

2023 LSBC 15
Hearing File No.: HE20200096
Decision Issued: April 6, 2023
Citation Issued: December 1, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

ANDREW YAT-CHEUNG LAU

RESPONDENT

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

Written Materials: January 18, 2023

Panel: Steven McKoen, KC, Chair
Nicole Byres, KC, Lawyer
Warren Funt, Public representative

Discipline Counsel: Ilana Teicher

No one appearing on behalf of the
Respondent

Written reasons of the Panel by: Nicole Byres, KC

INTRODUCTION AND BACKGROUND

[1] The Respondent was called and admitted as a member of the Law Society of British Columbia (the “Law Society”) on May 22, 2008.

DM3962945

- [2] On December 1, 2020, a citation was issued (the “Citation”) against the Respondent. Particulars of the Citation are set out in paragraphs [11] (a) to (f) below.
- [3] On January 1, 2021, the Respondent became a former member of the Law Society for non-payment of fees.
- [4] On January 20, 2022 an order was made that the Facts and Determination hearing proceed with written submissions only (the “January 20, 2022 Order”).
- [5] The Respondent did not file any responding materials with respect to:
- (a) the Law Society’s application resulting in the January 20, 2022 Order, or
 - (b) the Facts and Determination hearing.
- [6] On June 14, 2022 in the Facts and Determination decision (“F&D Decision”) on this matter, the Panel found that:
- (a) all of the allegations in the Citation had either been admitted to by the Respondent and/or proven by the Law Society;
 - (b) the Respondent’s behaviour for each of the allegations in the Citation met the test of a marked departure from the standard the Law Society expects of lawyers; and
 - (c) the Respondent’s conduct set out in each of the allegations in the Citation constituted professional misconduct.
- [7] The Disciplinary Action hearing was set for one day on December 6, 2022. Between June 30, 2022 and August 22, 2022, the Law Society and the LSBC Tribunal attempted to contact the Respondent regarding the date for this hearing and whether or not he would consent to having the hearing proceed in writing, however the Respondent did not respond to these communications.
- [8] On September 19, 2022 the Law Society applied for an order that the disciplinary action phase of the hearing in this matter be conducted in writing, and an order to set dates for the exchange of the Law Society’s submissions and reply if any, and the Respondent’s response. The Respondent did not respond to the September 19, 2022 application. The Panel granted the orders sought.

- [9] Despite having been deemed to be served with the Law Society's November 28, 2022 submissions, the Respondent did not respond by the December 12, 2022 date set for response.
- [10] This decision addresses the appropriate disciplinary action arising from the Respondent's professional misconduct.

FACTS AND DETERMINATION DECISION

- [11] As noted above, on June 14, 2022 the Panel determined that the Respondent committed professional misconduct in relation to the following six allegations in the Citation:
- (a) between approximately March 2016 and November 2019, the Respondent collected Goods and Services Tax ("GST") from his clients but failed to remit the funds and interest due to the Canada Revenue Agency in payment of the GST in a timely way, contrary to rule 7.1-2 of the *Code of Professional Conduct for British Columbia* (the "BC Code");
 - (b) between approximately April 2018 and August 2019, the Respondent collected British Columbia Provincial Sales Tax ("PST") from his clients but failed to remit funds and interest due to the British Columbia Ministry of Finance in payment of the PST in a timely way, contrary to rule 7.1-2 of the *BC Code*;
 - (c) the Respondent failed to remit the Trust Administration Fee ("TAF") to the Law Society within 30 days of the end of some or all of the quarters ending December 2017, March 2017, June 2018, September 2018, December 2018, June 2019, September 2019 and December 2019, contrary to one or more of the Law Society Rules ("Rules") 2-110 and 3-49(e), and rule 7.1-2 of the *BC Code*.
 - (d) the Respondent failed to notify the Executive Director of the Law Society in writing of the circumstances of an unsatisfied monetary judgment, filed against his law corporation in the Supreme Court of British Columbia on July 8, 2019 (Court File 19 2988, Victoria Registry), and his proposal for satisfying the judgment, contrary to one or both of Rules 3-49(a) and 3-50;
 - (e) between approximately March 2018 and November 2018, in the course of acting for various clients, the Respondent misappropriated \$14,336 held in trust on behalf of his clients, by withdrawing funds from trust for

the payment of his fees when he had not rendered any or sufficient legal services to justify the withdrawal, contrary to Rule 3-64; and

- (f) the Respondent withdrew or authorized the withdrawal of funds from trust without first signing and delivering a bill to his clients, contrary to one or both of Rule 3-65 and section 69 of the *Legal Profession Act*, SBC c. 9 (the “Act”).

POSITION OF THE LAW SOCIETY

[12] The Law Society’s position is that given the serious nature of the Respondent’s misconduct, disbarment is the appropriate global discipline.

[13] The Law Society also seeks costs of \$ 5,500.00, payable within 60 days of the Panel’s issuance of a decision in this matter, or on such other date as the Hearing Panel may order.

ANALYSIS

General principles with respect to disciplinary action

[14] The *Law Society of BC v. Ogilvie*¹ first articulated 13 (non-exhaustive) factors that should be considered when deciding on appropriate disciplinary sanctions. *Ogilvie* was followed in later decisions including the leading decision of *Law Society of BC v. Lessing*².

[15] The *Ogilvie* factors were later consolidated into the following four general factors in *Law Society of BC v. Dent*³:

- (a) the nature, gravity and consequences of the conduct;
- (b) the character and professional conduct record of the respondent;
- (c) the respondent’s acknowledgement of the misconduct and remedial action; and
- (d) public confidence in the legal profession, including public confidence in the disciplinary process.

¹ *Law Society of BC v. Ogilvie*, 1999 LSBC 17 (“*Ogilvie*”)

² *Law Society of BC v. Lessing*, 2013 LSBC 29 (“*Lessing*”)

³ *Law Society of BC v. Dent*, 2016 LSBC 05, at paras. 19 to 23 (“*Dent*”)

[16] The review panel in *Lessing* also stated that the disciplinary action imposed must be consistent with the Law Society's mandate to protect the public interest, per section 3 of the *Act*, and stated that where there is a conflict between the protection of the public and rehabilitation, the protection of the public, including protection of public confidence in lawyers generally will prevail.⁴

[17] In 2022, the panel in *Law Society of BC v. Lee*⁵ neatly summarized the approach panels should take when considering appropriate discipline, in light of *Dent* and *Lessing*:

After *Lessing* and *Dent*, the modern approach is to group the various factors under four headings, recognizing that many of the *Ogilvie* factors overlap. Additionally, the modern approach recognizes two particular concerns: (a) the protection of the public, including public confidence in the disciplinary process and the legal profession; and (b) rehabilitation of the lawyer. Where those two concerns conflict, the protection of the public prevails.

[18] In addition, the review panel in *Law Society of BC v. Faminoff*⁶, confirmed the following principles at paragraphs 84 and 87:

Decisions on penalty are an individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to the disciplinary proceedings.

While there is no prescribed formula, the consideration of aggravating or mitigating circumstances will assist in determining the appropriate disciplinary action and which other cases are most similar in order to define the range of appropriate penalties.

[19] Finally, while we note that in the F&D Decision this Panel found that the Respondent committed professional misconduct as described in six different kinds of allegations, the Panel is also guided by the *Law Society of BC v. Gellert*⁷, which held that panels should deal with the separate acts of misconduct globally when considering disciplinary sanctions.

⁴ *Lessing, supra*, at paras, 57 to 61

⁵ *Law Society of BC v. Lee*, 2022 LSBC 05, at para. 9 (“*Lee*”)

⁶ *Law Society of BC v. Faminoff*, 2017 LSBC 04, at para. 84 (“*Faminoff*”)

⁷ *Law Society of BC v. Gellert*, 2014 LSBC 05 at para. 37 (“*Gellert*”)

Nature and gravity of the misconduct

Failure to remit GST and PST

- [20] Between 2016 and 2019 the Respondent collected GST and PST from clients but failed to remit such amounts to the Canada Revenue Agency and the BC Ministry of Finance. The Respondent's failure to remit these amounts occurred over a protracted period and in the case of the PST remittances, despite the Respondent receiving at least five notices from the Ministry of Finance about the outstanding PST remittances.
- [21] The statutes which govern the collection of GST and PST make it clear that when GST or PST is collected, a statutory trust is created and that any failure to remit GST or PST is a breach of that trust. Further, failure to remit GST or PST is a breach of rule 7.1-2 of the *BC Code* which requires lawyers to promptly meet financial obligations relating to their practices.
- [22] Failing to remit GST and PST collected from clients is serious professional misconduct⁸ which is not excused nor mitigated by any statements made by the Respondent at the investigation stage about his personal or financial difficulties. While the amounts due were ultimately paid by the Respondent, he did not do so until well past their due dates.
- [23] The Respondent also failed to remit the Trust Administration Fee ("TAF") to the Law Society for 33 matters between October 1, 2017 and December 31, 2018 and while the Respondent eventually paid these arrears in August 2019, he failed to remit TAF at all for the second, third and fourth quarters of 2019.
- [24] Failure to remit TAF to the Law Society is contrary to Rule 2-110 requiring lawyers to pay TAF for each client matter where a lawyer received money in trust, as well as rule 7.1-2 of the *BC Code*. Further, failure to remit TAF is deemed a failure to meet a minimum standard of financial responsibility pursuant to Rule 3-49(e).

Failure to notify of monetary judgment

- [25] The Respondent admitted that he failed to notify the Law Society of an unsatisfied monetary judgement registered against his law firm by the Ministry of Finance for unpaid PST that he had collected from clients, but said that he was not aware of the Rule 3-50 requirement to report. The Panel found that the Respondent's failure to

⁸ *Law Society of BC v. Donaldson*, 2003 LSBC 27

familiarize himself with the applicable rules once he became aware of the judgment against him was a marked departure from the conduct expected of lawyers, and as such constituted professional misconduct.

Misappropriation and failure to deliver bills

[26] Between March and November of 2018, the Respondent misappropriated client trust funds from four clients totaling some or all of \$14,336, and in the case of two of those clients, the Respondent failed to deliver a bill prior to withdrawing the funds from trust. In some but not all cases, the Respondent completed the services after he had removed the funds deposited into trust for such services.

[27] The Panel in the F&D Decision stated:

The Panel finds that the evidence demonstrates a repeated pattern of unauthorized taking of client trust funds for each of the Respondent's clients JS, YH, VH and KL. The Panel also finds that the Respondent's actions, combined with his explanations for unauthorized and/or premature transfers of funds from his trust account, demonstrate an alarming and blatant disregard for the Respondent's obligations regarding trust funds, the fiduciary relationship between the Respondent and his clients, and his ethical obligations under the *BC Code*. Taking payment for services that are not rendered from funds that were to be held in trust is akin to theft.⁹

[28] The most serious finding in the F&D Decision was that the Respondent misappropriated trust funds and particularly that he engaged in conduct that was akin to theft. In *Law Society of BC v. Tak*, 2014 LSBC 57 at para. 35 the panel stated that:

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.

[29] Additionally, the panel in *Law Society of BC v. McGuire*, 2006 LSBC 20 at para. 30 made the following observation:

True, the Respondent regarded many of the takings as fees for work he had done, although the fees were not yet billed.... True, when he made

⁹ F&D Decision at para. 139-140

the withdrawals, the Respondent seemingly intended to put things right when he could do so. True, some of the withdrawals were put right, by delivery of a bill or by replenishment of the account, even before the Law Society became involved.... But none of that alters the fundamental fact that the Respondent broke, not once but many times over a long period of time, the clearest, most basic rule of professional conduct: you do not ever, under any circumstances, help yourself to trust money that belongs to your clients.

- [30] Given the Respondent's misappropriation of trust funds as well as his other actions of not remitting GST, PST, and TAF and failing to notify the Law Society of a monetary judgement against him, the Panel finds that a significant penalty is warranted.

Character and Professional Conduct Record of the Respondent

- [31] The Law Society's submissions refer to the Respondent's Professional Conduct Record ("PCR"), which consists of an administrative suspension effective September 22, 2020, however the Panel does not consider the Respondent's PCR as a separate event to be given weight in the consideration of penalty. The administrative suspension arose out of the investigation into the Citation, which in turn eventually led to the Panel's finding of professional misconduct.
- [32] However, the Panel does agree with the Law Society's submission that the failure of the Respondent to appear at or respond to any of the proceedings in this matter, including the Facts & Determination and Penalty stages, reflects poorly on the Respondent.

Acknowledgement of the Misconduct and Remedial Action

- [33] Throughout the proceedings before this Panel, the Respondent has not offered any acknowledgment of his actions. The Respondent, in his responses to Law Society investigators, did not deny many of the facts material to the allegations in the Citation, however he attempted to justify his actions on the basis that he was dealing with personal problems including financial difficulties. He also tried to justify the misappropriation on the basis that in most cases, the services for which he withdrew trust funds were eventually provided to the client.
- [34] As noted in the F&D Decision and previously in this decision, the Respondent cannot use his own financial difficulties to justify his actions. His attempts to do so

only serve to undermine any acknowledgement of misconduct that his admissions during the investigation might otherwise have demonstrated.

- [35] Also, and as noted by the Law Society, some of the Law Society's case was proven by way of admissions, however those admissions were deemed admissions because of the Respondent's failure to reply to the Law Society's Notice to Admit, and not because the Respondent accepted culpability or responsibility for his conduct.

Public Confidence in the Legal Profession and Disciplinary Process

- [36] The public must have confidence in the legal profession and in the ability of the Law Society to self-regulate the legal profession.
- [37] The need for public confidence in the legal profession and in the Law Society's ability to govern itself and disciplinary process underlies the primary purpose of disciplinary action as stated in the *Tak* decision at para 26:

The primary purpose of disciplinary action is set out in the following decisions: *Law Society of BC v. Hordal*, 2004 LSBC 36 at paragraph 51; *Law Society of BC v. Gellert*, ...2014 LSBC 05 paragraph 36; and *Law Society of BC v. Hill*, 2011 LSBC 16. In *Hill*, the hearing panel commented at paragraph 3 that:

It is neither our function nor our purpose to punish anyone. The primary object of proceedings such as these is to discharge the Law Society's statutory obligation, set out in section 3 of the *Legal Profession Act*, to uphold and protect the public interest in the administration of justice. Our task is to decide upon a sanction or sanctions that, in our opinion, is best calculated to protect the public, maintain high professional standards and preserve public confidence in the legal profession.

- [38] The Respondent's misappropriation of client funds along with his failure to remit taxes and his failure to remit TAF all erode the public confidence in the legal profession. The Respondent's failure to report a monetary judgement against him eroded the ability of the Law Society to govern him.
- [39] The Law Society is seeking an order of disbarment. Disbarment is the ultimate sanction and should be ordered when there are no other means of protecting the public.
- [40] The Panel considers the comments in *McGuire* at para. 24 to be instructive:

... We accept that disbarment is a penalty that should only be imposed if there is no other penalty that will effectively protect the public. Protecting the public, however, is not just a matter of protecting the Respondent's clients in future. Even if the latter could properly be done by imposing restrictions on the Respondent's use of his trust account, we do not think that such a measure adequately protects the public in the larger sense. Wrongly taking a client's money is the plainest form of betrayal of the client's trust. In our view, the public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. Protection of the public lies not only in dealing with ethical failures when they occur, but also in preventing ethical failures. In effect, the profession has to say to its members, "Don't even think about it." And that demands the imposition of severe sanctions for clear, knowing breaches of ethical standards. A penalty in this case of a fine and a practice restriction is, in our view, wholly inadequate for the protection of the public in this larger sense.

[41] Similarly, the panel in *Tak* at para. 38 held that:

There should be no doubt that a strong message of general deterrence should be sent to other members of the Law Society in respect of misappropriating funds, and it should be unequivocal that such misconduct will almost certainly result in the revocation of the right to practise law.

[42] Deliberate misappropriation of client funds will not invariably lead to disbarment, however there is a presumption of disbarment. Disbarment can be avoided if there are extraordinary mitigating circumstances to satisfy a panel that the protection of the public interest and reputation of the profession does not require disbarment.¹⁰

[43] In the instant case, the Panel finds that there are no extraordinary circumstances that would satisfy the Panel that disbarment is not appropriate. The Panel finds that in all the circumstances the only appropriate sanction on a global basis is that the Respondent be disbarred.

DECISION ON PENALTY

[44] The Panel agrees with the Law Society submission that the Respondent's actions, when viewed globally, are grave and that disbarment is the appropriate disciplinary

¹⁰ *Gellert*, supra at para 46.

action in response to the Respondent's actions and is necessary to maintain public confidence in the integrity of the legal profession.

COSTS

[45] The Law Society seeks costs of \$5,500.00 in accordance with Schedule 4 of the Law Society Tariff, payable within 60 days of the Panel's issuance of a decision in this matter, or on such other date as the Panel may order.

[46] The Panel accepts the calculation of costs under the Tariff and that an award of costs in the amount sought by the Law Society is appropriate here.

ORDERS

[47] Applying the factors discussed, the Panel orders that:

- (a) pursuant to section 38(5) of the *Act*, the Respondent is disbarred; and
- (b) pursuant to Rule 5-11 of the Rules, the Respondent must pay costs to the Law Society in the total amount of \$5,500 payable within 60 days of the release of this decision.