a discount on fees, the Respondent stated that he had "no idea".

Information available to the Respondent regarding EA and other clients

[45] In several of the property transfer forms from the Transactions where he served as the Respondent's client, EA gave divergent and often vague answers to questions about the nature of his employment. His answers included "carpenter", "business person" and "businessman", and varied from one form to another — once from "business person" to "carpenter" in the space of about a month. When the Respondent was asked by Mr. Bottomer if it was his practice to ask follow-up questions of clients who state "businessman" or "business person" as their occupation on property transfer forms, he answered "no".

[46] Mr. Bottomer testified that he thought that the word "conspiracy" in MK's criminal charge should have caused the Respondent to be suspicious of EA as someone referred to him by MK. In an interview with Mr. Bottomer, however, the Respondent denied being familiar with the nature of conspiracy charges or having his suspicions triggered by the word.

[47] In cross-examination at the hearing, the Respondent reasserted his unfamiliarity with conspiracy charges. The Law Society confronted him with the decision in *Canada (Citizenship and Immigration) v. Dhillon*, 2012 FC 726 where the Respondent had acted for a permanent resident of Canada whose admissibility to the country had been put into question by his prior conviction of conspiracy to import marijuana. The central issue of the case was whether a conviction of conspiracy to import marijuana constituted serious criminality pursuant to the *Immigration and Refugee Protection Act*, such that it rendered the Respondent's client inadmissible to Canada.

[48] In *Dhillon*, at para. 57, Snider J. noted the Respondent's argument that drug smuggling is a "totally different offenc[e]" from people smuggling, human trafficking and money laundering. Snider J. disagreed with the Respondent stating, at para. 64:

> In a real sense, money laundering overlaps substantially with drug trafficking. Quite simply, drug smuggling and trafficking give rise to money laundering (see e.g. Peter M. German, *Proceeds of Crime and Money Laundering: Includes Analysis of Civil Forfeiture and Terrorist Financing Legislation* (Toronto: Carswell, 1998 at 1A-9) …

[49] The *Dhillon* decision was released on June 11, 2012, between the penultimate and ultimate Transactions where the Respondent acted on MK's instructions. The Law Society submits that the Respondent's involvement in the *Dhillon* proceedings, and the timing of the *Dhillon* decision, ought to have triggered the Respondent to make reasonable inquiries prior to acting or continuing to act on matters referred to him by MK.

[50] In his submissions to this Panel, the Respondent claims to have little to no recollection of the circumstances surrounding the *Dhillon* case. He further states that, in any event, any knowledge he may once have possessed of his client's drug conspiracy conviction was peripheral in nature and was irrelevant to the Allegation of Failure to Make Reasonable Inquiries.

[51] In its submissions to this Panel, the Law Society also observes that many of the parties involved in the Transactions appeared to have known each other, to have been related to each other, or to have been connected to each other through MK or EA, such that some of the Transactions were not true arm's-length transactions. The Law Society argues that, in those Transactions where the parties clearly had close relationships to MK, to EA or to each other, the Respondent should have made inquiries to ensure that banks, mortgage companies and other relevant stakeholders were duly apprised of their close relationships.

[52] The Law Society further notes that MK provided instructions to the Respondent on each of the Transactions that he referred to him, and that the Respondent's client files show little or no evidence of direct communication between the Respondent and his clients. MK was not a party to the Transactions, but he provided the Respondent with the names of the involved parties and told him who to represent. In some of the Transactions, MK provided the Respondent with, in unusual detail, the parties' personal information, like employment and contact information, amounts owing on outstanding mortgages, and on one occasion, a party's social insurance number.

[53] In some client files from the Transactions, there is evidence to suggest that the Respondent had witnessed documents that were pre-signed, rather than signed in his presence. Some documents in the Respondent's client files contain signatures that purport to be from the same client but appear inconsistent with another.

Circumstances surrounding the Transactions

[54] In the records of some of the Transactions, MK or EA are noted as receiving payment of sale proceeds, despite not being a party to the sale, nor being licensed as a real estate broker eligible to receive remuneration under the *Real Estate*

Services Act. The records of several of the Transactions list deposits being paid directly by the purchaser to the seller, but lack proof or verification of the deposits actually being paid. Many of the Transactions proceeded with very quick closing dates after MK's initial instructions to the Respondent. Nearly all of the Transactions involved high-ratio mortgages with very low commissions. The Law Society submits that all of these circumstances were objectively suspicious and were either overlooked or ignored by the Respondent as "red flags" signalling clear fraud and money laundering risks.

[55] The Respondent submits that none of the Transactions involved circumstances that were objectively suspicious, in the context of involving parties from former Soviet bloc countries who mostly knew each other, who were accustomed to conducting business on a good faith basis with trusted intermediaries and who "had little trust in banks." He maintains that he was never alerted of procedural inconsistencies or "red flags" by real estate brokers, mortgage companies or other lawyers involved in the Transactions. According to his submissions and earlier testimony, all of the Transactions involved payments by way of bank drafts and never by way of cash.

[56] The Respondent appeared to defer to the banks involved to determine whether the Transactions were legitimate. During his direct examination, the Respondent stated: "So it was always by a bank draft or a certified cheque. And I never questioned those because I thought the bank would have checked where the – that the money was properly deposited, and I didn't think I – well, I didn't know that I had to check where the source of funds were."

[57] During his cross-examination, the Respondent often described himself as suffering from progressive memory loss and as having a "short-term memory" that prevented him from recalling the details of some of the Transactions, including the names, faces and other identifying features of some of his former clients. The same memory loss prevented him from recalling his role as counsel in *Dhillon.*

[58] In his submissions to this Panel, the Respondent states:

> It is totally unfair to accuse me of having little knowledge of the clients as I had testified that, because of my short term memory, I could not remember face [sic] or names and many times people come up to me and I have no recollection who they are even though they address me as if I have known them all my life.
>
> I know at the time of these Transactions I had made reasonable inquiries according to the Rules of the Law Society at that time.

[59] Despite his unequivocal recollection of having made reasonable inquiries on the Transactions as necessary, the Respondent did not provide any record of inquiries made. He also states in his submissions: "If there were any inconsistencies, as alleged, I truly cannot remember how these so called inconsistencies arose."

Law Society guidance on identifying risks of fraud and money laundering

[60] Mr. Bottomer testified about various Law Society publications periodically distributed to lawyers to remind them to be on guard against becoming the tool or dupe of unscrupulous clients or other persons. Many of these publications direct lawyers to look specifically for "red flags" or suspicious circumstances in real estate transactions.

[61] Mr. Bottomer testified that the Law Society published a number of reminders to lawyers about fraud and money laundering risks from 1999 through the time spanning the Transactions. He referenced one article published in the 2005 Benchers' Bulletin entitled "*Fighting Back Against Fraud – The Risks in Real Estate*", which presented a non-exhaustive list of "red flags", including the following:

(a) the vendor acknowledges payment of a deposit not required by the agreement of purchase and sale;

(b) the deposit is payable directly to the vendor, not to a real estate agent or a lawyer;

(c) there is no real estate agent involved in the transaction;

(d) the client needs to close the transaction very quickly;

(e) the purchase price is much higher than the purchase price of recent transfers of the same property;

(f) a new client refers a number of real estate files to the lawyer, and the same parties are repeatedly involved in the transactions; and

(g) the transactions feature high-ratio mortgages with mortgage insurance.

[62] Mr. Bottomer also testified that he understood the use of bank drafts in real estate transactions to be a risk factor for fraud and money laundering because they lack identification information to determine the source of funds. In confirmation of his understanding, the Law Society presented a 2019 Federation of Law Societies publication entitled "*Risk Advisories for the Legal Profession*" where payments

received by bank drafts from clients are noted as a risk factor for fraud and money laundering.

Findings of fact regarding the Allegation of Failure to Make Reasonable Inquiries

[63] For the most part, and as his memory allowed, the Respondent did not dispute the facts alleged to underpin his duty to inquire about suspicious circumstances of a transaction. He challenged some alleged facts about the fine details of the Transactions and about his personal knowledge of MK, EA and several real estate clients, but he admitted or left alone the basic circumstances of the Transactions as presented by the Law Society. He denied with some vehemence, however, that the same circumstances were suspicious in nature, such that they triggered a professional duty to make inquiries. In his categorical submission, he stated that "I did not find any suspicious circumstances regarding the Transactions."

[64] The Allegation of Failure to Make Reasonable Inquiries does not assert that the Respondent failed to make inquiries in circumstances that were subjectively suspicious. The main question for this Panel is whether they were objectively suspicious. Since many of the admitted or unchallenged circumstances of the Transactions line up squarely with the Law Society's published risk factors for fraud and money laundering, we find that they do amount to objectively suspicious circumstances that gave rise to the Respondent's duty to make inquiries.

[65] We find the main objectively suspicious circumstances of the Transactions, or the key "red flags", to be as follows:

(a) information regarding MK's criminal conviction for conspiracy to traffic cocaine in the United States, coupled with the Respondent's exposure to the nature and implications of a drug conspiracy conviction in *Dillon*;

(b) allegations of criminal activity made about EA in the course of the OR Estate Litigation, along with the source of the funds for the Drake Street Property purchase, and discoverable online information linking EA to a transnational drug trafficking organization tied to money laundering;

(c) obviously close relationships and business connections between many of the Respondent's repeat clients and other parties to the Transactions, despite their portrayal to banks and mortgage companies as arm's-length interests;

(d) changing employment information and addresses for the Respondent's clients, and in particular, EA;

(e) payments owing to MK and EA for the Transactions where they were not parties;

(f) deposits being paid directly to the vendor without verifiable record of the deposits actually being made;

(g) limited or no direct contact between the Respondent and his clients;

(h) quick closing dates after initial file instructions from MK;

(i) rapid increase in the Howe Street Property's selling price between its February 2012 purchase and its April 2012 sale; and

(j) high ratio mortgages with very low commissions.

[66] By his own admission, the Respondent did not make any inquiries prior to acting, or continuing to act, in these objectively suspicious circumstances. There is not enough evidence to determine if he ignored them as suspicious, or if he simply did not perceive them as suspicious. In any case, it follows that he also did not make any records of inquiries, nor did he decline to act or continue to act in the Transactions, until there was a reasonable basis for believing that they were legitimate.

[67] We find that the Law Society has established, on a balance of probabilities, the facts underlying the Allegation of Failure to Make Reasonable Inquiries. In summary, we find that the Respondent failed as a lawyer to ensure that he was not becoming the tool of possibly unscrupulous persons.

Evidence of the Allegation of Failure to Verify Client Identities

[68] The Law Society alleges that, in acting for clients GK and EK in the sale of the Southwest Marine Drive Property to their daughter, NK, on February 4, 2011, the Respondent failed to properly identify and verify his clients in accordance with the Rules then in force. In this particular transaction, EA held power of attorney for GK, while NK was his girlfriend at the time.

[69] The Respondent's client file for the sale of the Southwest Marine Drive Property does not contain verification documentation for any of GK, EK, NK or EA. Within the client file, banking and mortgage documentation provide some incomplete identifications of GK and EK, but there is no documentary evidence that the

Respondent took reasonable steps to verify their identities in accordance with the Rules then in force.

[70] The Respondent admitted during the Law Society's investigation that he did not have direct contact with GK during the transaction and that he could not recall any reason for her absence. Based on an embassy stamp on GK's power of attorney document, the Law Society submits that it is reasonable to infer that GK was in Moscow at the time of the transaction. Still, the Respondent's client file does not contain an attestation from a Russian agent that her identity was duly verified.

[71] The Respondent argued that he met his client identification and verification obligations in a number of different ways. He stated that he had verified the identities of GK and EK while acting for them in matters predating the sale of the Southwest Marine Drive Property. However, he did not provide any evidence in the investigation or at the hearing to substantiate this claim.

[72] In his May 23, 2021 response to the NTA, the Respondent suggested that he was familiar with his clients, GK and EK, as members of "the Eastern European Community", but he did not provide any evidence detailing how he knew them, or when and where he had met them. In cross-examination at the hearing, the Respondent suggested that he had met GK through her daughter, NK, but then he could not recall if he had met NK at all. He confessed to "getting people confused".

[73] At the hearing, the Respondent claimed to have verified EK's identity while representing EK in his purchase of a Surrey condominium, but that transaction occurred a year after the sale of the Southwest Marine Drive Property. Similarly, the Respondent claimed to have verified EA's identity while representing him in an ICBC litigation matter, but that matter also occurred after the sale of the Southwest Marine Property.

Findings of fact regarding the Allegation of Failure to Verify Client Identities

[74] There is clear, convincing and cogent evidence to show that the Respondent failed to verify the identities of GK, EK, NK or EA in the Southwest Marine Drive Property matter. We find that the Law Society has established, on a balance of probabilities, the facts underlying the Allegation of Failure to Verify Client Identities.

Evidence of the Allegation of Misappropriation of Trust Funds

[75] The Law Society alleges that the Respondent misappropriated or improperly withdrew the sum of $4,711.58 from trust while representing clients DK and LK in their January 2012 purchase of a downtown Vancouver condominium (the "Second Drake Street Property"). The Second Drake Street Property was the subject of a foreclosure and a court-ordered sale by A Property Management, who was represented by lawyer JB.

[76] On January 30, 2012, the Respondent issued a trust cheque to JB for the Second Drake Street Property purchase proceeds. Due to an accounting error, the cheque was $4,711.58 short of the amount owing. The $4,711.58, rightfully owed to the vendor, remained in the Respondent's trust account after the transaction completed.

[77] On August 30, 2012, the Respondent advised JB of the unpaid funds by way of a faxed letter. The faxed letter featured a sticky note suggesting that the Respondent had followed up with JB on September 18, 2012. In an email exchange the following day, JB's office asked the Respondent to pay the unpaid funds into court to the credit of ongoing legal proceedings. Despite direct evidence of JB and the Respondent discussing the proper payment of the unpaid funds in the same email exchange, the Respondent testified that he could not recall receiving the payment request on or around September 19, 2012, and suggested that it must have escaped his attention.

[78] The Respondent did not comply with JB's request or his legal obligation to remit the unpaid funds in September 2012. Instead, on July 31, 2013, he created a false invoice to his clients for $4,711.58 in legal fees and transferred that amount of trust funds to his general account. The Respondent admitted in cross-examination that he knew then that he was not entitled to the trust funds and that he had created the false invoice strictly as a "procedural tool" for their misappropriation.

[79] During the Law Society's investigation of the matter, the Respondent claimed that he created the false invoice and transferred the trust funds on the advice of his accountant. However, he could not produce clear, convincing and cogent evidence at the hearing to support the claim that his accountant had counselled him to transfer the trust funds to his general account for "safekeeping". The Panel drew an adverse inference from the Respondent's decision not to call the accountant to testify at the hearing, as he suggested he would. In any case, no advice from his accountant would have absolved him of his professional responsibility to engage in proper trust accounting practices under the Rules.

[80] On June 22, 2020, after the Law Society had begun to investigate the missing trust funds, the Respondent paid $4,711.58 into court to the credit of the original legal proceedings.

Findings of fact regarding the Allegation of Misappropriation of Trust Funds

[81] There is clear, convincing and cogent evidence to show that the Respondent misappropriated or improperly withdrew the sum of $4,711.58 while representing his clients in the Second Drake Street Property matter. We find that the Law Society has established, on a balance of probabilities, the facts underlying the Allegation of Misappropriation of Trust Funds.

Evidence of double jeopardy

[82] In his written submissions, the Respondent requested a dismissal of all three cited allegations on the grounds that they each raised issues already considered by a Conduct Review subcommittee on February 14, 2019, and were, therefore, "contrary to the law of double jeopardy". He grounded his claim in section 11(h) of the *Canadian Charter of Rights and Freedoms*, which relates to proceedings in criminal and penal matters and states:

> **11** Any person charged with an offence has the right
>
> …
>
> **(h)** if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again …

[83] The Respondent outlined the subject matter of Law Society investigations that informed the Conduct Review, and he described the informal proceedings as being concerned with his alleged breach of client identity and verification rules. He argued that he was "mildly sanctioned" for "basically the same transactions as set out in [the] Citation". He did not provide any documentary or *viva voce* evidence, or advance any case law, to substantiate his claim.

Findings of fact regarding double jeopardy

[84] In the absence of evidence to suggest that this Panel lacks jurisdiction to decide issues previously adjudicated, we cannot find any facts to form the foundation for further consideration of the Respondent's claim of double jeopardy.

LAW

Test for professional misconduct

[85] Professional misconduct is not defined in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* (the "*Code*"). The Benchers instead assess a lawyer's conduct in specific circumstances to determine if there is "a marked departure from that conduct the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171.

[86] In *Martin*, the hearing panel observed at para. 154:

> ... 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.

[87] In *Law Society of BC v. Kim*, 2019 LSBC 43, at para. 45, the hearing panel outlined the objective nature of the test for professional misconduct:

> 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. In determining the appropriate standard, a panel must bear in mind the requirements of the *Act*, the Rules and the *Code*, and then consider the duties and obligations that a lawyer owes to a client, to the court, to other lawyers and to the public in the administration of justice. Each case will turn on its particular facts.

Duty to be on guard against dishonesty, crime or fraud

[88] The Respondent's repeated failures to be on guard against dishonesty, crime or fraud occurred among the Transactions from January 2011 to May 2015. The Law Society's *Professional Conduct Handbook* (the "*Handbook*") was in force from May 1993 to December 31, 2012. The Law Society replaced the *Handbook* with the *Code* on January 1, 2013.

[89] The provision requiring lawyers to be on guard against dishonesty, crime or fraud is virtually unchanged from the *Handbook* to the *Code*, though the guiding footnote or commentary has expanded. Chapter 4, Rule 6, of the *Handbook* stated:

> 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 ...

[90] Rule 3.2-7 of the *Code* now reads:

> 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.

[91] Footnote 3 to Chapter 4, Rule 6, of the *Handbook* read as follows:

> A lawyer has a duty to be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client and, in some circumstances, may have a duty to make inquiries. For example, a lawyer should 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 matters, 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.

[92] The relevant commentary to rule 3.2-7 of the *Code* now reads:

> **[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 such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> **[3]** If lawyers have suspicions or doubts about whether they might be assisting a client in any dishonesty, crime or fraud, before accepting a retainer, or during the retainer, the lawyers 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.
>
> …
>
> **[3.2]** The lawyer should make a record of the results of these inquiries.

[93] A lawyer's duty to investigate the circumstances of their retainer arises when there is objective reason to suspect that the objectives of the retainer are not completely legitimate. A lawyer's failure to investigate objectively suspicious circumstances may constitute professional misconduct even in cases where the transaction or end result is not established as illegitimate: *Law Society of BC v. Gurney*, 2017 LSBC 15.

[94] The duty to make reasonable inquiries into objectively suspicious circumstances has been known to BC lawyers since at least 1996 when the BC Court of Appeal affirmed the Bencher panel decision in *Elias v. Law Society of British Columbia*, 1996 BCCA 1359, at para. 8:

> … 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 …

[95] In *Law Society of BC v. Rai*, 2011 LSBC 02, the hearing panel found the lawyer to have committed professional misconduct when he failed to make inquiries into objectively suspicious circumstances very similar to those confronting the Respondent. There, the lawyer represented multiple parties to 12 real estate transactions involving mortgage financing. His clients were referred to him by the same realtor over a one-year period, and the transactions were part of a scheme designed by the realtor to obtain mortgage proceeds under false pretences. They involved short closings, deposits paid directly to the vendor and the quick resale of properties at significantly higher prices.

[96] In *Law Society of Upper Canada v. Verbeek*, 2007 ONLSHP 123, another case of suspicious circumstances similar to those confronting the Respondent, the hearing panel confirmed the lawyer's admitted misconduct for having failed to make inquiries into the circumstances of 16 different real estate transactions.

[97] *Gurney* is the leading case on a lawyer's duty to be on guard against dishonesty, crime or fraud. There, the lawyer used his trust account to receive and disburse over $25 million dollars on behalf of his client, without making reasonable inquiries about the circumstances, and without providing any substantial legal services in connection with the trust matters. The hearing panel applied principles established in *Elias* in determining that the lawyer committed misconduct by failing to fulfill his gatekeeper function. It held, at para. 80:

> … 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.

[98] Several Law Society hearing panels have since relied upon the principles articulated in *Gurney* in determining that a lawyer's failure to be on guard against dishonesty, crime or fraud constituted professional misconduct: *Law Society of BC v. Uzelac*, 2020 LSBC 58; *Law Society of BC v. Yen*, 2020 LSBC 45; *Law Society of BC v. Hammond*, 2020 LSBC 30; *Law Society of BC v. Hsu*, 2019 LSBC 29.

Duty to verify client identities

[99] The Respondent failed to properly verify the identities of his clients in February 2011 when he was facilitating the sale of the Southwest Marine Drive Property. He was cited under Rules 3-93, 3-95, 3-97, 3-98 and 3-100 in place from 2008 to June 2015, which required him to take reasonable steps to verify the identities of his clients — physically present or not — when providing legal services in respect of a financial transaction.

[100] The purpose of the Law Society's client identification and verification rules was described by the hearing panel in *Law Society of BC v. Wilson*, 2019 LSBC 25, at para. 21:

> … The goal is to ensure that the legal 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.

[101] In *Wilson*, the lawyer left blank trust cheques for his non-lawyer staff to sign, permitted nearly $20 million dollars of trust funds to be disbursed without a

lawyer's signature, allowed his staff to use his confidential Juricert password and failed to properly verify the identities of his non-resident clients. For each of these transgressions, including his failure to properly verify client identities, the hearing panel determined that he had committed professional misconduct.

[102] In *Law Society of BC v. Lo*, 2020 LSBC 09, the lawyer represented a non-resident client in a real estate transaction without taking necessary steps to verify her identity, despite having no face-to-face contact with her. The lawyer made some efforts to have his client's identity verified by a notary in a foreign jurisdiction, but he had no direct contact with the notary and the verification documentation was incomplete. The lawyer admitted that his failure to properly verify the identity of his client amounted to professional misconduct.

Duty to properly handle trust funds

[103] The Respondent admitted to having misappropriated $4,711.58 in trust funds while representing DK and LK in their January 2012 purchase of the Second Drake Street Property. He was cited under Rules 3-56 and 3-57, then in force.

[104] In *Law Society of BC v. Gellert*, 2013 LSBC 22, the hearing panel defined the misappropriation of trust funds, at para. 71:

> Misappropriation of a client's trust funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law.

[105] The *Gellert* hearing panel proceeded to outline the sacrosanct nature of trust funds, and the serious consequences of its unauthorized use, at para. 73:

> The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. An unauthorized use of trust funds harms or risks harming the client, undermines the client's confidence in counsel, and has a seriously deleterious impact on the legal profession's reputation in the eyes of the public. Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out.

[106] In recognition of their sacrosanct nature, Law Society hearing panels have consistently found the misappropriation of trust funds to be among the most serious forms of professional misconduct. The hearing panel in *Law Society of BC v. Tak*, 2014 LSBC 57 stated, at para. 35:

> Misappropriation of client trust funds is perhaps the most egregious misconduct a lawyer can commit. Wrongly taking clients' money is the plainest form of betrayal of a client's trust and is a complete erosion of the trust required for a functional solicitor-client relationship. The public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. In the absence of multiple, significant mitigating factors, public confidence in the profession and its ability to regulate itself would be severely compromised if anything short of disbarment is ordered for misappropriation of client funds.

ANALYSIS

Allegation of Failure to Make Reasonable Inquiries

[107] As established in *Elias*, and confirmed in *Gurney*, a lawyer's duty to investigate the circumstances of their retainer arises when there is objective reason to suspect that the purposes of the retainer are not completely legitimate. The duty to make reasonable inquiries into objectively suspicious circumstances has been mandated by the Rules — and therefore known to BC lawyers — for more than a quarter century. It long predates the Law Society's heightened anti-money laundering measures of the past decade. The Respondent is incorrect in asserting that "hardly anyone was concerned about money laundering and proceeds of crime" when the Transactions took place.

[108] The central issue before this Panel is not whether one or more of the Transactions were, in fact, fraudulent or illegitimate, and it is not whether the Respondent knew that some of the actors in the Transactions had committed crimes. It is whether some of the circumstances surrounding the Transactions were sufficiently suspicious — on objective assessment — to trigger the Respondent's duty to make reasonable inquiries into their legitimacy. The Law Society has established, on a balance of probabilities, the facts to show that the Respondent had a duty to make reasonable inquiries and that he failed to make them.

[109] We have found that the Transactions were replete with objectively suspicious red flags and we have found that the Respondent failed to make reasonable inquiries into their legitimacy. As senior counsel with extensive experience in criminal and

real estate law, the Respondent either knew that some of the circumstances surrounding the Transactions were suspicious, or he was reckless or willfully blind to them. Whichever the case, he failed to be on guard against becoming the tool of unscrupulous persons and he failed to carry out his gatekeeper function in relation to money laundering and fraud.

[110] The Respondent's failure to investigate the numerous objectively suspicious circumstances of the Transactions, spanning from January 2011 to May 2015, was a marked departure from that conduct the Law Society expects of lawyers and, therefore, constitutes professional misconduct.

Allegation of Failure to Verify Client Identities

[111] The rules regarding client identification and verification exist to ensure that lawyers do not become inadvertent participants in money laundering, fraud and other criminal activities. They are an important extension of the lawyer's gatekeeper function as they prescribe the necessary steps for determining the legitimacy of a client's identity. They are particularly important when a lawyer is confronted with a client who is non-resident and/or outside of Canada. In the latter case, the lawyer must enter into a written agency agreement with a foreign lawyer or other qualified party to attest to the validity of the client identification documents.

[112] We have found that the Respondent failed to comply with his client identification and verification obligations regarding the sale of the Southwest Marine Drive Property, which was a sale from GK and EK to NK, and which involved MK and EA. The Respondent could not produce identity verification for any of the parties or individuals involved. GK was in Russia for the entire length of the transaction.

[113] Not every breach of the Rules regarding client identification and verification amounts to professional misconduct. In determining whether the Respondent's breach constitutes professional misconduct or, alternatively and simply, a breach of the *Act* or the Rules, we must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides* and the harm caused by the conduct: *Law Society of BC v. Lyons*, 2008 LSBC 09, at para. 35.

[114] The Respondent's breach of the Rules regarding client identification and verification was singular in nature, but it must be considered alongside his repeated failure to investigate the numerous suspicious circumstances of the Transactions, and his admitted misappropriation of client trust funds. Together, they demonstrate his casual but blatant disregard toward professional responsibilities that inconvenienced him and others involved in the Transactions.

[115] The sale of the Southwest Marine Drive Property was an unusual transaction. The parties adjusted the contract of purchase and sale so that the mortgage proceeds covered all amounts owing on the purchase. The sellers agreed to provide some of the purchase proceeds back to the purchaser after closing. These odd circumstances are hallmarks of mortgage fraud, which carry significant potential harm to the public.

[116] The Respondent's breach of the Rules regarding client identification and verification also put GK at significant risk of identity theft. Without properly verifying her identity while she was in Russia, the Respondent could not ensure that she was the person giving him clear instructions, or that another person was not using her name to perpetuate mortgage fraud.

[117] Under the circumstances of the Transactions, the Respondent's failure to verify his clients' identities was a marked departure from that conduct the Law Society expects of lawyers and, therefore, constitutes professional misconduct.

Allegation of Misappropriation of Trust Funds

[118] The Respondent admitted to having misappropriated $4,711.58 in trust funds while representing his clients in their January 2012 purchase of the Second Drake Street Property. He further admitted that he had created a false invoice as a "procedural tool" for the misappropriation.

[119] The proper handling of trust funds is a core element of a lawyer's fiduciary duty to the client. The misappropriation of trust funds is perhaps the most egregious misconduct a lawyer can commit: *Tak*, at para. 35. And yet, in this instance, the sanctity of trust funds was inconsequential to the Respondent. Rather than accept responsibility for an accounting error and take the necessary steps to remedy the error, the Respondent engaged in deception to avoid accountability for the situation.

[120] The Respondent's misappropriation of client trust funds in the Second Drake Street Property matter was a marked departure from that conduct the Law Society expects of lawyers and, therefore, constitutes professional misconduct.

DETERMINATION

[121] We find that the Law Society has established, on a balance of probabilities, the facts underlying each of the three allegations of misconduct set out in the Citation, those being: (i) the Allegation of Failure to Make Reasonable Inquiries; (ii) the

Allegation of Failure to Verify Client Identities; and (iii) the Allegation of Misappropriation of Trust Funds.

[122] We further find that the Law Society has proven, on the established facts, that the Respondent committed professional misconduct in relation to each of the three cited allegations.