2022 LSBC 22
Hearing File No.: HE20200002
Decision Issued: July 6, 2022
Citation Issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

**THE LAW SOCIETY OF BRITISH COLUMBIA**

AND:

**SERF GREWAL**

RESPONDENT

**DECISION OF THE HEARING PANEL**

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| Hearing dates: | October 21, 2021 and February 28, 2022 |
| Panel: | Christopher A. McPherson, QC, Chair<br>Ralston Alexander, QC, Lawyer<br>Thelma Siglos, Public representative |
| Discipline Counsel: | Jaia Rai |
| Counsel for the Respondent: | David J. Taylor |
| Written reasons of the Panel by: | Christopher A. McPherson, QC |

## INTRODUCTION

[1] The Facts and Determination phase of this matter took place on October 21, 2021. It was originally scheduled for a ten-day hearing to take place from July 19 to 28, 2021. The parties were able to reach an Agreed Statement of Facts and on July 19, 2021, the Law Society entered its case by entering the Agreed Statement of Facts

and the Respondent applied, with the consent of the Law Society, to adjourn the Facts and Determination hearing until October 21, 2021. The Panel agreed to the adjournment.

[2] The Facts and Determination hearing continued on October 21, 2021. The Respondent admitted, and this Panel found, that the Respondent had committed professional misconduct and a breach of the rules as set out in the 19-paragraph citation issued on February 7, 2020 (the "Citation").

[3] After further adjournments, including one precipitated by a change of counsel, the hearing on Disciplinary Action took place on February 28, 2022.

[4] At the request of the parties, the Panel provided oral reasons on Facts and Determination on October 21, 2021, with written reasons to be incorporated with the decision on Disciplinary Action. These are our reasons.

## FACTS AND DETERMINATION FINDINGS

[5] As the parties have agreed that the Respondent committed professional misconduct and rules breaches, the Panel does not find it necessary to exhaustively analyze the facts and governing law, other than to set out our overarching conclusions, refer to some of the key principles that guide us and summarize our findings.

### Overarching conclusions

[6] Based on the evidence provided by the Respondent through his Impact Statement, and an expert report from Dr. Kulwant Riar filed on the Respondent's behalf, the Panel concluded that there was a clear connection between the misconduct of the Respondent and mental health issues related to, among other things, but most significantly, the Respondent's childhood and personal trauma, and the consequences that flowed from his decision to report that trauma. This had profound effects on the Respondent's personal and business affairs. We are satisfied that these underlying issues assist in understanding the reasons behind, although not excusing, the Respondent's serious misconduct.

[7] We conclude that none of the Respondent's misconduct arose from dishonesty nor deliberate misconduct for personal gain. Further, it is apparent to the Panel that the Respondent was dealing with significant issues, which had a debilitating effect on his life and his career.

[8] It is also clear to the Panel that the Respondent has taken laudable steps to address the situation in which he found himself.

## Relevant principles

### Professional misconduct

[9] Professional misconduct is not defined in the Law Society Rules or the *Legal Profession Act*, SBC 1998, c. 9 (the "*Act*"), but the test is well-known. We do not propose to discuss in detail the leading case of *Law Society of BC v. Martin*, 2005 LSBC 16. Suffice it to say that the panel must be satisfied that the proven facts, which here were admitted by the Respondent, "disclose a marked departure from that conduct the Law Society expects of its members."[1]

[10] The question to be answered is "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."[2] It is an objective test.[3]

### Rules breaches

[11] A breach of the Rules does not necessarily amount to professional misconduct. If the conduct that constitutes a "Rules breach" does not result in any loss to a client, is done with no dishonest intent, and arises from the respondent, in effect, not paying attention to the administrative side of practice, such conduct may not reach the level of professional misconduct. There are several factors: the gravity of the misconduct; its duration; the number of breaches; whether there is dishonesty or malicious intent; and the degree of harm caused.

### Meaning of misappropriation

[12] It is important to say a few words about the meaning of misappropriation in the context of a lawyer's misconduct. It is defined broadly. It includes any unauthorized use of trust funds. It covers conduct that arises from a careless or casual approach to trust accounting all the way to deliberate, dishonest conduct. It exists on a continuum. Misappropriation does not mean theft. The concepts are different.

[13] The most recent case that sheds light on this issue is *Law Society of BC v. Ahuja*, 2020 LSBC 31. Any unauthorized use qualifies if there is an unauthorized, temporary use for the lawyer's purpose. It does not require personal gain or benefit to the lawyer. See para. 43 and the cases cited therein. A finding of

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[1] Aff'd Lawyer 12, 2011 LSBC 35
[2] *Lawyer 12*, para. 7
[3] *Law Society of BC v. Sangha*, 2020 LSBC 03, para. 67

misappropriation, at whatever point in the continuum it lies, leads inevitably to the conclusion that the lawyer has committed professional misconduct.

**Detailed findings**

[14] Based on the above principles, and as agreed to by the Respondent, our findings regarding the allegations contained in the Citation can be conveniently grouped as set out below.

(a) Paragraphs 1, 5, 6, 9 and 10: the Panel finds that the Respondent committed professional misconduct concerning these allegations. We conclude that these were instances of *unintentional* misappropriation of client trust funds resulting from trust shortages and errors relating to accounting. The amounts in question total slightly over $42,000. This serious misconduct occurred over a significant time frame (November 2014 to January 2018), and involved about 25 separate transactions.

(b) Paragraphs 2, 3 and 4: the Panel finds that the Respondent committed professional misconduct concerning these allegations. We conclude that they were caused by the mishandling of client trust funds due to a discrete error, which resulted in a trust shortage not reported to the Law Society. The total trust shortage was $3,770.

(c) Paragraphs 7 and 8: the Panel finds that the Respondent committed professional misconduct concerning these allegations. We conclude that he improperly withdrew trust funds by payments from trust for fees before delivering proper bills to the client. The amounts involved totalled $5,500.

(d) Paragraph 11: the Panel finds that the Respondent committed professional misconduct concerning this allegation. We conclude that he failed to comply with numerous accounting obligations over the course of four years - a very extended period.

(e) Paragraphs 12 to 18: the Panel finds that the Respondent's conduct concerning these allegations amounts to a Rules breach and does not rise to the level of professional misconduct. We conclude that the Respondent failed to report an unsatisfied monetary judgment and his insolvency to the Executive Director, and that he provided incorrect answers in his annual practice declarations and trust reports.

(f) Paragraph 19: the Panel finds that the Respondent committed professional misconduct concerning this allegation. We conclude that he improperly commissioned an affidavit from a client by not personally witnessing the attestation.

[15] In short, we find that the Law Society has met its burden and demonstrated that the Respondent committed professional misconduct as set out in allegations 1 to 11 and 19. We find that the Law Society has met its burden and proved that the Respondent has committed rules breaches, though not professional misconduct, as set out in allegations 12 to 18.

## DISCIPLINARY ACTION

### Position of the parties

[16] While the parties agree about the facts underlying the professional misconduct and the rules breaches that have been shown, they disagree regarding the appropriate disciplinary action.

[17] This disagreement centres on how, at the Disciplinary Action phase, to best address the connection between the misconduct of the Respondent and his mental health issues related to the significant trauma that he experienced in his past. It is clear to the Panel that this trauma and its aftereffects had a profound impact on the Respondent's personal and business affairs.

[18] The Law Society says that while the mental health and related issues of the Respondent are significant mitigating factors, an appropriate sanction would be a two-month suspension, followed by a period of prohibition from operating a trust account, restrictions from practising in the areas of criminal and family law, continued psychotherapy with assessments and authorizing those involved with the Respondent's therapy to notify the Executive Director of the Law Society if they are of the opinion that the Respondent's health may prevent him from meeting his professional obligations, and for the Respondent to enter into a formal mentoring relationship.

[19] The Respondent says that there should be no suspension, that his mental health and other issues are in his past, and that the appropriate sanction would be a fine. The Respondents submits that there should be no suspension, no restrictions on his practice, no order for continuing therapy, and no formal mentoring relationship. The Respondent does offer some alternative suggestions, namely, that he agree to reach out to a senior lawyer if he feels that he needs to speak about legal services,

that he provide a letter from such lawyer to the Law Society, and that he contact a practice advisor if so advised. He would also agree to consult with a therapist three times at six month intervals and consider any treatment recommendations. Further, the Respondent proposes that he retake and satisfy the requirements of the Small Firm Practice Course [now known as the Practice Management Course], complete a further five CPD hours of courses, and provide evidence that he has retained qualified accounting professionals or staff to assist with record keeping and trust accounting.

[20] As always, a panel must look to public interest in assessing the appropriate disciplinary action.

**Addressing mental health and related issues in the context of disciplinary action**

[21] The determination of the appropriate disciplinary action here should be examined through the lens of the mental health of the Respondent. More accurately, we ought to consider the effect on his mental state from the trauma that he experienced in his life, particularly the difficult decisions that he made on how to address extremely personal and serious events. The Panel concludes that the events described in the evidence, which we do not feel necessary to discuss in detail, were of such a nature that they could have been expected to have had an overwhelming effect on any person's health, well-being, and the way that person conducted their business and personal affairs.

[22] Necessarily, the determination of the appropriate disciplinary action is a very individualized process. In every case, we must consider the relevant factors. Those factors have been described in various ways, often as the "consolidated *Ogilvie* Factors", which consist of:

(a) nature, gravity and consequences of conduct;

(b) character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession including public confidence in the disciplinary process.

[23] Absent in this well-known list of factors is an express consideration of the mental health of the Respondent insofar as it was connected to the misconduct. Here, as

both parties acknowledge, the mental health of the Respondent is front and centre in our determination.

[24] In every case, the panel must consider both the rehabilitation of the lawyer and the protection of the public with public protection prevailing where these interests are in conflict. It is too often lost however that these are not necessarily competing interests. Depending on the circumstances, rehabilitation may well be the best way to serve public interest. We agree with the Law Society when it says in its submissions that "rehabilitation can promote, rather than undermine, protection of the public interest, including public confidence in the regulation of the profession."

[25] In our view, this case is unique. The constellation of facts that exist here is unlikely to repeat itself. This case calls for a highly individualized approach to the appropriate sanction, one that carefully considers the circumstances of the Respondent, the misconduct that has been proven, public interest, and the need to maintain public confidence in the profession and its disciplinary process.

[26] Both parties commend to us the work of the Mental Health Task Force of the Law Society, which has considered such issues and released several reports over the last few years. We agree that the work of the Mental Health Task Force is invaluable in informing our decision, although the Panel must act within the bounds of our jurisdiction as set out in the *Act* and the Rules.

[27] With this in mind, we turn to the reports from the Mental Health Task Force.

**Mental Health Task Force reports**

[28] The Mental Health Task Force was established in January 2018. It has produced several reports, including its First Interim Report dated December 7, 2018, its Second Interim Report dated January 20, 2020, and its Recommendation on the Development of an Alternative Discipline Process dated September 24, 2021.

[29] The First Interim Report focused largely on identifying the extra-ordinary prevalence of mental health and substance use issues within the legal profession.

[30] The research shows that lawyers have substantially higher levels (as much as four times greater) than the general population of problem drinking, substance abuse, anxiety, and depression.[4]

[4] First Interim Report, paras. 10 to 18

[31] The research also identifies stigma as an important consideration. Many lawyers were found to be reluctant to seek assistance.[5]

[32] The Mental Health Task Force recommended a number of educational strategies to bring attention to and improve knowledge and understanding of mental health and substance use issues affecting lawyers. The Law Society has implemented many of these recommendations.

[33] The First Interim Report also made recommendations concerning regulatory strategies, in particular, incorporating mental health and substance use issues into law firm regulation, addressing concerns connected to the Law Society Admission Program Enrollment Application, and amending the "duty to report" provisions in the *BC Code*.[6] Again, many of these recommendations have been implemented.

[34] The Second Interim Report built on the foundational work of the earlier recommendations to continue to improve the mental health of lawyers in BC, and is reflective of the important relationship between lawyer wellness and the protection of the public. One focus was expanding the information available to the profession and to law schools, thereby increasing the engagement among the profession and the regulator.

[35] Significantly, the Benchers of the Law Society implemented the proposed amendment to the "duty to report" and removed the medical fitness questions in the LSAP Application Form.

[36] Of particular significance to our determination of the appropriate disciplinary action is the recent recommendation to establish a pilot project concerning the development of an alternative discipline process (the "ADP"). The Benchers accepted this recommendation[7] and recently passed the required changes to the Rules implementing the ADP.[8]

[37] As identified in the ADP recommendations, while there is " … not necessarily a causal relationship between mental health … issues and misconduct, untreated health conditions can affect cognitive and other skills that are critical to a lawyer's ability to discharge their professional responsibilities."[9]

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[5] First Interim Report, para. 23
[6] First Interim Report, para. 116
[7] Recommendation on the Development of an Alternative Discipline Process ("ADP recommendations"), dated September 24, 2021
[8] Rule Amendments: Approval of Alternative Discipline Process, April 22, 2022
[9] ADP recommendations, para. 14

[38] Further, the Mental Health Task Force pointed out that "traditional" approaches to regulation " … provide limited opportunities to address health issues that have affected a lawyer's conduct."[10]

[39] One of the problems identified was that very few lawyers disclose and provide evidence concerning health conditions, particularly during the investigative stage, which suggests that many lawyers are apprehensive about revealing health conditions that may have "adversely impacted on their ability to fulfill their professional responsibilities."

[40] To his credit, the Respondent has disclosed his history, including the impact his mental health issues had on hi conduct.

[41] The Mental Health Task Force set out the purpose of the ADP as providing the Law Society " … with an opportunity to address alleged misconduct outside of the formal discipline stream in circumstances in which a lawyer's health condition is a contributing factor."[11]

[42] The Mental Health Task Force identified four guiding principles:

(a) confidentiality;

(b) voluntariness;

(c) a without risk process for both sides; and

(d) public interest.[12]

[43] Obviously, given that this is a hearing on Disciplinary Action, these principles must be applied in the context of this Hearing and the relevant rules, however, in the view of this Panel, these guiding principles should inform our decision.

[44] ADP contemplates that the lawyer will provide health information confirming the " … existence of a health issue that has contributed to the conduct issue(s)."[13] The Panel acknowledges that the Respondent has done so here, and as referred to above, the Panel is satisfied that there was a clear connection between the misconduct of the Respondent and mental health issues.

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[10] ADP recommendations, para. 15
[11] ADP recommendations, para. 27
[12] ADP recommendations, para. 28
[13] ADP recommendations, para. 42

[45] Another central tenet of ADP is that the parties work towards a "consent agreement" as opposed to one where the regulator unilaterally proposes terms. This approach fits with the voluntary principle as well as potentially terms suggested by the lawyer, which will be informed by their experiences of managing their health issues within their practice setting.[14]

[46] The aim, as one would expect, is a set of terms tailored to the lawyer's individual health and practice circumstances, which may include such things as a recommended treatment plan, medical monitoring and reporting requirements, practice restrictions, or other steps.[15]

[47] Significantly, in the Panel's view, the expertise in crafting the appropriate supports and treatment must lie in professionals apart from the regulator, a panel or, for that matter, the lawyer.[16]

[48] While this Hearing is not pursuant to the ADP, the Panel is of the view that the above considerations should be considered in crafting the appropriate disciplinary action where the jurisdiction to do so is available.

[49] As will be seen, the parties are not in agreement, so it falls to the panel, based upon the evidence before it, and the submissions of the parties, to determine the appropriate sanction.

**Suspension or fine**

[50] The Law Society takes the position that a two-month suspension is appropriate. The Respondent says that the appropriate disciplinary action is a fine.

[51] In addressing this issue (as well as whether there should be any further conditions), the Panel is cognizant of the "consolidated *Ogilvie* Factors", as set out above. For ease of reference, we repeat them here:

(a) nature, gravity and consequences of conduct;

(b) character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession, including public confidence in the disciplinary process.

[14] ADP recommendations, para. 49
[15] ADP recommendations, para. 50
[16] ADP recommendations, para. 51

[52] The Law Society submits, and we agree, that given the unique circumstances here, it is not necessary, nor helpful, to go through each of the *Ogilvie* Factors. Rather, as set out in *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 57, we should concentrate on two factors (rehabilitation and protection of the public), which include public confidence in the legal profession and the disciplinary process.

[53] All parties submit that whatever sanction is imposed, it ought to reflect an individualized approach. We agree.

[54] Here, we are of the view that we should address this issue under the following framework:

(a) the nature, gravity, and consequences of the misconduct considered globally, considering why the misconduct occurred, assessed through the lens of public interest and the need to maintain public confidence in the profession and its disciplinary process; and

(b) the Respondent's unique personal circumstances, with the goal of minimizing future risk to the public.

**Nature, gravity and consequences of the misconduct**

[55] Examined globally, the Respondent's misconduct is very serious. It is fundamental that lawyers must scrupulously abide by the trust accounting rules. The Respondent did not. Over the course of four years, he was involved in the misappropriation of significant amounts of client trust funds on numerous occasions. While the misappropriation was not intentional and the Respondent did not gain any personal advantage, his misconduct strikes at the very heart of one of the most fundamental duties of lawyers: the need to protect all client funds that are held in trust by the lawyer. Those funds belong to the client, not the lawyer.

[56] If it were not for the unique circumstances of this matter, the Panel would not hesitate in imposing a lengthy suspension of over six months. However, the evidence shows that there is a clear causal connection between the misconduct and the mental health of the Respondent, such that public interest and the maintenance of public confidence in the profession and its disciplinary process does not require a lengthy suspension.

[57] The Law Society suggests that a suspension of two months, together with conditions aimed at ensuring that the Respondent continues to manage his mental state and protects the public against financial or other risks, would better serve the public.

[58] The Respondent agrees that some conditions may be in order but submits that no suspension is required and that a fine is sufficient.

[59] In determining whether a fine or suspension (with or without conditions) is appropriate, the Panel has considered several authorities. In *Re Doroshenko*[17], a case resolved pursuant to the recent consent resolution process, the lawyer received a two-month suspension and was required to take a further five hours of CPD courses related to trust accounting. His misconduct was similar to the misconduct here: misappropriation of about $45,000 over the course of four and one half years by withdrawing funds from trust when there were insufficient funds on deposit for the clients, failing to identify the trust shortages, failing to immediately eliminate the trust shortages, failing to report the trust shortages, and various related misconduct connected with trust accounting.

[60] The misconduct in *Doroshenko* arose from misappropriation by a staff person and the failure to adequately supervise staff due to a concussion and other stressful events in the life of the lawyer at the time.

[61] In *Law Society of BC v. Lowe*, 2019 LSBC 37,[18] the lawyer was suspended for five months for misappropriation of about $9,000 (as estimated pre-billed disbursements), in addition to failure to deposit nearly $75,000 (also estimated pre-billed disbursements) into a pooled trust account, and failure to prepare and deliver appropriate bills. However, the misconduct was deliberate (although not dishonest) as the lawyer believed, incorrectly, that the pre-billed disbursements were not trust funds, despite previous advice to the contrary. He also profited from his misconduct, unlike the Respondent.

[62] Another case involving unintentional misappropriation is *Law Society of BC v. Sahota*, 2018 LSBC 20.[19] The review board increased the length of suspension to three months for "grossly negligent accounting practices and non-compliance with trust accounting obligations" over a period of three years. The review board held that the minimum range of suspension was three to six months. The review board agreed with the hearing panel that the lawyer was "comprehensively inept" concerning the financial aspects of his practice and had "no appreciation of the trust accounting rules."[20]

[63] While some of the language in *Sahota* is apposite here, the Panel is not of the view that the Respondent was inept or had no appreciation of the trust accounting rules.

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[17] Consent Agreement pursuant to Rule 3-7.1 accepted by Discipline Committee on April 28, 2021
[18] *Law Society of BC v. Lowe*, 2019 LSBC 37
[19] *Law Society of BC v. Sahota*, 2018 LSBC 20
[20] *Sahota*, para. 3

However, it is apparent that his mental state contributed to repeated, serious misconduct concerning largely, but not exclusively, the financial aspects of his practice.

[64] Clearly, none of the above cases are directly comparable to the present one, but the Panel finds that they provide useful guidance.

[65] The Respondent says that the following factors militate against the imposition of a suspension:

(a) the misconduct was connected to the events taking place in his life at the time, and not due to personal choices that he made;

(b) no client suffered any loss;

(c) all clients were provided with proper legal services;

(d) his motivation was to protect the legal interests of his clients; and

(e) there was no deliberate action by him that led to the misappropriation – instead, he relied on staff, although he agrees that his monitoring of staff was inadequate.

**Respondent's unique personal circumstances**

[66] The only professional conduct record of the Respondent is related to an administrative suspension and interim undertakings connected to this Citation.

[67] It is clear, as referred to above, that the Respondent recognizes that his personal circumstances and related mental health issues had a profound effect on his ability to fulfill his professional obligations, particularly as related to the financial aspects of his practice.

[68] Further, the Respondent has admitted the allegations and, most importantly, took steps on his own to address the significant mental health issues with which he was faced.

[69] According to Dr. Riar, the Respondent greatly benefitted from psychotherapy sessions between 2015 and 2017 and is of the view that things are getting back to normal for him.

[70] In his supplemental report, Dr. Riar opines that at the time of examination, the Respondent did not have any psychiatric or psychological conditions that would

impede his ability to provide legal services and did not require treatment at that time.

[71] However, as pointed out by the Law Society, Dr. Riar does not provide an opinion concerning whether the Respondent is likely to require treatment in the future.

**Conclusions regarding fine or suspension**

[72] The Panel concludes that the nature of the misconduct here is such that, despite the evidence demonstrating the unique personal circumstances of the Respondent and the causal link between his mental state and the misconduct, a suspension is required to maintain public confidence in the profession and its disciplinary process.

[73] While normally, given the extremely serious misconduct a lengthy suspension would be required, given the unique circumstances here, we are satisfied that a suspension of two months would appropriately address public interest and maintain confidence in the profession.

## CONDITIONS

[74] The jurisdiction of this Panel to impose conditions and limitations as part of its determination of the appropriate disciplinary action is founded on ss. 38(5)(c) and (d) and (7) of the *Act*, which read:

> (5) If an adverse determination is made under subsection (4) against a respondent other than an articled student or a law firm, the panel must do one or more of the following:
>
> …
>
> (c) impose conditions or limitations on the respondent's practice;
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> (d) suspend the respondent from the practice of law or from practice in one or more fields of law …
>
> …
>
> (7) In addition to its powers under subsections (5) … a panel may make any other orders and declarations and impose any conditions or limitations it considers appropriate.

[75] Sections 38(5)(c) and (7) are worded broadly and give this Panel wide discretion to order conditions on the practice of the Respondent, insofar as they fit "harmoniously" with the scheme of the *Act*, its objects, and the intention of the legislature.[21] However, this jurisdiction is far from unlimited and must always be considered within the context of the purpose of the *Act*. We will address this point further below regarding ordering of medical treatment.

[76] The Law Society and the Respondent have both suggested potential conditions. The Panel is of the view that in addition to the two-month suspension, some conditions on the practice of the Respondent are necessary to protect public interest and maintain public confidence in the profession.

**Position of the Law Society**

[77] The Law Society proposes the following conditions:

(a) prohibiting the Respondent from operating a trust account, receiving trust funds, and acting as a signatory to any trust account;

(b) suspending the Respondent from practising law in the areas of criminal and family law;

(c) ordering the Respondent to continue psychotherapy under the care of registered psychiatrist(s) or psychologist(s) (the "Medical Professionals") with assessment of a minimum of every six months from the date of the panel's order, and in accordance with any additional therapy recommendations made by the Medical Professionals;

(d) ordering the Respondent to authorize and instruct all Medical Professionals involved with his therapy to notify the Executive Director of the Law Society if, in the opinion of the Medical Professionals, the Respondent is at risk of his health preventing him from meeting his professional practice obligations; and

(e) ordering the Respondent to enter into a formal mentorship relationship with a senior practising lawyer of his choosing (the "Mentor") and to authorize and instruct the Mentor to notify the Executive Director of the Law Society if, in the opinion of the Mentor, the Respondent is at risk of his health preventing him from meeting his professional practice obligations.

[21] See: *Dhillon v. The Law Society of British Columbia*, 2021 BCSC 806 at para. 52

[78] We discuss the jurisdiction of the Panel to order conditions (c) and (d) below. There is no issue that we have the jurisdiction to order conditions (a), (b) and (e).

**Position of the Respondent**

[79] The Respondent suggests the following:

(a) there should be no prohibition from operating a trust account, but rather that:

(i) he retake and satisfy the requirements of the Small Firm Practice Course (which we take to mean the Practice Management Course offered by the Law Society);

(ii) he complete an additional five CPD hours of courses relating to trust accounting and Small Firm Accounting;

(iii) he complete and submit, as required, all Trust Reconciliation Reports and other trust related reports strictly in accordance with the regulatory deadlines; and

(iv) he provide ongoing satisfactory evidence that he has retained qualified accounting professionals or staff to assist with financial record keeping and trust accounting issues.

(b) there should be no restriction of his ability to practise criminal or family law;

(c) he does not require a formal mentorship agreement but is prepared to agree (although not as a condition of any disciplinary action) to reach out to a senior lawyer if he feels that he wishes to speak to someone about a client, or client matter, or any other provision of legal services, and that he will provide a letter from such senior counsel and, if so advised, he will reach out to the Law Society and contact a practice advisor; and

(d) he does not require a formal arrangement with either a psychiatrist or psychologist but is prepared to consult with a therapist three times at six month intervals, provided there is no disclosure of such sanction.

[80] The Panel will discuss its jurisdiction regarding (c) and (d) below.

**Jurisdiction of panel regarding ongoing medical therapy**

[81] In support of its position that the broad language of ss. 38(5)(c) and (7) permits this Panel to order medical treatment, the Law Society submits that the scheme and object of the *Act* requires panels to impose sanctions in the public's interest. The Law Society further submits that the public interest mandate allows panels to order conditions related to medical treatment in order to permit appropriate regulatory oversight, and to hold otherwise would be inconsistent with that public interest mandate. The Law Society points to s. 26.02 of the *Act*, which allows the benchers to make rules that permit three or more benchers to make an order requiring a lawyer to submit to an examination by a medical practitioner and to instruct that practitioner to report on the "ability of the lawyer to practise law."

[82] It seems to the Panel that s. 26.02 is geared towards the competence of a lawyer, as opposed to appropriate sanctions for misconduct. But the Law Society submits that cases do support the broad power of a panel to order a wide range of potential sanctions, such as "disgorgement",[22] and find further support in the broad range of investigative powers under Rule 4-55 (dealing with investigation of the books, records, and accounts of a lawyer). [23]

[83] Concerning the jurisdiction of this Panel to order ongoing medical therapy, the Law Society specifically relies on two cases to support the jurisdiction of this Panel to order ongoing medical therapy.

[84] One such case is *Law Society of BC v. Knight*, 2021 LSBC 36. The Panel feels it is necessary to discuss the facts in some detail.

[85] In *Knight*, the lawyer *intentionally* misappropriated client funds. Medical evidence showed that the lawyer met the diagnostic criteria for severe substance use disorder for both alcohol and cocaine *not in remission*. Further, the medical evidence showed that the serious misconduct occurred "… primarily as a result of the untreated brain disease that he suffered from …" and substance use disorders that the lawyer " … *continues to have the potential to suffer from."* [emphasis added].[24]

[86] The medical evidence presented in *Knight* did not specifically address the lawyer's current fitness to practise law nor whether he was following a treatment program that would reduce the likelihood of his use of alcohol or drugs.

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[22] See *Law Society of BC v. Gurney*, 2017 LSBC 32 at para. 58
[23] See, for example, *A Lawyer v. The Law Society of British Colombia*, 2021 BCSC 914, at paras. 44 to 45
[24] *Knight*, para. 31

[87] The Law Society in *Knight* relied on the medical evidence and the aggravated facts of the matter, and sought a number of sanctions, including the requirement for an appearance before a board of examiners before the minimum 16-month suspension was to end to satisfy the board that the lawyer's competence to practise law was not adversely affected by a dependency on alcohol and drugs,[25] and to enter into and comply with a "medical monitoring agreement", the terms of which are not revealed in *Knight*.

[88] The lawyer, who represented himself at the hearing, did not consent to the sanctions proposed by the Law Society but did not oppose them and agreed that they were appropriate.

[89] As can be seen, the panel in *Knight* had evidence of an ongoing substance abuse issue and was concerned about the *competence* of the lawyer to practise law while that issue persisted. Further, the panel appeared to infer from the medical evidence, reasonably it must be said, that the public would remain at risk until the lawyer dealt with his substance abuse issue. Even so, there is no indication in the judgment that the panel ordered ongoing treatment of the lawyer.

[90] *Knight* refers to earlier decisions, particularly *Law Society of BC v. Gellert*, 2005 LSBC 15, where the single bencher panel imposed a condition that the lawyer obtain a psychiatric evaluation (the evidence showed that the lawyer suffered from depression) before returning to practice. The lawyer agreed.

[91] The Law Society also relies upon *Law Society of BC v. Gounden*, 2021 LSBC 07. In *Gounden*, medical evidence demonstrated that the lawyer had a very low risk of re-offending. The medical experts recommended that the lawyer not practise as a sole practitioner, that he take ongoing psychotherapy and that a high level of vigilance and supervision was required, in particular should the lawyer be involved with financial or similar proceedings.

[92] In *Gounden*, the lawyer, through his counsel, agreed with the conditions.

[93] The Panel concludes that in certain, isolated circumstances, it has the jurisdiction to order that a lawyer undergo medical therapy, even if the lawyer does not consent. We reach this conclusion due to the nature of the *Act* and its overarching concern with the public's interest in the administration of justice. However, this jurisdiction must not be exercised lightly and before doing so, there must be a firm, evidentiary foundation upon which to make such orders.

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[25] Section 38(5)(f)(iii) expressly permits such a condition

[94] This evidentiary foundation must include clear, expert evidence, which shows that the proposed medical therapy would benefit the lawyer and serve public interest. It cannot be based upon "common sense" inferences, for the simple reason that those inferences may be based on erroneous beliefs about the nature of mental illness and how it can be addressed through medical treatment. It is the expertise of professionals that this Panel must rely upon, not its own preconceived, and possibly inaccurate, opinions concerning the best way to address mental illness.

[95] We are cognizant of the fact that prohibiting a lawyer from practicing law unless the lawyer enters into a medical treatment plan as recommended by an approved medical practitioner is a serious infringement on the freedom of a respondent to choose the most appropriate medical treatment for their own needs. We should not interfere in that choice absent compelling evidence that doing so will serve public interest.

**The evidentiary basis here**

[96] As referred to above, Dr. Riar, whose opinions form the only expert evidence here, concluded that while the Respondent benefitted greatly from the psychotherapy he took from 2015 to 2017, at the time of Dr. Riar's examination, the Respondent did not have any persisting psychiatric or psychological conditions that would impede his ability to provide legal services and did not require treatment at that time.

[97] This opinion falls far short of the compelling evidence that would lead this Panel to order medical treatment against the wishes of the Respondent, and we decline to do so.

**Medical conditions suggested by the Respondent**

[98] As referred to above, the Respondent suggests that he would consult with a therapist three times at six month intervals.

[99] The Panel considers this to be a sensible condition. This would address any lingering concerns about the potential for a triggering event that could again place the Respondent in a situation where the public could be placed at risk.

**Jurisdiction of the panel regarding non-disclosure of certain conditions**

[100] The Respondent suggests that any condition regarding consulting with a therapist should not be disclosed. He submits that this would have a "chilling" effect on decisions by lawyers to disclose underlying medical conditions.

[101] The Law Society submits that while non-disclosure orders might be appropriate at an interim stage, this Hearing is a final determination and to maintain public confidence in the disciplinary process, transparency is vital.

[102] While we agree that there is jurisdiction to order non-disclosure of conditions, we do not feel it would be appropriate here regarding consulting with a therapist. The public is entitled to know why the Panel has agreed to a relatively modest suspension for the very serious misconduct here, and is also entitled to know that, for a limited period, the Respondent must consult with a therapist.

**Restrictions on practice areas**

[103] The Law Society submits that the Respondent should be prohibited from practising criminal or family law. The basis for this submission appears to be that these areas of law regularly deal with sensitive and potentially traumatic experiences of clients, and this could trigger, again on a "common sense" basis, a relapse of the issues that gave rise to the misconduct. They point out that allegation 19 of the Citation involved the Respondent improperly commissioning an affidavit by not meeting personally with the client. The explanation offered by the Respondent was that he was "medically unwell" and wanted to avoid discussing sensitive matters with his client. This event took place in May 2017.

[104] The Respondent submits that the terms "criminal" or "family" law are broad and vague terms, and if he were to be prohibited from practising in these areas, he would be significantly prejudiced in his ability to maintain his practice in Surrey, BC. He also submits that there is no evidentiary basis to support this sanction, as none of the allegations specifically relate to a "family" or "criminal" law matter (the Panel points out that paragraph 19 of the Citation does relate to a family law matter, indirectly at least) and that there are no allegations regarding improper legal advice or competency to provide legal advice. The Respondent stresses that the allegations relate to the administrative aspects of his law practice and certain decisions he made in his personal life.

[105] We agree with the Respondent. The evidence does not provide a sufficient basis to prohibit him from engaging in particular areas of law. While the improper commissioning of the affidavit occurred in the context of a family law matter, we do not find that, absent any other evidence, this misconduct supports a prohibition. While we accept that family and criminal law may be more likely than other areas of law to involve "sensitive" matters (in the sense of clients finding themselves in situations that may relate to potentially adverse experiences in their personal lives), virtually any area of law has the potential to expose a lawyer to "sensitive" issues.

Without evidence to support the suggestion that exposure to matters that may arise in family or criminal law files is likely to trigger the Respondent in some way , or a clear connection between these areas of law and the misconduct, we are not prepared to prohibit the Respondent from engaging in these areas of law.

**Formal mentoring relationship**

[106] The Law Society submits that the Panel should order that the Respondent enter a formal mentorship relationship. The basis for the submission appears to be that the Mentor would then be able to advise the Law Society if, in the Mentor's view, the Respondent's health was at risk and that his health could adversely impact the Respondent's professional obligations, thereby allowing the Law Society to take appropriate actions.

[107] The Respondent submits that he has been a lawyer for over 19 years and that at no time has his competency to provide legal services been questioned. He argues that such an arrangement would require the Respondent to disclose highly private information knowing that the Mentor would be obliged to share such information with the Law Society and have a chilling effect on the Respondent's trusted support network with whom he is comfortable consulting and speaking. He also points out that there have been no issues since 2018. Further, he submits that the nature of his practice, primarily contracting himself out to other law firms for court work, necessarily involves frequent communications with other lawyers and as such, any concerns the Law Society has are likely to be addressed by those lawyers.

[108] The Panel also notes that telling a lawyer that that lawyer should report another lawyer as a result of a perceived mental health issue flies in the face of the 2019 amendments to the "duty to report" under rule 7.1-3 of the *BC Code*.

[109] As an alternative, the Respondent says he is willing to "reach out to a senior lawyer" if he ever feels that he wishes to speak to someone about a client, client matter, or the provision of legal services, but asks that this type of informal assistance is more appropriate in the form of a letter agreement as opposed to a formal sanction.

[110] We have carefully considered the submissions of both parties. In our view, the evidence does not support the need for a formal mentorship agreement. We also decline to order the Respondent to enter into a letter agreement with the Law Society. First, we are skeptical that we have the jurisdiction to do so and, more importantly, we do not see the utility in such an arrangement. We take it as a given that if the Respondent feels it is necessary, he will reach out to a senior lawyer for advice or assistance, and we encourage him to do so.

[111] Further, of course, there are other confidential services available to all members of the Law Society, such as the Lawyer's Assistance Program and Lifeworks. Our view is that such services are more likely to lead to a favourable outcome than orders from a panel.

**Prohibition from operating a trust account**

**General comments**

[112] It is common ground that the bulk of the misconduct here was connected to the administrative side of the Respondent's practice, especially his trust account. As referred to above, the proper handling of trust funds is integral to the practice of law. Clients depend on their lawyers to zealously safeguard all trust funds. The entire trust accounting scheme of the Law Society is geared towards the protection of clients who entrust their hard-earned funds to their lawyers. It goes without saying that lawyers must scrupulously follow the trust accounting rules. The Respondent did not. Repeatedly. For years.

[113] The disciplinary action that this Panel imposes must focus on ensuring that the public is confident that the Respondent will faithfully adhere to all principles and rules connected in any way to the management of funds held in trust.

**Position of the parties**

[114] The Law Society submits that the only way to protect the public is to prohibit the Respondent from operating a trust account, receiving trust funds, and acting as a signatory to any trust account.

[115] The Respondent says that this would be too drastic a sanction and points out:

(a) The conduct did not involve dishonesty or deliberate action and was not for personal gain.

(b) He has been practising without a trust account for three and one half years and this time should be credited to him since he has been forced to work around these challenges, which make it difficult to adequately represent clients and to provide full services to them. He says that he has lost many clients and has not been retained by potential clients, which has adversely affected his professional and financial position.

(c) It is difficult for a lawyer in a sole practice or a small practice group to run their practice without a trust account.

(d) There is no evidence of there ever being insufficient funds in his trust account to pay out all of a client's trust monies if required.

(e) The significant errors occurred as a result of "events" that were happening in his personal life and not due to personal choices.

(f) Most of the errors occurred in residential real estate conveyances.

[116] The Respondent submits that the following orders can adequately protect the public, namely, that he shall:

(a) retake and satisfy the requirements of the Small Firm Practice Course;

(b) complete an additional five CPD hours of courses relating to trust accounting and Small Firm Accounting;

(c) complete and submit, as required, all Trust Reconciliation Reports and other trust account related problems strictly in accordance with the regulatory deadlines;

(d) not undertake residential real estate conveyances, unless it is part of a litigation matter; and

(e) provide ongoing satisfactory evidence that he has retained qualified accounting professionals or staff to assist with financial record keeping and trust accounting issues.

**Conclusions on trust accounting issues**

[117] The Panel concludes that the facts here do not support a complete ban on the Respondent operating a trust account, receiving trust funds, and acting as a signatory to any trust account.

[118] While we understand the position of the Law Society, we are of the view that the following militates against such an order:

(a) the conduct did not involve dishonesty or deliberate action and was not for personal gain;

(b) the underlying cause of the misconduct was the continued effects of the significant trauma experienced by the Respondent in conjunction with him practising, for the most part, on his own with little support;

(c) the Respondent has been practising without a trust account for three and one half years; and

(d) there is no evidence of there ever being insufficient funds in the Respondent's trust account to pay out all of a client's trust monies if required.

[119] We are, however, of the view that a formal trust supervisory agreement is necessary to properly safeguard the public. We therefore order that the Respondent enter into a trust supervisory agreement on terms satisfactory to the Law Society. The Panel is of the view that this condition should end after two years of incident-free practice. The Respondent shall submit a request to the Law Society to terminate the trust supervisory agreement, and providing the incident-free condition has been met, the Law Society shall remove the supervision requirement.

[120] We are further of the view that, given the misconduct here, the Respondent should not engage in any residential real estate conveyances, even in the context of a litigation matter. He will have to refer such conveyances to another practitioner. While we appreciate that this will be inconvenient, we are of the view that such a term is necessary to protect the public.

[121] In addition, we order that the Respondent:

(a) retake and satisfy the requirements of the Practice Management Course;

(b) complete an additional five CPD hours of courses directly related to trust accounting and Small Firm Accounting; and

(c) provide ongoing evidence satisfactory to the Law Society that he has retained and uses qualified accounting professionals or staff to assist with financial and trust accounting matters.

[122] We decline to make an order that the Respondent submit all trust reports strictly in accordance with regulatory deadlines, as he is obliged to do so in any event.

**COSTS**

[123] The Law Society seeks costs in the amount of $11,862.75 as set out in its draft Bill of Costs. The Respondent says that the Panel should exercise its discretion and reduce the amount of costs awarded because the entire case was put forward based on an agreed statement of facts, that no witnesses were called and, essentially, the

entirety of the evidence was by consent. The Respondent further points out that the parties acted in a very cooperative manner throughout.

[124] Further, the Respondent points out that his annual income is in the range of $45,000 to $50,000 and says that consideration should be given to his decision to return to BC in the circumstances.

[125] In the circumstances, the Panel is prepared to exercise its discretion and reduce the award of costs to a modest degree. We order costs of $9,000, with time to pay of 16 months from the end of the suspension we have ordered.

**NON-DISCLOSURE**

[126] Both parties agree that the panel should make orders pursuant to Rule 5-8 for non-disclosure of certain evidence. We agree and order that there shall be no publication of:

(a) any of the medical reports of Dr. Riar filed in these proceedings;

(b) the Impact Statement filed by the Respondent; and

(c) any information that directly describes the underlying trauma experienced by the Respondent and the difficult decisions he made to address these extremely personal and serious events in his life.

[127] The parties have requested, and the Panel agrees, that the Law Society and the Respondent be permitted two weeks to review this Panel's decision before it is published to address any issues of non-publication and non-disclosure.

**RESULT**

[128] The Panel makes the following orders:

(a) the Respondent shall be suspended from the practice of law for two months beginning the first day of the month following the publication of this decision;

(b) the Respondent shall consult with a therapist three times at six month intervals and instruct his therapist to report any concerns to the Law Society;

(c) the Respondent shall enter into a trust supervisory agreement on terms satisfactory to the Law Society, which shall terminate after two years of incident-free practice, as set out in paragraph 119 above, and further, the Respondent shall:

(i) retake and satisfy the requirements of the Practice Management Course;

(ii) complete an additional five CPD hours of courses directly related to trust accounting and Small Firm Accounting;

(iii) provide ongoing evidence satisfactory to the Law Society that he has retained and uses qualified accounting professionals or staff to assist with financial and trust accounting matters;

(d) The Respondent shall not undertake any residential real estate conveyances; and

(e) The Respondent shall pay costs of $9,000, which amount is due in full by no later than 16 months after he completes his two-month suspension.

**NON-DISCLOSURE ORDER**

[129] Further, the Panel orders that there be no publication of:

(a) any of the medical reports of Dr. Riar filed in these proceedings;

(b) the Impact Statement filed by the Respondent;

(c) any information that directly describes the underlying trauma experienced by the Respondent and the difficult decisions he made to address these extremely personal and serious events in his life; and

(d) the parties shall have two weeks from the delivery of this decision to them to review the decision and bring to the attention of this Panel any matters relating to this publication ban that they feel this Panel may wish to consider.