2022 LSBC 30
Hearing File No.: HE20180107
Decision Issued: August 24, 2022
Citation Issued: December 12, 2018
Citation Amended: October 21, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

HONG GUO

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates: December 16, 17, 18, 19 and 20, 2019; October, 6, 7, 8 and 9, 2020; November 13, 2020; February 9, 2021; March 18, 2021

Panel: Sarah M. Westwood, Chair; Gillian M. Dougans, Lawyer; Carol Gibson, Public representative

Discipline Counsel: Alison L. Kirby

Counsel for the Respondent: Craig E. Jones, QC

TABLE OF CONTENTS Para.

PRELIMINARY MATTERS
Application to exclude a member of the public 1
Application for a stay based on prosecutorial misconduct 24

CITATION
Introduction 42
Parties 44
Citation 45

FACTS 50
The Respondent 51
The companies 57
The clients 65
The transactions 82
The Law Society investigation 112

ISSUE 120
121
LEGAL FRAMEWORK

CREDIBILITY 127

POSITIONS OF THE PARTIES 136

ANALYSIS 141
Defects in the Investigation 142
Solicitor-client privilege vs. duty to co-operate 158
Can the "marked departure" test be met? 165
Cultural and business practices 168

ALLEGATIONS 173
Conflict of Interest 174
Provision of legal services while having direct or indirect financial interest 200
. Failure to respond or cooperate with Investigation 213
Failure to provide competent service 224

CONSTITUTIONAL QUESTION 234

CONCLUSION 262

ORDER TO PROTECT CONFIDENTIAL AND PRIVILEGED INFORMATION 264

PRELIMINARY MATTERS

Application to exclude a member of the public

Background

[1] At the start of this hearing on December 16, 2019, the Respondent made an application under Rule 5-8(1) to exclude Robert Grosz, a member of the public, from the hearing room, and to restrict the disclosure of information. The Law Society agreed that there should be orders excluding Mr. Grosz and preventing him from obtaining transcripts of the hearing, and also a non-disclosure order redacting confidential and privileged information from the exhibits, but disagreed on the scope of restriction of information to the public. The Panel also heard submissions from Mr. Grosz. The Panel ruled that the Respondent and the Law Society would each have one half-hour for submissions and that Mr. Grosz would have one hour for submissions.

[2] The Respondent applied for the following orders:

(a) an order under Rule 5-8(1) that Robert William Gordon Grosz, a member of the public, be excluded for the entirety of the hearing of this matter and any related proceedings;

(b) an order pursuant to Rule 5-9(1) that Robert William Gordon Grosz is not entitled to receive a transcript of any of the proceedings or copies of any exhibits tendered in evidence; and

(c) an interim order that exhibits and transcripts of the proceedings not be disclosed to any person pending a further order of the Panel.

The Law Society supported the orders to exclude Mr. Grosz and to preclude him from obtaining a transcript of the proceedings.

[3] The application for the third order was withdrawn.

[4] The Panel eventually decided to exclude Mr. Grosz with written reasons to follow.

Application to exclude Mr. Grosz and prevent him from receiving transcripts or copies of exhibits

[5] The Respondent's evidence was that Mr. Grosz had been a paralegal in her law firm for a short time in 2016 and 2017. It was during this time that the Respondent's former accountant stole approximately $7 million from her trust account. Mr. Grosz' work involved dealing with the aftermath of this theft. The Respondent's evidence was that after Mr. Grosz' employment was terminated in 2017, he began a campaign of harassing conduct, which included showing up at the Respondent's office and barricading himself in her accounting room; copying confidential personal and client documents from her office, including documents related to Law Society investigations; making complaints to the Law Society; commencing frivolous civil claims; swearing a criminal complaint; claiming to be an investigator for the Law Society; and emailing a wide variety of people, including the Prime Minister, judges, lawyers and business people, with various complaints about the Respondent and attaching confidential documents that he had taken from her office. The Respondent's evidence was that in early 2019, Mr. Grosz' conduct escalated and he began to attempt to insert himself into approximately two dozen civil claims against her and her law corporation. He filed complaints against her law corporation's trustee in bankruptcy with the Office of the Superintendent of Bankruptcy, the Vancouver Police, the RCMP and the Ministry of Citizens' Services. Mr. Grosz also made complaints to the Law Society against numerous lawyers who had acted for the Respondent.

[6] The Respondent submitted that Mr. Grosz' presence at the hearing was extremely stressful to her and she was concerned with how he would use any information he learned at the hearing. The Respondent argued that given Mr. Grosz' well-documented history of abusing his public right of access, his presence at the hearing would be unnecessarily stressful, distracting and disruptive for the parties, counsel and Law Society staff. An order to exclude only Mr. Grosz would be the least intrusive measure in the circumstances. The more general interim sealing order was sought to protect the confidentiality interests of the Respondent, her staff and her clients. The application for this order was withdrawn by the Respondent.

[7] The Law Society supported the Respondent's application to exclude Mr. Grosz and to preclude him from obtaining a transcript of the proceedings. The Law Society's evidence in the affidavit of Gavin Hoekstra, a staff lawyer with the Law Society,

was that Mr. Grosz had commenced two lawsuits in the Supreme Court of British Columbia against the Respondent and her law corporation; had applied to be appointed a receiver in her law corporation's bankruptcy proposal; had applied to be added as a party or *amicus curiae* in numerous other lawsuits involving her; and had laid a private information against her alleging criminal offences. Mr. Hoekstra's affidavit stated that Mr. Grosz had distributed information and documents that are subject to a statutory privilege and are otherwise confidential or subject to solicitor-client privilege.

[8] The Law Society opposed the application for an interim sealing order on the basis that it was, as framed, too broad. The Law Society's position was that a less restrictive non-disclosure/redaction order over confidential or solicitor-client privileged client information was appropriate. Under such an order, even Mr. Grosz would be entitled to obtain copies of appropriately redacted exhibits.

[9] The Law Society argued that Rule 5-8(1) expects hearings to be open to the public with the ability to be publicized and reported upon. The open hearing principle is recognized in section 41 of the *Administrative Tribunals Act*, SBC 2004, c. 45, and is an aspect of the freedom of expression in section 2 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Law Society argued that there needs to be "a public interest in confidentiality that outweighs the public interest in openness" as expressed by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 241, [2002] 2 SCR 522.

British Columbia Supreme Court orders concerning Mr. Grosz

[10] In October 2019, Justice Forth had been assigned to, or declared herself seized of, a number of the proceedings brought, or attempted to be brought, against the Respondent by others and by Mr. Grosz. On November 8, 2019, Justice Forth issued a Memorandum to Counsel and to Mr. Grosz, which set out the following:

(a) It was inappropriate for Mr. Grosz to attend in court after the conclusion of a matter and attempt to speak to the judge without counsel for the other parties being present. She advised Mr. Grosz not to do this again.

(b) She refused to hear Mr. Grosz on a reconsideration application relating to the orders she had made in action number B170021.

(c) She refused to adjourn the applications in action number S199755 set for December 3 and 4, 2019 at Mr. Grosz' request. Those

applications were to strike or dismiss by the defendants and potentially an application to declare Mr. Grosz a vexatious litigant.

(d) She advised that it was inappropriate for Mr. Grosz to attempt to hand up to a judge unsworn affidavits or unfiled materials.

(e) She declined to provide Mr. Grosz with directions on providing materials to the media.

(f) She advised Mr. Grosz to obtain legal advice before disclosing materials to third parties that could be in breach of solicitor-client privilege or contrary to the provisions of the *Legal Profession Act.*

(g) She declined to consider an application by Mr. Grosz to seal the file of action number B170021 since Mr. Grosz was not a party to that action.

(h) She advised that it was inappropriate for Mr. Grosz to seek to add himself as a party or *amicus curiae* in 18 other proceedings without serving an application, with supporting affidavits, on the parties and counsel. She declared that if he were to make such an application, he must do so before her, and she declared herself seized of any of those applications.

(i) She noted that Mr. Grosz was directed not to send emails or letters to Court Registry staff by Legal Counsel for the Court in May 2019 and again in her memorandum of October 10, 2019. Mr. Grosz was also advised that his behaviour with the court's administrative staff was completely unacceptable by Justice Meyer in *Grosz v. Guo*, 2019 BCSC 1545. In view of Mr. Grosz' continuing disregard of these directions, Justice Forth made the following orders:

    (a) the Court Registry staff are at liberty to refuse to speak to Mr. Grosz by telephone;

    (b) the Court Registry staff are at liberty not to return any voice mail messages left by Mr. Grosz; and

    (c) unless Mr. Grosz is responding to an email from Court Registry staff to him, Mr. Grosz is only to communicate with the Court Registry staff by a Request to Appear or engaging the formal process of the Court. Any Request to Appear sent in by Mr. Grosz

must not make reference to unfiled materials, emails, or any other documents.

[11] On November 15, 2019, Justice Forth made further orders on the application of the Law Society, including the following:

(a) that Mr. Grosz was permanently prohibited from disclosing information or records obtained during the course of a Law Society investigation, audit, inquiry or hearing, except for a purpose contemplated by the *Legal Profession Act* or the Rules;

(b) that Mr. Grosz must delete certain files;

(c) that Mr. Grosz must obtain the written consent of the Executive Director of the Law Society to file any document in any court that contains any report made under the *Legal Profession Act*;

(d) a ban on the publication of various materials filed by Mr. Grosz in action numbers S-178289 and B170021; and

(e) a sealing order over specific documents filed in action number S-178289.

[12] On December 10, 2019, Justice Forth made further orders, including the following:

(a) a sealing order over Affidavit #2 of Hong Guo filed in action number S-178289; and

(b) Mr. Grosz is restrained from using, copying, disclosing, transmitting or conveying any of the G Corp. Documents to anyone until further order of the court.

[13] Mr. Grosz was disruptive during the Respondent's and the Law Society's submissions, frequently interjecting or objecting from the gallery.

[14] In his submissions, Mr. Grosz stated that he wanted the same privilege of any member of the public to sit quietly in the hearing room and listen. He advised the Panel that he was already under two publicity bans and three sealing orders from Justice Forth. He acknowledged that privileged solicitor-client information would be redacted from the exhibits. Mr. Grosz advised that he was applying to become a member of the Law Society of British Columbia and that he would not do anything to jeopardize his application. Mr. Grosz asked that the application to exclude him be adjourned until he could properly prepare for it, and in the meantime, he offered

to shut his computer off while in the hearing room. In the alternative, Mr. Grosz asked that he be able to listen to the hearing from a remote location, and in the further alternative, he asked to be provided with daily transcripts.

[15] Much of Mr. Grosz' submissions were rambling and confusing. He spoke at length about not having enough time to prepare his written submissions for the application to exclude him and of various people he contacted. He claimed that counsel for the Respondent was also his lawyer and, therefore, in a conflict of interest. He claimed that Justice Forth had no authority to make the Orders that she did but also claimed that the Orders provided a layer of protection against the objection to him attending the hearing. Mr. Grosz handed the Panel a large affidavit with numerous exhibits in support of his submissions. The affidavit was marked as Exhibit 6. Copies of the affidavit were made by the Law Society as a courtesy. Neither the Law Society nor the Respondent had seen Exhibit 6 before. It was not necessary to read Exhibit 6 since the Panel initially decided that Mr. Grosz could attend the hearing on conditions.

[16] The Panel ruled as follows:

(a) Mr. Grosz had to confirm that he was not recording the proceedings in the hearing room. He confirmed he was not.

(b) Mr. Grosz' application for an adjournment to prepare further submissions was dismissed.

(c) The application to exclude Mr. Grosz from the hearing room was dismissed.

(d) Mr. Grosz would be allowed to stay in the hearing room but not allowed to receive copies of transcripts or exhibits.

(e) Mr. Grosz was not allowed to use a computer or electronic device while in the hearing room.

[17] For the remainder of day one of the hearing, Mr. Grosz sat quietly in the gallery.

[18] At the start of day two of the hearing, the Respondent made a further application for the following orders:

(a) that all hard copies of the documents appended to the printed submissions of Mr. Grosz be forthwith destroyed;

(b) that Mr. Grosz immediately delete any and all Dropbox or other web links where the documents referred to in the first part of the order may be accessed by any person;

(c) that Mr. Grosz provide to counsel for the Law Society and Ms. Guo, within 24 hours, an accounting of every person to whom the documents referred to in order 1 were distributed or made accessible in any form whatsoever; and

(d) that Mr. Grosz be excluded from the remainder of the hearing and any and all related proceedings.

[19] The Law Society supported this application but recommended that the filed copy of Exhibit 6 be sealed and that the Law Society be permitted to retain one copy.

[20] The Respondent advised the Panel that the sealing order of Justice Forth applied to Affidavit #2 of Hong Guo, which Mr. Grosz had attached to his submissions in this hearing. This was a breach of the judge's sealing order. As well, the Respondent advised that Mr. Grosz had made these materials available to a large number of people by providing access to a Dropbox account. In his submissions, Mr. Grosz admitted that this was true but claimed that there was no intention to secretly file Affidavit #2 in defiance of the sealing order and the publication ban, and that he advised counsel for the Law Society that he had done so after the end of day one.

[21] As a result of this development, the Panel decided that hearing further submissions from Mr. Grosz, or allowing him to remain in the hearing room, would be too disruptive to the process. Given the nature of the disclosure by Mr. Grosz, contrary to the orders of Justice Forth, the Panel was no longer of the opinion that there were any less intrusive measures that could be taken to preserve the integrity of this process.

[22] The Panel made the following orders:

(a) The affidavit of Robert Grosz, dated December 6, 2019, marked as Exhibit 6 in the proceedings herein, be sealed, and that any access to Exhibit 6 be permitted only with the approval of the Executive Director of the Law Society;

(b) One copy of Exhibit 6 be retained by the Law Society, and that all other hard copies of Exhibit 6 be provided to the Respondent;

(c) Mr. Grosz immediately delete any and all Dropbox or other web links where the documents filed as Exhibit 6 in this hearing may be accessed by any person;

(d) Mr. Grosz provide to counsel for the Law Society and counsel for the Respondent, within 24 hours, an accounting of every person to whom the documents filed as Exhibit 6 were distributed or made accessible in any form whatsoever; and

(e) Mr. Grosz be excluded from the remainder of the hearing and any continuation thereof.

[23] This Order was made pursuant to Rule 5-8(1) and (2), which states:

> **5-8**(1) Every hearing is open to the public, but the panel or review board may exclude some or all members of the public.
>
> (1.1) The panel or review board must not make an order under subrule (1) unless, in the judgment of the panel or review board
>
> (a) the public interest or the interest of an individual in the order outweighs the public interest in the principle of open hearings in the present case, or
>
> (b) the order is required to protect the safety of an individual.
>
> (2) On application by anyone, or on its own motion, the panel or review board may make the following orders to protect the interests of any person:
>
> (a) an order that specific information not be disclosed despite Rule 5-9 (2) *[Transcript and exhibits]*;
>
> (b) any other order regarding the conduct of the hearing necessary for the implementation of an order under paragraph (a).

Application for a stay based on prosecutorial misconduct

Background

[24] Before making final submissions, the Respondent sought an order that the proceedings be permanently stayed due to what can be summarized as “prosecutorial misconduct”. The Respondent alleged that the conduct of counsel

for the Law Society ("Discipline Counsel") had severely compromised her right to a fair hearing, undermined the administration of justice and constituted an abuse of process.

[25] After hearing submissions from both parties, the Panel ruled that the application was dismissed with written reasons to follow.

[26] The Respondent set out the following grounds for granting a stay of proceedings. It was alleged that Discipline Counsel did the following:

(a) Made improper and highly prejudicial references to an "excluded 'complaint history' of the Respondent" suggesting that this history was "substantial and longstanding". The Respondent alleged that Discipline Counsel threatened to introduce into evidence the Respondent's "full complaint history" and that this improperly revealed the existence of a "complaint history" that was not before the Panel.

(b) Employed inferences and innuendo suggesting that the Respondent was involved in a criminal fraud. The Respondent alleged that Discipline Counsel interrupted the cross-examination of her own witness with a speech that insinuated that the Respondent had some connection with a fraud or the companies involved in a fraud.

(c) Made baseless accusations of dishonesty on the part of Respondent's counsel which were not withdrawn. The Respondent alleged that Discipline Counsel interrupted Respondent's counsel during a submission and stated that she would only permit him to continue if he was "truthful".

[27] The Respondent submitted that the role of discipline counsel is similar to a prosecutor in a criminal trial whose duty is not to win but to see that justice is done through a fair hearing on the merits.

[28] The Respondent submitted that the cumulative effect of the conduct above has affected the Respondent's right to a fair hearing in a way that cannot be corrected by any other remedy, and that the offending behaviour of Discipline Counsel calls into question the integrity of the British Columbia legal profession's regulatory system.

[29] The Law Society, represented by different counsel on this application, submitted that the three alleged instances of prosecutorial misconduct were not fairly presented and that the following additional facts are needed:

(a) It was counsel for the Respondent who repeatedly raised the Respondent's complaint history on the fourth day of the hearing on December 19, 2019.

(b) On the seventh day of the hearing, October 6, 2020, it was the Complainant who interrupted the cross-examination, and Discipline Counsel was scrambling to read the reasons for judgment that had just been handed to her and on which counsel for the Respondent was cross-examining the Complainant.

(c) On the eleventh day of the hearing, November 13, 2020, Discipline Counsel's choice of words was unfortunate but made in the context of "hard-fought" litigation.

Legal test for abuse of process

[30] The parties agree on the principles of law that apply in this case.

[31] The panel has the inherent authority to stay proceedings if there has been an abuse of process.

[32] The Supreme Court of Canada in *R. v. Scott*, 1990 CanLII 27, [1990] 3 SCR 979 at 1007 stated that " … abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice."

[33] Thus, there is a primary category referring to the parties' interest in hearing an issue and a residual category referring to the public interest in the integrity of the judicial process.

[34] The remedy of a stay is only appropriate in the "clearest of cases, where no other remedy would rectify the situation."[1] The Panel agrees with Counsel for the Law Society when they say that by permanently halting the prosecution of an accused, the granting of a stay has the effect of depriving society of the opportunity to see justice done on the merits. Since the Law Society's statutory objective and duty is to "uphold and protect the public interest in the administration of justice", the Respondent's allegations must be examined closely.

[1] *Law Society of Upper Canada v. Natale*, 2012 ONLSHP 201 relying on *R. v. Regan*, 2002 SCC 12, 1 SCR 297

[35] The role of prosecutor is not to win but to see that justice is done through a fair trial on the merits. The Law Society submits, and the Panel agrees, that the abuse of process doctrine developed in criminal law applies equally to administrative hearings.

Decision

[36] It was Respondent's counsel who first and repeatedly brought up the existence of other complaints against the Respondent – in his opening remarks, while cross-examining Sarah Gosden, while examining John Forstrom, and in submissions regarding the Respondent's consent to the Law Society obtaining a mirror image of her hard drives. If there are other citations, they are a matter of public record. This Panel will decide the allegations in this citation only on the evidence led in this hearing. The existence of other complaints has been put into evidence by the Respondent presumably because it will assist her in her defence. The merits or result of any of these complaints is not in evidence. This ground is not made out.

[37] During the cross-examination of JY, the Law Society's witness and Complainant, Respondent's counsel produced a decision of the Supreme Court of British Columbia (*Xie v. Yuan*, 2018 BCSC 941) in which Justice Sharma referred to a multi-million dollar fraud that JY admitted to participating in before his move to Canada. This was done to discredit JY's evidence. The decision had not been provided to Discipline Counsel.

[38] Evidence had already been led that the Respondent was a friend of JY's ex-wife. The Respondent had denied being her lawyer but, in fact, had acted for her in respect of the sale or purchase of some real estate. The exchange during JY's cross-examination did not amount to proof or even a suggestion that the Respondent was in any way related to the fraudulent enterprise in China that Justice Sharma referred to. It was clear to the Panel that Discipline Counsel was attempting to determine the relevancy of Justice Sharma's decision by asking for clarification. This ground is not made out.

[39] Discipline Counsel's use of the word "truthful" was an unfortunate choice, and it was clear to the Panel that what she was saying was "I won't object as long as you don't do anything I need to object to." From time to time, the Panel has been aware of a degree of frustration between the parties' lawyers. However, both counsel have managed to resolve their points of contention and treat each other with the courtesy the Panel expects to see from senior counsel. Hearings are hard work and the allegations in this citation are complicated and serious. While Discipline Counsel's comment was unhelpful, in no way did it diminish the Panel's high

opinion of Respondent's counsel, his candour or integrity. Discipline Counsel apologized to counsel for the Respondent and the Panel in an email dated November 20, 2020. It was not an "interim apology" - it was a complete apology offered in the "interim" while the Law Society obtained outside counsel.

[40] In her reply submissions, the Respondent submits that Discipline Counsel's comment also produced a procedural unfairness in that the Panel called a brief recess after Discipline Counsel's comment and then upheld the Law Society's objection to putting the affidavit of Eric Shipman, a lawyer appointed by the Law Society to supervise the Respondent's law practice, into evidence before counsel for the Respondent had made his submissions. The Panel did go on to hear the Respondent's submissions and still ruled that the affidavit could not go into evidence simply because the Respondent "recognized" it. This ground also has not been made out.

[41] The evidence presented by the Respondent falls far short of establishing the grounds for abuse of process and the application for a stay of proceedings is dismissed.

CITATION

Introduction

[42] The citation arises from the initial complaint of JY, a former client of the Respondent, in which JY claimed that he paid $105,000 for a 50 per cent interest in M Ltd., thinking that the Respondent was both his lawyer and 50 per cent business partner. JY alleges that the Respondent, without his consent, transferred his shares to F Corp., with the result that JY is now a ten per cent shareholder in F Corp. The other 90 per cent of the shares in F Corp. are owned by ZZ. Both JY and ZZ state that they never met each other, nor discussed with each other the sale of JY's shares in M Ltd. to F Corp. in exchange for a ten per cent interest in F Corp.

[43] The remainder of the citation came to light during the investigation of JY's complaint and the practices of the Respondent in relation to her immigration and corporate practice.

Parties

[44] The hearing of this matter involves references to five personal clients, three corporate clients, three witnesses, other than the Respondent and the Complainant, and numerous other parties. These are as follows:

(a) Respondent's clients:

(i) JY, Complainant;

(ii) ZZ, investor in F Corp.;

(iii) CL, business immigration client; and

(iv) JZ and YZ, brothers and business immigration clients;

(b) Companies:

(i) F Corp., purchaser of the shares of M Ltd. – by the end of 2014, owned 90 per cent by ZZ and 10 per cent by JY;

(ii) M Ltd., initial business investment by JY, purchased by ZZ; and

(iii) Guo Law Corporation ("G Corp."), the Respondent's law firm

(c) Witnesses:

(i) TE, G Corp. employee;

(ii) John Forstrom, lawyer and Law Society investigator; and

(iii) Sarah Gosden, forensic accountant employed by the Law Society;

(d) Others:

(i) HL, original vender of M Ltd.;

(ii) MG, Respondent's sister and employee of G Corp.; and

(iii) YW, an employee of G Corp.

Citation

[45] On December 6, 2018, the Discipline Committee of the Law Society of British Columbia directed that a citation be issued against the Respondent. The citation

was issued on December 12, 2018 and amended on October 21, 2019 pursuant to Rule 4-21(1) of the Law Society Rules. The amended citation sets out five allegations against the Respondent, namely:

1. Between approximately September 2012 and June 2016, you acted in a conflict of interest while representing two or more of your clients JY, ZZ, CL, JZ, YZ and F Corp. in connection with the purchase and operation of M Ltd., and in particular you:

   (a) acted for your clients JY, ZZ and F Corp. in connection with the purchase of M Ltd. from HL without first obtaining their informed consent to the joint representation, contrary to one or more of Chapter 6, Rules 3 and 4 of the *Professional Conduct Handbook*, then in force (the "*Handbook*"), or rule 3.4-7 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*");

   (b) preferred the interests of ZZ and F Corp. over those of JY, contrary to one or both of Chapter 6, Rule 1 of the *Handbook*, and section 3.4 of the *BC Code*;

   (c) continued to represent your clients ZZ and F Corp. when a conflict arose between ZZ and F Corp. and JY, contrary to one or both of Chapter 6, Rule 5 of the *Handbook*, and rule 3.4-8 of the *BC Code*;

   (d) acted for your client CL in connection with an application to the British Columbia Provincial Nominee Program ("BCPNP") involving the proposed purchase and operation of M Ltd. by CL, without first obtaining the informed consent of one or more of JY, ZZ, CL, JZ, YZ and F Corp., contrary to one or both of Chapter 6, Rule 6.3 of the *Handbook*, and rule 3.4-2 of the *BC Code*;

   (e) acted for your clients JZ and/or YZ in connection with an application to BCPNP involving the proposed purchase and operation of M Ltd., without first obtaining the informed consent of JY, ZZ, CL and F Corp., contrary to one or both of Chapter 6, Rule 6.3 of the *Handbook*, and rule 3.4-2 of the *BC Code*;

   (f) acted for your clients ZZ, F Corp., JZ and YZ in connection with a proposed sale of M Ltd. by ZZ and/or F Corp. to JZ and/or YZ without first obtaining the informed consent of one or more of JY, ZZ, CL, JZ, YZ and F Corp., contrary to one or more of Chapter 6, Rules 3, 4 and 6.3 of the *Handbook*, and rules 3.4-2 and 3.4-7 of the *BC Code*; and

(g) preferred the interests of ZZ and F Corp. over those of JZ and YZ, contrary to one or both of Chapter 6, Rule 1 of the *Handbook*, and section 3.4 of the *BC Code.*

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

2. Between approximately September 2012 and September 2014, you provided legal services for one or more of your clients JY, ZZ, CL, JZ, YZ and F Corp., in connection with the purchase and operation of M Ltd., when you or your sister MG, or both, had a direct or indirect financial interest in M Ltd. or F Corp., or both, contrary to one or more of Chapter 7 of the *Handbook*, and rules 3.4-28 and 3.4-29 of the *BC Code*.

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

3. Between approximately June 2014 and October 2018, in the course of an investigation into your conduct arising from a complaint made by JY, you failed to respond substantially and fully to the Law Society, or you made representations to the Law Society that you knew or ought to have known were false or misleading, or both, contrary to one or both of Rule 3-5(7) of the Law Society Rules and rule 7.1-1 of the *BC Code*, in some or all of the following communications:

   (a) in an e-mail dated August 5, 2014, you denied having a direct or indirect financial interest in F Corp. when you knew or ought to have known that you and your sister MG had been or were officers, directors and shareholders of F Corp. and you had sole signing authority over F Corp.'s bank account;

   (b) in an interview on January 16, 2015, you stated that you "absolutely never" conducted any business or signed any director's resolution for M Ltd. when you knew or ought to have known that you were a director of M Ltd., that you were the corporate solicitor for M Ltd., that you had signed a banking resolution as president of M Ltd. and that you were the sole signing authority for M Ltd.'s bank account;

   (c) in an interview on January 16, 2015, you stated that you "really did not know" YW when you knew or ought to have known that YW received wages from G Corp.;

(d) in a letter dated June 7, 2015, in reference to $50,000 said to be invested by your client ZZ in F Corp.;

  (i) you stated "ZZ did not invest this sum through my office. So I do not know where and how this money was deposited", when you knew or ought to have known that the funds were forwarded to you in connection with ZZ's application for permanent residence, and were deposited by you to a bank account for which you were the sole authorized signing authority;

  (ii) you stated that you did not know the source of funds for [bank] draft [number] in the amount of $25,000, when you knew or ought to have known that the funds were drawn on a bank account for which you were the sole authorized signing authority; and

  (iii) you stated that [bank] draft [number] was hand delivered to your office, that you did not know who delivered it and that "ZZ told me it would be delivered", when you knew or ought to have known that the funds were drawn on a bank account for which you were the sole authorized signing authority;

(e) in a second letter dated June 7, 2015, you stated that to the best of your knowledge you had not received any funds from your client ZZ in connection with M Ltd. (other than $53,000 and $50,000 previously disclosed), or any other matter, when you knew or ought to have known that on or about November 23, 2012, you had received $613,092.46 from ZZ in connection with M Ltd.;

(f) in an e-mail dated March 29, 2015, in response to an inquiry as to whether you had any knowledge about a transaction in which JZ and/or YZ acquired any interest in M Ltd. or F Corp., you stated that you "had no knowledge of the matter", when you knew or ought to have known that you had filed an application under BCPNP on behalf of JZ and ZZ based on the proposed purchase and operation of M Ltd.; and

(g) over the course of the investigation, you failed to disclose that you had been acting for one or more of your client(s) ZZ, JY, CL, JZ and YZ in connection with their proposed purchase of M Ltd. as it related to various applications under BCPNP.

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

4. Between approximately September 2012 and June 2015, you failed to serve one or more of your client(s) F Corp., JY, ZZ, JZ and YZ in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation, contrary to one or more of Chapter 3, Rule 3 of the *Handbook*, and rules 3.2-1 and 3.2-2 of the *BC Code*, by doing one or more of the following:

   (a) preparing the assignment of your client JY's contract to purchase the shares of M Ltd. to F Corp., and in doing so:

      (i) failing to make inquiries and document the consideration to be received by your client JY from your client F Corp. for the assignment; and

      (ii) failing to adequately explain to your client JY what involvement you, MG and your client ZZ had in F Corp.;

   (b) failing to ensure that any agreement between your client JY and your client ZZ to purchase wood chips from M Ltd. through F Corp. was reduced to writing;

   (c) failing to ensure that any agreement between your client JY and your client ZZ to purchase M Ltd. through F Corp. was reduced to writing;

   (d) failing to advise your client JY about the risks associated with becoming a minority shareholder;

   (e) failing to recommend or advise your client JY about the need for a shareholders' agreement;

   (f) failing to ensure that your client JY received the agreed upon interest in F Corp.;

   (g) failing to ensure that any agreement between your client ZS and your clients JZ and YZ to purchase M Ltd. was promptly and properly documented; and

   (h) failing to advise your clients JZ and YZ about F Corp.'s interest in the lands occupied by M Ltd.

This conduct constitutes professional misconduct or incompetent performance of duties undertaken in the capacity of a lawyer, pursuant to s. 38 of the *Act*.

[46] The Respondent admitted that on December 14, 2018, she was served with the citation in accordance with the requirements of Rule 4-19, and further admitted that on October 21, 2019, she was served with the amended citation.

[47] The Respondent did not admit any professional misconduct or incompetent performance of duties undertaken in the capacity of a lawyer.

[48] During the period of the citation from approximately 2012 to 2015, the Respondent ran an extremely busy practice, much of which focused on business immigration from China. The Respondent had offices both in Richmond, BC and Beijing, China and, of necessity, ran bank accounts in both Canada and China. Many of her business practices arose out of the unique demands of servicing clients in both countries. This Panel finds, however, that the cultural or business practices of a particular group do not outweigh the obligations of a lawyer under the *Act*, the Rules and the *BC Code*, and as such, it is not a justification to cite "differing business practices" as a defence to an allegation of not complying with one's obligations as counsel.

[49] This Panel finds that the Respondent has committed professional misconduct and that her conduct served as a marked departure from that conduct the Law Society expects of lawyers on all allegations, except allegation 3(c), where this Panel finds that it was careless of the Respondent not to know the legal names of the employees for whom she wrote pay cheques, but not an issue of misleading the Law Society, contrary to one or both of Rule 3-5(7) of the Rules and rule 7.1-1 of the *BC Code*.

FACTS

[50] The Law Society provided, and relied upon, evidence contained in a notice to admit and its attachments, including several interview transcripts, dated October 22, 2019 (the "NTA"). The Respondent largely admitted the contents of the NTA, although provided some qualifications and explanations for context or clarification of its contents. These will be dealt with in the course of these reasons.

The Respondent

[51] The Respondent was called to the Bar in 1999 in Ontario and moved to Saskatchewan in 2000 where she practised with a Saskatchewan firm until moving to British Columbia in or around 2005. The Respondent was called and admitted as a member of the Law Society of Saskatchewan on September 8, 2000 and of the Law Society of British Columbia on May 4, 2009.

[52] Before attending law school in Ontario, the Respondent completed a master's degree in Sociology at the University of Regina.

[53] The Respondent maintains a busy practice in Richmond and has done so since April 2010. During the period September 2012 to June 2015, the Respondent was the only practising lawyer at G Corp. The practice operates primarily in the areas of real estate (residential and commercial), corporate, and administrative law (including labour, immigration and regulatory bodies). The Respondent's immigration practice caters largely, if not solely, to a Chinese clientele.

[54] From July 6, 2011 to September 20, 2016, the Respondent's chief place of practice was located in Richmond, BC, but she also operated an office in Beijing, China. In cross-examination, the Respondent confirmed the address of this office in Beijing, China (the "Beijing Office"), despite denying the possession or location of the Beijing Office in the NTA, and not disclosing the existence of the Beijing Office on annual trust reports filed with the Law Society from 2011 through 2016.

[55] To service and assist Chinese clients, the Respondent maintained Chinese banking facilities in addition to the ten trust accounts and seven general accounts listed in the NTA. The Respondent testified that, in part, the Chinese bank accounts were used to facilitate her Chinese clients' attempts to move funds out of China in excess of the Chinese currency restrictions.

[56] During the period September 2012 to June 2015, G Corp. reported operating ten trust accounts and seven general accounts, one of which was a personal account held jointly between the Respondent and MG (the "Joint Account").

The companies

[57] To assist her clients, the Respondent routinely established shelf companies with various names. These companies were then available immediately for transfer when needed for a client's purposes. F Corp., initially incorporated on July 2, 2010, was one such company. F Corp. was essentially inactive until September 2012.

[58] The Respondent was the initial subscriber for 10,000 shares in F Corp., and one of two initial directors. On July 2, 2010, the Respondent transferred all shares in F Corp. to MG and the second director ceased to act, leaving the Respondent as the sole director and officer. The Notice of Change of Directors removing the second director was not prepared and filed until October 3, 2012.

[59] In June 2011, the Respondent opened a bank account for F Corp. (the "F Corp. Account") and completed the Authorized Signing Authority Electronic Access and Signature From as president and director of F Corp. The Respondent remained the sole signing authority for the F Corp. Account until at least July 2015.

[60] Effective September 1, 2012, the Respondent resigned as a director and officer of F Corp., being replaced by MG who became and remained the sole director and officer until at least July 2014. MG transferred her shares in F Corp. to ZZ on September 3, 2012. The Notice of Change of Directors was prepared and filed on November 20, 2012. In her interview with Mr. Forstrom on January 16, 2015, the Respondent stated that ZZ paid "about" $100 for the shares of F Corp. and $980 for "the whole company".

NTA, Tab 40, at page 46

[61] From incorporation to the present, F Corp.'s registered and records office has remained the Respondent's residence, and the Respondent's staff have prepared and filed F Corp.'s annual reports, notices of change of directors and notices of change of address through G Corp. and have prepared and maintained F Corp.'s register of directors and central securities register.

[62] The Respondent was president, secretary and sole director of M Ltd. from November 23, 2012 through November 1, 2013 and was the sole signing officer of M Ltd.'s bank accounts at the Bank of China in Richmond between at least January 2013 and February 2016. From 2012 to at least 2014, the Respondent completed various legal and other work in relation to M Ltd., including acting as registered and records office, hiring or providing employees, providing business consultations, and preparing response documents to a notice of civil claim.

[63] By February 2015, M Ltd. had ceased operations.

[64] The Respondent's accountant prepared the annual financial statements and income tax returns for both F Corp. and M Ltd.

The clients

[65] JY first retained the Respondent in June 2010 regarding purchasing real property with JY's wife. The Respondent testified that, while she was retained by JY for this purpose, ultimately JY's wife paid her fees. The Respondent testified that she and JY's wife had been business associates before meeting JY, but that she had never been the wife's lawyer.

[66] JY again retained the Respondent in 2011 in connection with the incorporation of a business unrelated to the matters in the citation, in 2012 in connection with a tenancy group, and in May through July 2013, JY consulted the Respondent regarding the purchase of a business loosely identified as an acupuncture clinic. JY does not speak or read English and gave evidence in Mandarin through an interpreter.

[67] In or about September 2012, the Respondent informed JY that M Ltd. was offered for sale for $900,000. Also in September 2012, the Respondent and JY travelled to Quesnel, BC to view the property and a sawmill business and to meet with the vendor, HL. On September 26, 2012, the Respondent instructed TE to draft the share purchase agreements between HL and JY for the purchase of the M Ltd. shares.

[68] In or around December 2011, ZZ retained the Respondent in connection with an application under the business skills category (now the entrepreneur immigration scheme) to BCPNP. On or about December 19, 2011, the Respondent prepared and submitted to BCPNP a business plan for ZZ to purchase a wood pellet manufacturing business, which was confirmed by BCPNP on or around February 6, 2012 and accepted by BCPNP on July 23, 2012.

NTA, Tab 35

[69] In the letter of acceptance, BCPNP confirmed that ZZ was required to continue to submit "Performance Agreement Monitoring Reports" in relation to the approved investment and that failure to provide timely progress reports or to follow the investment and job creation schedules outlined in the business plan could result in the withdrawal of BCPNP's approval.

NTA, Tab 35

[70] The Respondent submitted an application for permanent residency for ZZ on August 23, 2012, and on May 16, 2013, the application was approved.

[71] In or around January 2012, CL retained the Respondent in connection with his application under the business skills category to BCPNP. The Respondent's initial business plan submission on behalf of CL proposed to establish a new sawmill in Fort St. James, BC. The Respondent submitted a business plan to BCPNP on behalf of CL to this effect on or about January 11, 2012.

[72] On June 26, 2012, BCPNP interviewed CL regarding his business plan, and on July 16, 2012, BCPNP sent the Respondent a letter indicating that CL's application was rejected, in part because of CL's indication, during his interview with BCPNP, that

rather than establish a new sawmill in Fort St. James, he intended to purchase an existing sawmill.

NTA, Tab 48

[73] In September 2012, the Respondent, with the assistance of her staff, drafted a new business plan for CL to purchase and operate M Ltd., for which the purchase price, including the business and the lands on which the business was located, would be $900,000.

[74] On October 1, 2012, the Respondent wrote to BCPNP requesting the opportunity to resubmit a revised proposal to BCPNP on behalf of CL to purchase "a long established sawmill located in Quesnel, BC, which until recently was a sawmill operating at full capacity." On October 12, 2012, BCPNP informed the Respondent that it had opened a file and was processing CL's application.

[75] On October 24, 2013, BCPNP invited CL to attend an interview regarding his revised proposal to purchase M Ltd., and on January 31, 2014, BCPNP informed the Respondent that CL's application was refused.

[76] In or about August 2013, JZ and YZ retained the Respondent in connection with their application under the business skills category to BCPNP.

[77] On or about October 2013, the Respondent prepared a business plan for submission to BCPNP on behalf of JZ, under which JZ proposed to purchase and operate M Ltd., at which his brother YZ would work as a key employee.

[78] On or about October 15, 2013, the Respondent prepared a share purchase agreement between ZZ, as vendor, and JZ and YZ, as purchasers, with respect to the shares of M Ltd.

Transcript of Proceedings, October 9, 2020, at pages 55 and 56

[79] On or about November 1, 2013, the Respondent submitted a business plan on behalf of JZ to BCPNP, the subject of which was the purchase and operation of M Ltd.

Transcript of Proceedings, October 9, 2020, at page 59

[80] Between November and December 2013, the Respondent and her staff drafted various documents regarding the purchase of M Ltd. from ZZ by JZ and YZ, including addenda of the share purchase agreement, share certificates, and a performance agreement signed on December 12, 2013 by JZ, as general manager,

with respect to the purchase of M Ltd. These documents were forwarded to BCPNP on behalf of JZ and YZ on March 4, 2014.

Transcript of Proceedings, October 9, 2020, at pages 77 to 80

[81] JY was not informed of any of the proposed agreements or transactions involving ZZ, JZ, YZ and M Ltd.

The transactions

[82] As part of her immigration practice, the Respondent worked with clients to submit business proposals to BCPNP to support their immigration. The Respondent testified that generally it could be a matter of years between first submitting a proposal and business plan to BCPNP and final approval or rejection of the client for immigration. To this end, certain proposals could be used for multiple clients and could be withdrawn, changed or resubmitted during the period of waiting for confirmation or rejection.

[83] The Respondent had people in China promoting these projects to people wishing to use BCPNP to immigrate to Canada.

[84] The Respondent first became aware of M Ltd. in about June 2012 when a realtor informed her of the opportunity to buy the sawmill in Quesnel. The Respondent stated that, as part of her immigration practice, she had her contacts in China promote this opportunity. CL, who resided in Wuhan, was one of the people so informed.

[85] JY approached the Respondent in the summer of 2012 expressing an interest in purchasing a business that he then hoped to resell to a friend wishing to immigrate to Canada.

[86] In late September 2012, the Respondent instructed TE to draft a share purchase agreement between JY, as purchaser, and HL, as seller, in connection with the shares of M Ltd., and also to draft agreements to purchase the three parcels of land associated with the business. The total purchase price for the business and the lands was $900,000. This same month, the Respondent and JY travelled to Quesnel to view the sawmill. JY later provided a videotape of this trip, which he maintained proved that the Respondent and he were entering into a partnership to buy M Ltd. for business or immigration purposes. The Respondent denied this, stating that her attendance on this trip was at JY's request and that she went because she was interested in seeing a sawmill, and that she wished to assist JY in translating as she knew he spoke limited English.

NTA, Tab 193, pages 35 and 36

[87] Under the agreements, JY was to pay a deposit of $50,000 upon signing the share purchase agreement, with the balance of the funds due on closing. JY asserted that he and the Respondent agreed to purchase M Ltd. together and then either sell the sawmill or transfer the company to someone else, and that he and the Respondent were each to contribute 25 per cent of the purchase price, with a loan for the balance of the purchase price being arranged through third party financing, which the Respondent would find or set up. The Respondent denied JY's version of events.

Transcript of Proceedings, October 6, 2020, at pages 11 to 15;
NTA, Tab 40, at pages 17, 26 and 27

[88] JY testified that, while the purchase of M Ltd. was to be in his name, the shareholdings would be split equally between himself and the Respondent's company, F Corp. The Respondent denied this.

[89] The closing for the purchase of M Ltd. was originally scheduled for October 31, 2012. On September 27, 2012, the Respondent issued a cheque payable to F Corp. in the amount of $50,000, drawn on the Joint Account. The next day, the Respondent deposited this cheque into F Corp.'s bank account, the same day that JY signed the share purchase agreement and contracts of purchase and sale for the M Ltd. business and lands.

[90] On October 1, 2012, JY provided the Respondent with a bank draft payable to Park Georgia Realty in trust in the amount of $25,000. On October 4, 2012, the Respondent withdrew $25,000 from the F Corp. Account, and on October 8, 2012, the Respondent obtained a bank draft payable to Park Georgia Realty in trust in the amount of $25,000.

[91] The Respondent testified that, sometime between July and October 2012, she discussed the possibility of ZZ setting up his wood pellet business on the lands associated with the M Ltd. deal, with the sawmill serving as a supply source for wood chips for the business. The Respondent testified that she provided him with technical information about the size of the operation, the purchase price of the sawmill and related matters. There is no documentation regarding this communication in the Respondent's files.

Transcript of Proceedings, October 8, 2020, at pages 111 to 113;
NTA, Tab 40, at pages 58 to 60

[92] The Respondent testified that the $50,000 initially paid into the F Corp. Account in September came from ZZ, and that the $25,000 withdrawn from the F Corp. Account and paid to Park Georgia Realty in trust, as part of the agreements regarding JY's purchase of M Ltd., was a deposit from ZZ in respect of the future wood chip supply agreement. In her January interview with Mr. Forstrom, the Respondent asserted that JY's $25,000 also came from ZZ, although she was not part of any negotiations between JY and ZZ. The Respondent further asserted in that interview that she introduced ZZ and JY in September. Both ZZ and JY denied meeting and ZZ said any negotiations were done through MG. ZZ also swore in an affidavit that he did not deposit any money with F Corp. until October 2012.

NTA, Tab 40, at pages 18 to 21; NTA, Tabs 38 and 39

[93] The Respondent testified that she did not advise ZZ or JY to obtain independent legal advice regarding their discussions and that she drafted no documents or agreements outlining these agreements as ZZ and JY did it between themselves and she was not acting for either of them. In the January 2015 interview, the Respondent further stated that she was not acting as counsel when she advised JY that his shareholding in the business would be diluted if he did not contribute more money to the venture, but was merely passing along information as a friend.

Transcript of Proceedings, October 8, 2020, at pages 116 to 120 and 130;
NTA, Tab 40, at pages 95 to 97

[94] ZZ, in his affidavits, and JY, in his testimony, stated that they never met each other, nor did they ever negotiate any agreements together. ZZ further stated that he believed all negotiations regarding F Corp. and M Ltd. occurred through MG and JY.

Transcript of Proceedings, October 6, 2020, at page 4; NTA, Tab 39

[95] On October 24, 2012, BCPNP invited CL to attend an interview about his application to invest $1,293,000 to establish M Ltd. in Quesnel.

[96] The original closing date for the purchase of M Ltd. was October 31, 2012. Due to the Respondent's inability to come up with the price due on closing, the closing date was extended twice, with the ultimate purchase price reduced to $730,000. Addenda to the original Contract of Purchase and Sale and Share Purchase Agreement were duly prepared by G Corp. and signed by JY. The Respondent provided no other documentation regarding the negotiation of these extensions.

[97] JY informed TE and the Respondent that he would be unable to provide the funds by the ultimate closing date of November 16, 2012. The Respondent, in her interview with JF in January 2015, said that she contacted several people to try to find the funds to enable the M Ltd. deal to close, that one of those she called was ZZ, and that the other person was someone "from Wuhan".

[98] TE testified that JY seemed "incredibly nonchalant" about the inability to come up with the funds.

Transcript of Proceedings, December 16, 2019

[99] The Respondent stated in her interview with Mr. Forstrom on August 25, 2015 that she told ZZ that he had three options: to forfeit the $25,000 initially deposited through F Corp. and walk away; to lend the money to JY; or to buy M Ltd. himself. In the same interview, the Respondent also stated that she advised ZZ that lending money to JY was not a good option. Later, when JY brought a proposal to buy M Ltd. for a purchase price of $1,200,000 with the purchase price to be paid out of the profits of the sawmill in later years, the Respondent further advised against this transaction.

NTA, Tab 41, at pages 51 to 53;
NTA, Tab 40, at page 452; NTA, Tab 193, at page 36; NTA, Tab 195, at page 4

[100] On November 20, 2012, the Respondent had TE draft the Assignment of Contract with JY, as assignor, and F Corp., as assignee, and signed it as agent for F Corp. This and the other closing documents regarding the purchase of M Ltd. by F Corp. were forwarded to RDM Lawyers.

NTA, Tab 67; NTA, paras. 119 and 120

[101] On November 22, 2012, the Respondent issued personal cheques drawn on the Joint Account to pay DP and GS the amount of $10,000 each. DP and GS were identified in both of CL's BCPNP applications as experts and consultants in the forestry business, and paid in relation to the closing of the sale of M Ltd. to F Corp. Other than the personal cheques, the Respondent produced no documentation in relation to services provided by DP and GS.

[102] Transcript of Proceedings, December 16, 2019, at pages 79 and 80;
Transcript of Proceedings, December 17, 2019, at pages 45 and 46

[103] On November 22, 2012, the Respondent obtained a bank draft drawn on the Joint Account in the amount of $613,092 and made payable to G Corp. In an e-mail to the Law Society on June 16, 2015, the Respondent stated that this amount was a

loan from her to ZZ. The next day, November 23, 2012, ZZ wired the equivalent in Chinese currency ("RMB") of $613,092 to the Respondent's account at the Industrial and Commercial Bank of China ("ICBC Account"). There is no listing of the ICBC Account in the Respondent's annual trust reports, and no record of any funds paid by ZZ to the Respondent in China in G Corp.'s books and records.

NTA, Tabs 125, 174 and 176;
Transcript of Proceedings, December 18, 2019, at page 21

[104] Also on November 22, 2012, JY provided a bank draft in the amount of $80,000 to G Corp. The Respondent recorded the receipt of this bank draft as having been received from F Corp., as she did with the bank draft for $613,092. While the $80,000 was received from JY, the Respondent testified that she believed the money was paid on behalf of F Corp., as she stated that she was no longer counsel for either JY or ZZ, only for F Corp., and that she believed the $80,000 was paid by JY to receive his ten per cent of the F Corp. shares, as negotiated between JY and ZZ. The Respondent provided no documents or agreements regarding any such agreement, nor any instructions from JY that the money was to be paid on behalf of F Corp.

NTA, Tabs 123 and 176;
Transcript of Proceedings, October 9, 2020, at pages 130 to 133

[105] The purchase and sale of M Ltd. by F Corp. ultimately closed on November 23, 2012 when the purchase price, less a $73,000 holdback (ten per cent of the purchase price), was provided to the seller's lawyer. There were no undertakings recorded regarding the holdback. The closing documents named F Corp. as purchaser of the M Ltd. business and lands. The same date, MG appointed the Respondent as the director of M Ltd. on behalf of F Corp., and signed the resolution so appointing the Respondent as the sole shareholder of M Ltd. The share registers for F Corp. and new share certificates were not updated nor prepared until April 2014.

[106] On November 27, 2012, the Respondent issued a bill to F Corp. for the purchase of M Ltd. for $8,277.17 "for services rendered".

[107] On November 28, 2012, the Respondent, as authorized agent for F Corp., entered into a commercial lease (the "Lease") with DT and a numbered BC company for $16,000 a month. JY testified that around this date, he was told he did not need to manage M Ltd. as the Respondent had leased it. In her interview with Mr. Forstrom on January 16, 2015, the Respondent stated that, as MG was dealing with the Lease, the Respondent did not know much about it.

NTA, Tabs 27 and 127; NTA, Tab 40, at pages 85 and 86;
Transcript of Proceedings, October 9, 2020, at pages 38 to 39
Transcript of Proceedings, October 6, 2020, at page 32

[108] Under the Lease, the numbered company was to pay rent to F Corp. of $16,000 per month and, in turn, invoice G Corp. for labour and management costs incurred in connection with the operation of M Ltd.

[109] On May 1, 2013, the Respondent and the solicitor for the vendor of M Ltd. agreed that $53,000 of the $73,000 holdback should be released to the vendor, and the Respondent issued a cheque drawn on the Joint Account in the amount of $53,000 payable to G Corp. in trust. Also on this date, the Respondent deposited the cheque into the pooled trust account to the credit of F Corp.

[110] In a letter to Mr. Forstrom dated June 8, 2015, the Respondent stated that the use of the Joint Account and personal funds occurred as a result of ZZ's request for assistance, that it proceeded by way of a personal loan, which ZZ then repaid by wiring money to the Respondent's brother's account in China, that ZZ received independent legal advice regarding the transaction, and that the Respondent believed that the funds were, therefore, not trust funds but a payment of a personal loan in a transaction fair and reasonable to ZZ. There are no records regarding these payments in G Corp.'s books and records, and no record of any agreement between the Respondent and ZZ regarding this loan.

NTA, Tab 189; Transcript of Proceedings, October 9, 2020, at page 45

[111] From 2013 until it ceased operating in 2015, the documents show and TE testified that the business of M Ltd. operated with involvement from the Respondent, including:

(a) The Respondent opened and remained the sole signing authority for the M Ltd. bank account from 2013 through 2015 (NTA, Tab 109 and para. 192);

(b) G Corp. received lease payments under the Lease, the cheques for which were made payable to F Corp. and deposited to the F Corp. bank account;

(c) The Respondent retained an accountant to prepare corporate tax returns for M Ltd. and F Corp.;

(d) The Respondent's assistants sent regular e-mails to the accountant regarding F Corp.'s operations *vis a vis* M Ltd. concerning such issues

as rent owed by F Corp. and paid by the Respondent, salaries owed to a manager at M Ltd. and the Respondent's husband, and a $50,000 "investment of purchase" paid by the Respondent;

(e) F Corp.'s rented office premises at an address in Richmond owned by the Respondent;

(f) Directorships and shareholdings of both M Ltd. and F Corp. by the Respondent and MG or the Respondent's employees were ongoing;

(g) employees of the Respondent were also listed as employees of M Ltd.;

(h) The Respondent provided and invoiced M Ltd. for "business consultations";

(i) Financial transactions between M Ltd. and G Corp.'s staff and other matters were ongoing; and

(j) The Respondent received regular (and up to daily) reports regarding the operations of M Ltd.

TE also testified that " … I don't think there's any dispute that, you know, [the Respondent] … was the person helping to oversee this operation … this idea of daily reports was just to probably figure out what people were actually doing and what was actually happening." The Respondent denied she had any role in overseeing the operations of M Ltd. or F Corp.

NTA, Tabs 115 to 117 and 126 to 170;
Transcript of Proceedings, December 17, 2019, at pages 77 to 83;
(quote from pages 79 and 80)

[112] In November 2014, JY reported to Mr. Forstrom that he learned that ZZ and JZ had purchased M Ltd. and that JY's name appeared on none of the documents. While documents purporting to document this purchase, including share purchase agreements, share certificates and so on, were prepared and provided to BCPNP in support of ZZ's and JZ's BCPNP application, the Respondent testified that the deal to purchase M Ltd. never closed, and the shares remained with F Corp., held 90 per cent by ZZ and ten per cent by JY.

NTA, Tab 186;
Transcript of Proceedings, October 9, 2020, at pages 50 to 59 and 77 to 92

The Law Society investigation

[113] The Law Society initiated their investigation (the "Investigation"), after JY filed a complaint on June 5, 2014 (the "Complaint"), alleging that the Respondent had misled him and taken "illegal possession of my personal property through concealment and deception" in relation to the purchase of M Ltd. and the various share transactions involving M Ltd. and F Corp. JY alleged that he and the Respondent were supposed to buy M Ltd. as equal partners, and that the Respondent had deceived him and had him sign documents that he did not understand, essentially stealing his interest in M Ltd.

NTA, Tab 176

[114] Between June and August 2014, the Law Society communicated with the Respondent regarding the Complaint, and the Respondent provided information and documents in response to the Law Society's questions. The Respondent denied JY's version of events.

[115] The Law Society retained John Forstrom in August 2014 and he remained the investigator for the majority of the Investigation, excepting the period from May 2017 until June 2018 when a different investigator took on the file, and the period from May 2016 to May 2017 when the Investigation was formally in abeyance. On September 5, 2014, Mr. Forstrom wrote to the Respondent (the "First Letter") confirming his retainer as the investigator, and asking for both a formal interview and further documentation related to issues raised by the Complaint that the Respondent suggested would be relevant.

NTA, Tab 184

[116] In the First Letter, Mr. Forstrom also stated that his initial review of the information gathered so far raised concerns

> … that you may not have conformed to the following standards of professional conduct prescribed by the *Legal Profession Handbook* when representing [JY]:
>
> > • Chapter 6 - Duty of undivided loyalty to every client, and duty to avoid conflicts of interest between clients; and
> >
> > • Chapter 7 - Duty to avoid conflict between your own interests and those of your client.

NTA, Tab 184

[117] Over the next two years, Mr. Forstrom and the Respondent exchanged further emails and documents regarding the Complaint, in the course of which the involvement of CL, ZZ, JZ and YZ came to light in relation to the transactions involving M Ltd. and F Corp. Mr. Forstrom's concerns relating to the documentation and involvement of these additional parties were outlined in his correspondence with the Respondent.

NTA, Tabs 184 to 193

[118] By late 2015, the Respondent retained counsel, and further communication regarding the Investigation and the Complaint continued. The Investigation was placed into abeyance from May 2016 until May 2017, at which time the Respondent retained new counsel. In a letter dated June 6, 2018, Mr. Forstrom wrote to the Respondent's new counsel outlining some outstanding questions and summarizing much of the correspondence from 2015 through 2016 to the Respondent's former counsel, including providing a summary of a letter initially sent in February 2016 setting out (amongst other things) that:

> The professional conduct concerns identified in the course of my investigation so far include:
>
> (a) **Conflict of Interest Between Clients**: … ;
>
> (b) **Conflict of Interest between Lawyer and Client**: … ;
>
> (c) **Acting Against Former Client**: … ;
>
> (d) **Quality of Service**: … ;
>
> (e) **Failure to cooperate in Investigation**: …

NTA, Tab 195, at pages 4 and 5;
Transcript of Proceedings, December 19, 2019, at pages 71 to 73

In each instance, Mr. Forstrom provided some details about the source of the concerns and referenced the relevant *BC Code*, Rules or *Handbook* sections.

[119] At the hearing, Mr. Forstrom testified that, while JY was not able to provide evidence that the Respondent acted as a business partner, he believed it clear that the Respondent acted, at least, as JY's lawyer. In this context, Mr. Forstrom confirmed that he had received a video from JY of the September 2012 trip that the Respondent and JY took to the M Ltd. premises in Quesnel. While he did not adopt JY's version of the contents of the video, Mr. Forstrom did testify that it

appeared the Respondent was acting as counsel during the discussions between HL and JY regarding the purchase of M Ltd., and not merely translating. Mr. Forstrom testified that:

> The tape, generally speaking, is consistent with his premise that [the Respondent] was negotiating the purchase of the sawmill, which could be consistent that she was doing this in partnership with him, could be consistent with his -- the premise that she was doing this as his counsel. And when I looked at it, that was the conclusion that I drew, was it's consistent with his story but it doesn't prove the partnership aspect of it … The question whether it involved a partnership or a solicitor/client relationship was not essential to the thing that I was trying to get to the bottom of. And at that point, this videotape definitely confirmed to me that [the Respondent] was there as [JY's] representative.
>
> Transcript of Proceedings, December 19, 2019, at pages 64 and 65

[120] By the end of June 2018, the Respondent retained her current lawyer, who remained her lawyer through this hearing. The citation was issued in October 2018.

ISSUE

[121] The issue for this Panel to decide is whether or not, on the above facts, the Respondent's behaviour violates the portions of the *Act,* the Rules, the *Handbook* and the *BC Code*, so as to amount to professional misconduct as alleged by the Law Society.

LEGAL FRAMEWORK

[122] Whether or not the Respondent's behaviour amounts to professional misconduct must be considered in light of the provisions of the *Act*, the Rules, the *Handbook* and the *BC Code*, which the Law Society alleges were breached.

[123] It is the Law Society's burden to prove the facts necessary to support the finding of misconduct. Adopting the standard articulated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 SCR 41, Law Society hearing panels, such as that in *Law Society of BC v. Seifert*, 2009 LSBC 17, have held that:

> … the burden of proof throughout these proceedings rests on the Law Society to prove, with evidence that is clear, convincing and cogent, the

> facts necessary to support a finding of professional misconduct or incompetence on a balance of probabilities.
>
> [124] *Seifert*, at para. 13

[125] While "professional misconduct" is not defined by the *BC Code*, the *Act* or the Rules, it is a term that has regularly been considered by hearing panels. In the leading case of *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171, the hearing panel stated the test for professional misconduct as " … whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[126] In 2011, in the matter of *Re: Lawyer 12*, 2011 LSBC 11, after reviewing previous decisions, the single Bencher hearing panel concluded at para. 14 that:

> … the pith and substance of these various decisions displays a consistent application of a clear principle. The focus must be on the circumstances of the Respondent's conduct and whether that conduct falls markedly below the standard expected of its members.

[127] The "marked departure" test in *Martin* cannot be excused by a lawyer's *bona fides*, nor is *mala fides* required to prove professional misconduct. With respect to the issue of culpability, in *Law Society of BC v. Harding*, 2014 LSBC 52, at para. 79, the panel wrote:

> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a "mere mistake", "inadvertence", or events "beyond one's control" is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.

[128] This Hearing Panel must, therefore, consider the evidence presented to it to determine whether the Law Society has met its burden of showing that the Respondent acted contrary to the enumerated provisions of the *Handbook*, the Rules and the *BC Code*, in such a way as to have committed professional misconduct.

CREDIBILITY

[129] The Complainant, the Respondent, TE, John Forstrom and Sarah Gosden all testified at the hearing as to the facts and their recollection of events surrounding the subject matter of the amended citation. Accordingly, this Panel must consider the credibility of the testimony presented, particularly where the Panel is urged to consider the context and interpret the documentary evidence presented in a particular manner.

[130] When witness testimony is presented, hearing panels have relied on the principles set out in the 1951 case of *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA) to evaluate credibility, namely that "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." These principles have been adopted in such matters as *Law Society of BC v. Schauble*, 2009 LSBC 11 and *Law Society of BC v. Vlug*, 2018 LSBC 26.

[131] In *Schauble*, the panel further considered whether a witness had an interest in the outcome of the proceeding as a factor when evaluating the credibility of *viva voce* testimony.

[132] Sarah Gosden oversaw the Rule 4-55 Investigation of the Respondent's records and accounts. She testified as to the searches of the mirror images of the Respondent's computers and the documents that were and were not found, including the absence of records relating to any client funds deposited or otherwise dealt with through the Respondent's Chinese banking facilities. Ms. Gosden had no interest in the outcome of the proceedings. Her evidence was given clearly and carefully, and her evidence was credible.

[133] John Forstrom was called as a witness by the Respondent. Mr. Forstrom gave his evidence carefully and clearly, admitted to forgetting certain details such as specific dates, and gave his testimony in a considered and fair manner. Although he may be said to have an interest in the outcome of the proceedings insofar as he was the investigator and believes in the integrity of his investigation and the conclusions he drew, he does not stand to benefit or lose from the proceedings, and as such, he remains an independent and credible witness.

[134] TE was also called by the Respondent, having been employed by her as a paralegal between 2012 and 2014. TE testified that he does not speak Mandarin or Cantonese, he received instructions from the Respondent, he acted as a conduit for the flow of information from clients (particularly M Ltd. in this case) to the

Respondent, and he drafted documents relating to the transactions considered in the amended citation. While TE clearly likes and respects the Respondent, he again gave his evidence fairly and carefully, including admitting to his bias in favour of the Respondent, and he was a credible witness.

[135] The Law Society called the Respondent to testify. Her evidence was frequently contradictory, and when pushed to answer questions or resolve the apparent discrepancies between her testimony and what documents exist, she often stated that she could not remember details. At other times, the Respondent stated that responses she had previously given Mr. Forstrom that proved to be inaccurate or wrong were the result of attempts to assist him in understanding matters. The Respondent's almost transactional explanation of who was or was not her client, when her obligations to clients began or ended, and her duties to former clients, appeared to arise either from a total lack of knowledge of, or a failure to comprehend the requirements of, a lawyer's obligations and relationship to a client. The Respondent could not explain why documents and files either did not exist, or had not been produced to the Law Society, and she seemed at best confused as to the content of some of the materials. The Respondent did admit that her practice had been poor, but did not express much of an understanding of the problems exposed by the Investigation. The Respondent's evidence was not credible.

[136] It is important to note that the lack of documentary evidence is troubling and rendered it more complicated both to evaluate credibility and find facts relevant to the amended citation. This Panel finds that the Respondent's assertion that "Chinese business isn't done that way" does not assist and that her failure to produce such documents as agreements, correspondence or notes of client meetings or instructions, given how bad she reported her memory to be, further casts doubt on her versions of events.

[137] The Complainant's evidence was internally consistent as to matters underlying the Complaint, although the Complainant was evasive and resisted answering questions unrelated to his complaint against the Respondent. The documents in the NTA supported, rather than refuted, the Complainant's assertions regarding not knowing ZZ, and his denial of any negotiations regarding agreements with ZZ is supported by the affidavit of ZZ. Again, the absence of any documents produced from the Respondent's files regarding the documentation and other agreements she testified to assisting with during this period supports the suggestion that such agreements simply did not exist. Although the Complainant's version of how the M Ltd. deal proceeded was categorically denied by the Respondent, his reasoning and belief in that process were consistent. The Complainant clearly believed the Respondent to be his lawyer and to be protecting his interests. In this regard, and where supported

by what little documentary evidence there is, the Complainant's evidence was more credible than that of the Respondent.

POSITIONS OF THE PARTIES

[138] In submissions, the Law Society provided the following summary and overview of the amended citation, stating that:

1. The citation as amended contains four allegations of professional misconduct arising out of the Respondent's handling of transactions involving six of her clients with conflicting claims to the same sawmill business and her failure to be candid about the extent of her personal interest in the various transactions and their connection to her immigration practice.

2. …

3. The allegations in the citation can be summarized as follows:

   (a) acting in a conflict of interest while representing two or more of [JY, ZZ, CL, JZ, YZ and F Corp.] in connection with the purchase and operation of [M Ltd.], including:

      (i) failing to obtain the informed consent of JY to her representation of [JY] and [ZZ/F Corp.] in connection with the purchase of [M Ltd.] from [HL] (allegation 1(a));

      (ii) preferring the interest of [ZZ] over that of [JY] in connection with both a wood chip supply agreement and the sale of shares in [M Ltd.] from [F Corp.] to [ZZ] and subsequently to the [JZ and YZ] Brothers (allegation 1(b));

      (iii) continuing to represent [ZZ] and [F Corp.] when a conflict arose as to [JY's] interest in the Sawmill and [F Corp.] (allegation 1(c));

      (iv) acting for current clients with competing interests ([CL, JZ, YZ, F Corp.]) without the clients' consent and when the matters were substantially related or the Respondent had confidential information arising from her representation of one client that could reasonably affect the other (allegations 1(d) to (f)); and

(v) preferring the interest of [ZZ and F Corp.] over that of [JZ and YZ] in connection with the sale of shares in the Sawmill (allegation 1(g));

(b) acting in a conflict of interest by providing legal services to one or more of the six clients when the Respondent or her sister had a direct or indirect financial interest in the Sawmill or [F Corp.] (allegation 2);

(c) failing to respond substantially or fully to the Law Society during the course of the investigation or misleading the Law Society about the scope of her involvement in the Sawmill and [F Corp.], the source of the funds to purchase the Sawmill and the relationship between the Sawmill and her various clients' applications under BCPNP (allegation 3);

(d) failing to provide the quality of service expected of a competent lawyer by failing to ensure that any agreements between her clients were properly documented; that her clients were properly advised of the risks associated with the proposed agreements and that her clients received the agreed upon interest in [F Corp.] and the Sawmill (allegation 4).

Submissions of the Law Society, December 7, 2020

[139] The Law Society submits that this conduct is a marked departure from that conduct the Law Society expects of lawyers, and constitutes professional misconduct.

[140] In response, the Respondent states the following:

2. The Respondent says the citation must be dismissed in its entirety. To be succinct, the Respondent's main points in response can be summarized as follows:

(a) In order to preserve fairness to a respondent and the privileges and confidentiality of non-complaining clients, any part of the prosecution which exceeds either (a) the offences particularized in the citation or (b) the allegations for which notice was provided during the investigation cannot be pursued.

(b) In the context in which the events of September and October 2012 unfolded, it was reasonable and permissible for [the Respondent] to conduct the 2012 transactions as she did.

(c) Simultaneously representing multiple BCPNP applicants is not a conflict of interest, even if the clients' business proposals are the same.

(d) [The Respondent] did not have any "direct or indirect financial interest" of a type that would trigger conflict rules.

(e) [The Respondent's] level of service to any of her clients did not fall below expected standards.

(f) [The Respondent] did not, at any time, communicate with an intention to mislead or frustrate the LSBC investigation.

(g) If [the Respondent] did commit any breach of the *Act, Rules* or *Code*, such breach or breaches do not constitute professional misconduct.

Submissions of the Respondent, January 7, 2021

[141] The Respondent highlighted her position on the

> … legal standards applicable to this citation hearing, including the issue of fair notice in both the investigatory and prosecution stages; the onus of proof, the threshold for conviction, and the standards governing conflicts of interest among clients … [and a summary] regarding the extent to which courts have acknowledged and accommodated customary Chinese business practices.

[142] The Respondent urged the Panel to accept her evidence as the most credible and reliable version of events available, with any discrepancies to be explained by her underlying honesty and eagerness to assist her clients. For the reasons outlined above, this Panel does not accept the Respondent's evidence.

ANALYSIS

[143] The Respondent raises several preliminary arguments addressing the Investigation and the citation as a whole, whether the matter should be dismissed as a consequence of cultural and historical context, and whether the "marked departure" test has, or can be, reached in this instance.

Defects in the Investigation

[144] The Respondent asserts that the Investigation throughout was characterized by a lack of fair notice in the investigatory and prosecution stages, and that failure to give full notice of the matters listed in the amended citation during the investigation stage fatally taints the whole process such that the amended citation should be dismissed outright.

[145] In terms of the mechanics of the Investigation itself, John Forstrom was retained to investigate the initiating complaint of JY, of which the Respondent admits she was given notice. In the course of so doing, Mr. Forstrom uncovered further information that he believed indicated discipline concerns. As these further and additional concerns arose, he wrote to the Respondent to inform her of the new matters to be investigated. The Respondent was notified of the initial complaint on July 15, 2014, and then Mr. Forstrom wrote either to the Respondent or her counsel on September 5, 2014, February 2, 2016 (by email) and June 6, 2018 to inform the Respondent of the additional concerns that had come to light during the course of the Investigation.

NTA, Tab 179; NTA, Tab 184; Exhibit 28, NTA, Tab 195

[146] As new matters come to light that suggest a lawyer's conduct may constitute a discipline violation, the Executive Director must treat them as a complaint, whatever the source, in accordance with Rule 3-4(2). As Mr. Forstrom's investigation revealed more of what he thought to be discipline violations, he notified the Respondent of them, in at least general terms, with reference to the relevant sections of the *Handbook*, the Rules or the *BC Code*, as applicable. That they were not precisely enumerated as set out in the amended citation is not required.

[147] Throughout Canada, the courts have, in the case of self-regulating bodies and the requirements for procedural fairness, consistently distinguished between the investigative and prosecutorial or hearing stages. In 1964, the Supreme Court of Canada in *Guay v. Lafleur*, 1964 CanLII 45 stated:

> Generally speaking, apart from some statutory provision making it applicable, the maxim '*audi alteram partem*' does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power either to impose a liability or to give a decision affecting the rights of parties.

Guay, at para. 188

[148] Subsequent Canadian decisions have affirmed that general principle with some modification such that, following *Cusack v. Law Society of Ontario*, 2019 ONSC 5015, and others, there is a recognition of a limited duty of fairness such that a respondent should be advised of the matters complained of, and be given the opportunity to respond.

[149] Although there do not appear to be any Law Society decisions precisely on point, the 2007 Saskatchewan decision in *Swanson v. Institute of Chartered Accountants of Saskatchewan*, 2007 SKQB 480 is telling. In that case, Mr. Swanson, a chartered accountant, conducted an audit of the accounts of the Poundmaker Cree Nation, from which audit flowed a complaint alleging that Mr. Swanson had breached the bylaws of the Institute of Chartered Accountants of Saskatchewan.

[150] At para. 34 of the decision, the court stated that "[t]here is no question that the professional conduct committee investigated matters that were not specified in the complaint … The question is whether the committee had jurisdiction to do so."

[151] After considering the content and meaning of the Saskatchewan *Chartered Accountants Act, 1986*, the court stated that the provisions of this Act:

> … demonstrate, however, that it shares with other statutes pertaining to self-regulating professions the goal of protecting the public interest as it relates to the profession. In this Act, that goal is evidenced by references to the institute's council ultimately being responsible for the competence and discipline of chartered accountants. The goal is evidenced also by the reference in s. 24 to "the best interests of the public".
>
> Members of the public are common sources of complaints against professionals, including chartered accountants. Members of the public often do not know all of the duties and obligations of chartered accountants. For this reason, a complainant who is a member of the public may express concern about the conduct of a chartered accountant, but the complainant may not be able to point to the precise terms of the statute or bylaws that may be breached by the conduct.

Swanson, at paras. 35 and 36

[152] Similarly to the structure of the legislation in *Swanson*, Rules 3-4(2) to 3-4(8) provide that the Executive Director must consider a complaint, that information from any source indicating that a lawyer's conduct may constitute a discipline violation must be treated as a complaint, that the Executive Director may investigate a complaint (or not) and may appoint a lawyer to do so, and that the Executive Director must refer the matter to the Discipline Committee (or Practice

Standards Committee) at the end of the investigation, unless the Executive Director decides to take no further action on the matter. The options for the Discipline Committee are then set out in the provisions of Rule 4-4.

[153] The court in *Swanson*, considering the structure of complaints, stated the following:

> … the process begins with an initial complaint, but the complaint that is put to the discipline committee for disposition at a hearing is the complaint of the professional conduct committee, not of the initial complainant. This process recognizes the typical unfamiliarity of the public with the details of the obligations of chartered accountants. The process also permits the professional conduct committee to screen complaints that are frivolous or that otherwise cannot or should not be prosecuted.
>
> The Act, then, contemplates that the complaint that is put to the discipline committee may be different from the initial complaint that triggered the investigation. This leads to the question of whether the complaint of the professional conduct committee may be broader than the initial complaint, or simply may be an edited version of the initial complaint.
>
> In answering this question, I first return to the Act's goal of protecting the public interest. The public interest is not to be protected without regard for the rights of members of the profession, of course. The public interest and members' rights must be balanced. Keeping in mind, though, that members of the public are unlikely to know how to identify alleged breaches of the Act or bylaws with precision, some flexibility in interpreting "the complaint" is fair and appropriate.
>
> Second, in answering the question I consider the likely sequence of events if the professional conduct committee is limited to investigating matters specifically identified in the initial complaint. This circumstance would prevent the committee from investigating and recommending a hearing with respect to matters that come to the investigating members' attention during the investigation of the initial complaint.
>
> This circumstance would provide a formula for a prolonged and more costly process. Under this circumstance, when a matter - not specifically identified in the initial complaint - would come to the investigating members' attention, a new complaint would have to be made in order to initiate investigation of that additional matter. Presumably, that new complaint would be made by one of the investigating members who discovered it. This new complaint would lead to the initiation of a new

> investigation process. Likely, the investigating member who made the new complaint to initiate that process would be obliged to neither investigate the additional matter nor continue investigating the first matter, since that person now would be a complainant with respect to the member under investigation. Thus a replacement investigator would need to be appointed.
>
> Ultimately, the investigations of the first matter and of the new matter would be completed. Reports to the professional conduct committee would be made, and the committee would make its recommendation as to whether a hearing should be held. The new matter still would have been investigated and decided upon by the professional conduct committee, but only with additional time and cost.
>
> Nowhere in this circumstance is there a benefit to the public. The process simply would be more time-consuming and more complicated. Nowhere in this circumstance is there a benefit to the member under investigation. The circumstance would provide no greater fairness, and the member would face a more time-consuming and complicated process.
>
> On the other hand, there is no benefit to the public or to the members in permitting the professional conduct committee to root around for something to investigate, regardless of whether it relates to a complaint. The interests of both the public and the members coincide in the committee being permitted to investigate potential breaches that come to its attention in the course of an investigation. The interests of neither the public nor the members coincide with the committee being permitted to search for potential breaches on its own initiative.
>
> For these reasons, I conclude that the investigation of a complaint fairly can include the investigation of matters that, while not specified in the initial complaint, are related to the initial complaint. How closely related the matters must be is dictated first by the statutory provisions, and second by the circumstances of the case.
>
> *Swanson*, at paras. 38 to 46

[154] Under the Rules, the Executive Director fulfills the same purpose as the "professional conduct committee" under the legislation in *Swanson*.

[155] In finding that the complaint forwarded to the Discipline Committee may be different from the initial complaint that triggered the investigation, the court in

Swanson relied heavily on a decision from the British Columbia Court of Appeal in *Stolen v. British Columbia College of Teachers*, 1995 CanLII 1443 (BCCA), where Justice Prowse stated that

> [T]here are valid policy reasons for supporting the view that the investigating committee is not precluded from considering information which comes to its attention at the outset or during the course of its investigation *if it relates to* the conduct or competence of a member who is the subject of a report or complaint. … To require an additional complaint or report for every new instance of conduct which might tend to suggest lack of competence on the part of the member would, in my view, unduly interfere with the investigatory process.
>
> There may be cases, however, in which fairness dictates that the new information should be presented by way of a new complaint. … The circumstances in which this is most likely to occur are where the information provided is of a serious nature and *unrelated to the original complaint*. This is a matter calling for the exercise of judgment on the part of the investigating committee and the registrar and should be left to be dealt with by them on a case by case basis.
>
> In this case … These were *related complaints* tending to show a pattern of behaviour which, if established, placed the formal complaint and report in an altogether different light than if they stood alone.
>
> [emphasis added]
>
> *Stolen*, at paras. 50 to 52

[156] The court in *Swanson* then considered whether Mr. Swanson was entitled, as part of a duty of fairness, to complete particulars of the complaint against him. In considering this question, the court stated:

> In examining whether the committee fulfilled its limited duty of fairness, it is helpful to refer to the full duty of fairness that is owed by a discipline committee in the event of a matter proceeding to charges and a hearing. The duty of fairness at the hearing stage is described by Sara Blake in *Administrative Law in Canada*, 4th ed. (Toronto: Butterworths, 2006) at pages 40-41:
>
> > The most complete and detailed disclosure is required in cases involving the discipline of professionals, because a discipline proceeding jeopardizes a vocation that may be practised only after

> extensive training to qualify and because the allegations often impugn the individual's good character and reputation. (A licence to engage in a business or trade is not a right of the same order and does not attract the same standards of procedural fairness.) In professional discipline, factual particulars should be described in the notice of hearing or in a supplementary document. Both the client and the specific misconduct should be identified. However, a notice should not read like an Information in a criminal proceeding. How detailed it should be depends on the complexity and seriousness of the case. A failure to provide details in the notice of hearing can be cured by full disclosure of the evidence to be filed at the hearing. The tribunal is not restricted to considering only the facts alleged in the notice of hearing, but should make its decision in light of all of the facts adduced at the hearing. The notice is merely an outline of the alleged facts.

The full duty of fairness requires the provision of full particulars, so that the member knows the case that he or she will be asked to meet at the hearing. A deficiency in providing sufficient particulars can be remedied, in some cases, at the hearing.

[157] *Swanson,* at paras. 71 and 72

[158] The Respondent in this case was provided a copy of the initial complaint, and Mr. Forstrom did advise the Respondent of additional matters arising in the course of the Investigation. The Respondent then received full particulars of the results of the Investigation when she received the citation and the amended citation, and she received full disclosure of the Law Society's evidence thereafter. The limited obligation of fairness at the investigation stage was met. Any defect in meeting such obligation was cured during the prosecution stage when the Respondent had full particulars of the citation and full disclosure from the Law Society, thereby having full knowledge and awareness of the case she had to meet.

[159] There is no doubt that Mr. Forstrom did advise the Respondent of the additional matters that arose in the course of his investigation and of the corresponding broadening of his investigation. There is also little question that the additional matters arose out of Mr. Forstrom's investigation of the circumstances regarding the transactions surrounding the purchase and sale of M Ltd. Concerns regarding the Respondent's cooperation and communications with the Law Society arose within the investigation itself. These are all, therefore, related matters such that it did not breach the limited duty of fairness owed at the investigation stage to provide full particulars of each matter as it came to light. Similarly, it is not

necessary for such further information to be in the wording of an eventual citation to engage the Respondent's duty to cooperate with that investigation.

[160] This Panel finds that the Investigation into the matters underlying the citation and the amended citation was not flawed and information regarding the Investigation was not withheld from the Respondent such as to affect her rights to procedural fairness or duty of fairness that may have been owed to the Respondent at the investigation stage. We decline to dismiss the citation on this basis.

Solicitor-client privilege vs. duty to cooperate

[161] A lawyer has a positive obligation to cooperate with an investigation by the Law Society. As discussed in both the recent cases of *Law Society of Ontario v. Diamond*, 2021 ONCA 255 and *Law Society of BC v. Lessing*, 2022 LSBC 07, that obligation is a necessary feature of effective self-regulation.

[162] In *Diamond*, the Ontario Court of Appeal dismissed a lawyer's appeal from a decision dismissing his attempt to overturn a decision by the Ontario Law Society finding that he was guilty of professional misconduct for failing to cooperate with the Law Society's investigation. In describing the duty to cooperate with a law society investigation as fundamental to the principles of self-regulation, the court stated that obligation to cooperate is:

> … designed to ensure that there is a complete response and no inordinate delays in investigations by the self-regulated authority. It requires nothing more than prompt and complete responses when requested, which are essential to moving investigations forward. Delays in doing so can only serve to shake the public's confidence in the Law Society's self-regulatory authority: see *Law Society of Upper Canada v. Baker*, 2006 OHLSHP 21 at para. 6; *Law Society of Upper Canada v. Wysocky*, 2009 ONLSHP 77, at paras. 89-90. As the Law Society points out in their factum, the "reputation of the ability of the profession to self-regulate would quickly be diminished if the obligation to cooperate could be subverted by a 'cat and mouse game' (as described by the Hearing Panel), that fell short of a clear refusal."
>
> It is against all of that backdrop that the test for failing to cooperate, finding its foundation in *Ghobrial*, 2014 ONLSHP 5, and *Boissonneault*, (May 23, 2008), Toronto, CN04/08 (Law Society of Upper Canada Hearing Panel) must be considered. In my view, the test appropriately has both subjective and objective components. It is for the Law Society to prove the failure to cooperate - the absence of good faith dealings with the

> Law Society - on a balance of probabilities. In coming to that determination, the Hearing Division will consider all of the evidence and circumstances informing whether the licensee was or was not, in relation to the Law Society in its supervisory and investigatory functions, honest, open, and helpful.
>
> [163] *Diamond*, at paras. 67 and 68

[164] In *Lessing*, in the course of finding the lawyer "ungovernable", the panel stated the following with respect to a lawyer's obligation to cooperate with Law Society investigations:

> The repeated pattern of non-response addressed by the amended citation effectively frustrates the Law Society investigation process and prevents resolution of complaints. The rules requiring full and responsive answers to inquiries are foundational to the Law Society's ability to fulfill its duty to regulate in the public interest. A lawyer's repeated lack of compliance will undermine public confidence in the Law Society.
>
> This Hearing Panel, in its analysis in the F&D Decision, specifically considered that the Respondent did meet some requests made by the Law Society and made certain, albeit incomplete, attempts to address the matters raised by the amended citation. However, in the F&D Decision and here, the Hearing Panel finds those efforts to be insufficient against the strict compliance mandated by the Rules. When considered globally, the Hearing Panel finds that the Respondent's misconduct has indeed increased, worsened and become entrenched over time.
>
> *Lessing*, at paras. 23 and 24

[165] Thus, the Respondent cannot rely on a supposed risk to solicitor-client privilege, or client confidentiality, as a reason not to cooperate with regards to investigations involving non-complaining clients, or to limit the extent to which she may be required to cooperate. Moreover, the Respondent cannot rely on the Law Society's apparent failure to find documents that the Respondent was asked to provide, despite the Law Society's attempts at mirroring and searching her hard drives, as a basis to allege that the Law Society has failed to produce clear, cogent and persuasive evidence of misconduct.

[166] The Respondent argues that failure fully to enumerate all elements of a complaint places clients' rights at risk and potentially (in this case actually), expands into matters implicating the confidentiality and privilege of non-complaining clients. The Respondent suggests that a failure to provide full written notice of each

element of what ultimately became the amended citation impaired her ability to cooperate fully with the Investigation, as she had an overriding duty to protect and maintain her clients' confidentiality and privilege. However, that full response to a Law Society investigation does not involve a breach of solicitor-client privilege, or of client confidentiality and privacy, is demonstrated by the wording of sections 88(1.1) to (1.3) of the *Act*, where section 88(1.3) provides that:

> A lawyer who or a law firm that, in accordance with this Act and the rules, provides the society with any information, files or records that are confidential or subject to a solicitor client privilege is deemed conclusively not to have breached any duty or obligation that would otherwise have been owed to the society or the client not to disclose the information, files or records.

[167] The Respondent also waived such concerns when, on March 3, 2017, she consented in writing to the mirror image of her computers obtained by Ms. Gosden and the Law Society investigators being used without restriction for a number of matters, including those arising from the JY complaint.

Exhibit 15

[168] Accordingly, this Panel finds that the Respondent was not rendered incapable of complying with the Investigation by virtue of obligations to her clients' confidentiality, privacy and privilege. The Panel does not find that the amended citation should be dismissed on this basis.

Can the "marked departure" test be met?

[169] The Respondent also questions whether the Law Society has shown that the Respondent's behaviour met the "marked departure" test for considering whether the Respondent's behaviour in relation to the matters set out in the amended citation amounts to professional conduct. The Respondent cites previous Law Society decisions, citing particularly *Law Society of BC v. McKinley*, 2019 LSBC 20, where the panel set out the test as:

> In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the difference between a finding of breach of the *Act* or Rules and a finding of professional misconduct and held:
>
> > [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct,

> > is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
> >
> > …
> >
> > [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels 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 respondent's conduct.
>
> To make findings of professional misconduct with respect to allegations in the citation involving Law Society Rules, the panel should determine whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects of lawyers, in reference to the factors articulated in *Lyons*.
>
> *McKinley*, at paras. 33 and 34

[170] This Panel agrees with this characterization of the test, but also notes the conclusions of the panel in *Law Society of BC v. Harding*, 2014 LSBC 52:

> In our view, given all the cases and the guiding principles from *Stevens v. Law Society (Upper Canada)* (1979), 55 OR (2d) 405 (Div. Ct.), and the marked departure test from *Martin*, there must be culpability in the sense that the lawyer must be responsible for the conduct that is the marked departure. The words 'marked departure' are where one finds the requirement that the nature of the conduct must be aggravated or, to use the words of *Stevens*, outside the permissible bounds.
>
> As *Stevens* and *Re: Lawyer 12* (both the single-bencher and the review decision) make clear the panel must look at all of the circumstances. In *Law Society of BC v. Lyons,* 2008 LSBC 09, the panel set out the following factors to consider in determining whether given conduct rises to the level of professional misconduct:
>
> > (a) the gravity of the misconduct;
> >
> > (b) the duration of the misconduct;

> (c) the number of breaches; and
>
> (d) the presence or absence of *mala fides*; and
>
> (e) the harm caused.
>
> The requirement that all the circumstances be considered and the factors set out in *Lyons* preclude an assertion that particular factors are determinative or trump factors.
>
> Accordingly, it is not helpful to characterize the nature of blameworthiness with reference to categories of conduct that will or will not establish professional misconduct in any given case. Whether there was intention, or a 'mere mistake', 'inadvertence', or events 'beyond one's control' is not determinative. While such evidence is relevant as part of the circumstances as a whole to be considered, absence of advertence or intention or control will not automatically result in a defence to professional misconduct because the nature of the conduct, be it a mistake or inadvertence, may be aggravated enough that it is a marked departure from the norm. On the other hand, such evidence, taken as a part of the consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross the permissible bounds.
>
> *Harding*, at paras. 76 to 79

[171] It is, therefore, not the presence of *bona fides* nor the absence of *mala fides* that determines whether a lawyer's actions amount to professional misconduct, but whether, having a view to the five factors found in *Lyons*, the lawyer is responsible for conduct that falls outside the permissible bounds of behaviour. The Panel, therefore, does not believe that we are constrained by the need to determine the nature of blameworthiness to evaluate whether or not the Respondent's behaviour constitutes a marked departure from that behaviour expected of competent counsel.

Cultural and business practices

[172] Finally, the Respondent also submits that her behaviour was both acceptable and met her clients' expectations in the cultural context in which she was practising. The Respondent notes several cases in which the differences between Chinese and Canadian business practices are highlighted, and submits that "one of the tasks of the Panel in this case is to surmise the legitimate and reasonable expectations of [the Respondent's] clients … when they are engaging the services of a lawyer. In so doing, it must examine all the circumstances of the case including preferences of

the Chinese business culture of the time." The Respondent continues to suggest that, since the clients were happy for matters to proceed as they did and since that accorded with the general expectations of Chinese business practices at the time, any irregularities or errors arising from such practices can, and should, be accepted.

[173] With respect, this Panel disagrees with the Respondent's suggestion that whether a lawyer's conduct amounts to professional misconduct requires a consideration of cultural business norms. The cases cited by the Respondent in support of her submissions relate solely to matters between parties on either side of a business deal, none of whom were lawyers. At all times during her interactions with the clients, the Respondent was acting as a lawyer; she has not suggested differently, although she maintains that periodically her obligations as counsel ceased once a transaction concluded. The Respondent has been practising law in Canada since 2000 and specifically, in British Columbia since 2009. There is no provision in the *Act*, the *Handbook*, the Rules or the *BC Code* for lessening of a lawyer's obligations based on cultural considerations, nor has the Respondent pointed to any case law supporting such an assertion.

[174] If the Respondent was unable to fulfill her obligations to her clients due to the "preferences of the Chinese business culture of the time", then she had an obligation either not to accept the work or to explain her obligations and give the clients the option of proceeding or not within the constraints of practice as set out in the *Act*, the *Handbook*, the Rules and the *BC Code.* This Panel does not accept that the Respondent's obligations to her clients, the Law Society and the public are, or were, altered or reduced by virtue of the alleged preferences of the Chinese business culture.

[175] It is worth noting that the Respondent led no evidence regarding the standard of practice in immigration matters. Accordingly, while this Panel makes findings regarding the Respondent's actions as a lawyer with respect to her obligations under the *Act,* the *Handbook,* the Rules and the *BC Code*, we make no findings or comments regarding the business practice of depositing funds in China for a similar amount in Canada to avoid Chinese currency restrictions, nor having a viable British Columbia business used more than once for a business immigration proposal.

[176] The Panel is therefore not persuaded that, if the Respondent's behaviour amounted to professional misconduct, it should be excused on the basis of cultural or business preferences.

ALLEGATIONS

[177] It is therefore necessary to consider the allegations in the amended citation individually. In so doing, the Panel is constrained by the wording of the allegations themselves and the provisions of the *Act*, the *Handbook*, the Rules and the *BC Code*.

Conflict of Interest

[178] In submissions, the Respondent relies heavily on the Supreme Court of Canada's analysis of conflicts of interest as set out in the cases of *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 and *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39.

[179] The Respondent points out that the Supreme Court of Canada highlighted the difference between the "bright line" rule, where "the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting" [emphasis in original] (*McKercher*, at para. 33), and a residual "substantial risk" category of conflicts, which the court in *McKercher* described as follows:

> … the question becomes whether the concurrent representation of clients creates a substantial risk that the lawyer's representation of the client would be materially and adversely affected. The determination of whether there exists a conflict becomes more contextual, and looks to whether the situation is "liable to create conflicting pressures on judgment" as a result of "the presence of factors which may reasonably be perceived as affecting judgment" … In addition, the onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict — there is only a deemed conflict of interest if the bright line rule applies.

McKercher, at para. 38

[180] Thus, the Respondent submits that, since the matters between the Respondent's clients were commercial, not legal, the bright line rule does not apply and it is necessary to turn to the analysis under the "substantial risk" category. To this end, the Respondent quotes the court in *Strother* at paras. 54 and 55:

> As recognized by both the trial judge and Newbury JA, the conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business, or who compete with each other for business. There was no *legal* dispute between Monarch and Sentinel. Monarch relies on the

> "bright line" rule set out in *Neil*, 2002 SCC 70, but (leaving aside, for the moment, Strother's personal financial stake) there is no convincing case for its application here.
>
> The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. Here the alleged "adversity" between concurrent clients related to business matters. This is not to say that commercial interests can *never* be relevant. The *American Restatement* offers the example of two business competitors who seek to retain a single law firm in respect of competing applications for a single broadcast licence, i.e. a unique opportunity. The *Restatement* suggests that acting for both without disclosure and consent would be improper because the subject matter of both retainers is the same licence (*Restatement (Third) of Law Governing Lawyers*, vol. 2, at § 121 (2000)). The lawyer's ability to provide even-handed representation is put in issue. However, commercial conflicts between clients that do *not* impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact. In my judgment, the risk did not exist here provided the necessary even-handed representation had not been skewed by Strother's personal undisclosed financial interest. Condominium lawyers act with undiminished vigour for numerous entrepreneurs competing in the same housing market; oil and gas lawyers advise without hesitation exploration firms competing in the oil patch, provided, of course, that information confidential to a particular client is kept confidential. There is no reason in general why a tax practitioner such as Strother should not take on different clients syndicating tax schemes to the same investor community, notwithstanding the restricted market for these services in a business in which Sentinel and Monarch competed. In fact, in the case of some areas of high specialization, or in small communities or other situations of scarce legal resources, clients may be taken to have consented to a degree of overlapping representation inherent in such law practices, depending on the evidence: *Bolkiah v. KPMG*, [1999] 2 AC 222 (HL), at p. 235; *Kelly v. Cooper*, [1993] AC 205 (PC).
>
> [emphasis in original]

[181] The Respondent goes on to state that, in the BCPNP process, there was no indication that the Respondent's representation of her clients was impaired as a

consequence of her inclusion of M Ltd. in multiple BCPNP applications and that, accordingly, there was no conflict.

[182] The Respondent also emphasizes that, in the absence of any evidence regarding the retainer agreements between the Respondent and her clients, it is impossible to define the scope of the Respondent's representation of the clients so as to establish whether or not even a commercial conflict existed sufficient to fulfill the "substantial risk" category. The Respondent submits, starting at para. 107 and continuing to para. 118:

> In *Strother*, it was emphasized that "whether a real risk of impairment exists" in the simultaneous representation of two clients is not a conclusion of law, but rather "a question of fact". And it is a question on which the party asserting the conflict – here the Law Society – bears the onus.
>
> In this case there are three considerable deficits in the evidentiary record: the Law Society has not introduced evidence with respect to the terms of the retainer agreements in place with any of the clients alleged to have been in conflict with each other, or with her; and the Law Society has not introduced evidence about the nature of the "interests" arising at various stages of the BCPNP application process, as it existed in the 2012 to 2014 period. These are consequential omissions.
>
> The third deficit (related to the first) is with respect to the various parties' understanding or consent to any simultaneous proposals. Proving this lack of consent is not ordinarily a high hurdle, because the client will simply say on the stand "I didn't consent". But here the Law Society has no disgruntled clients, has chosen not to call clients as witness (except [JY]), nor even interviewed of them on this question during its investigation. And so it must discharge this burden through other evidence. So to the extent that any of the supposed conflicts could be resolved by consent (the Law Society, incidentally says that they could not), the Panel is not entitled to presume a lack of consent: indeed the presumption will effectively be the opposite.
>
> …
>
> According to McLachlin CJC in *Strother* at para. 142 (writing for four Justices dissenting in the result but not on this point), "the starting point in determining whether a conflict of interest arose in a particular case is *the contract of retainer* between the lawyer and the complaining party.

[emphasis added].” In *McKercher*, this time writing for a unanimous Court, the Chief Justice again stressed (at para. 37) the importance of reviewing the “terms of the retainer” when considering the expectation of the parties in cases where the “bright line” rule does not apply (although in that case, it did).

Of course the nature and terms of the retainer may not be determinative of the analysis, but they are nevertheless central to it, as the Court recognized in *Brewer v. Brewer*, 2010 NBQB 196:

> 140. Whether an interest is “directly” adverse to the “immediate” interests of another client is determined with reference to the duties imposed on the lawyer by the relevant contracts of retainer. This precision protects the clients, while allowing lawyers and law firms to serve a variety of clients in the same field. This is in the public interest.

The details of the contracts are not, of course determinative, but they are consequential. For example, it would matter if [JL] had engaged [the Respondent] to assist him with the purchase of the sawmill, on the one hand, or only to assist him putting together a proposal that would meet the investment criteria of the PNP and so get him approved, on the other. There is enough on the record to indicate the latter, certainly. But the Law Society has never produced any evidence of the former. With [ZZ and JZ], it also does not appear that [the Respondent’s] legal retainer included assistance with the purchase of the sawmill or lands, although the documents surrounding that file are … in complete disarray.

…

And it follows that, in the entirety of the Law Society’s submissions, there is not a single description of any aspect of the retainer agreements that are alleged to be in conflict. It is just asserted that they are.

Now, of course, *any* lawyer’s retainer agreement comes with its fiduciary obligations and duties of loyalty, and is subject to ‘statutory requirements’ in the *Handbook* or *Code*. But, that aside, the scope of a lawyer’s duties and obligations are not fixed, for the very reason that “loyalty” requires giving effect to the client’s understanding and expectations of the relationship – that is what is missing in this case. It’s missing because nobody complained …

> This is not a reverse onus case. There is no principle to be derived from *Strother* that any retainer by a lawyer will be presumed to be on the strictest and most exclusive possible terms, subject to the lawyer proving otherwise. The Law Society must prove the terms of the "contracts of retainer", on the balance of probabilities, with clear and cogent evidence. They then must demonstrate that these create legal interests that are in conflict, and the risk of adverse consequences for clients.
>
> [emphasis in original]

[183] The Respondent argues that, in the absence of retainer agreements, there is no evidence upon which this Panel can find that the conflicts as alleged by the Law Society exist and, therefore, no basis to find that the Respondent committed professional misconduct with respect to the first allegation in the citation.

[184] The Respondent, however, omits some relevant portions of quotes from the cases she cites. In *Strother*, for example, at para. 55, the court ends the paragraph by stating that:

> … The thing the lawyer must *not* do is keep the client in the dark about matters he or she knows to be relevant to the retainer: *Neil*, at para. 19. As Story J. commented almost two centuries ago:
>
> > No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.
> >
> > (*Williams v. Reed*, 29 F. Cas. 1386 (1824))
>
> The client cannot be taken to have consented to conflicts of which it is ignorant. The prudent practice for the lawyer is to obtain informed consent.

[185] The Respondent admitted that she never, for example, obtained informed, or indeed any, consent from JY regarding the F Corp. purchase of the M Ltd. shares, the transfer of those shares, nor the involvement of ZZ in that deal. The Respondent admitted that she did not inform or get the consent of JY, ZZ or any of the BCPNP clients regarding the inclusion or use of M Ltd. in the BCPNP application process.

[186] It is possible that the Respondent could have had a retainer agreement with each or all of the clients that may have permitted such a free-wheeling use of M Ltd., without written instruction or confirmation from any of F Corp., ZZ or JY. And it is also true that consent from a client may overcome some conflict issues. As stated by Justice Voith in *Mickelson v. Borden Ladner Gervais LLP*, 2018 BCSC 348, at paras. 148 and 149:

> While fiduciary duties may extend beyond the terms of a retainer, it is clear that the terms of a retainer do inform the nature of the fiduciary duties owed by lawyers. In *Hilton v. Barker Booth and Eastwood*, [2005] 1 All ER 651 (HL), the Court said:
>
> > [30] A solicitor's duty of single-minded loyalty to his client's interest, and his duty to respect his client's confidences, do have their roots in the fiduciary nature of the solicitor-client relationship. But they may have to be moulded and informed by the terms of the contractual relationship: see the well-known observations of Mason J. in *Hospital Products Ltd. v. United States Surgical Corp.* (1984) 156 CLR 41 at 97, cited by Lord Browne-Wilkinson in giving the judgment of the Privy Council in Kelly v. Cooper [1994] 1 BCLC 395 at 401, [1993] AC 205 at 215.
> >
> > [emphasis in original]
>
> One of the reasons that a formal retainer will inform the duty of loyalty is that clients can consent, by their agreement to the terms of a retainer agreement, to certain limitations on the duty of loyalty owed by the lawyer to the client. This can include consenting in advance to conflict situations which may arise, or to a course of conduct that will be followed in the event that a conflict does arise [citations omitted].

[187] With respect to the possibility of consent overcoming conflict issues, the court in *Mickelson* wrote, at paras. 156 to 157:

> Finally, consent can overcome many difficulties relating to conflicts of interest. In *Alberta Union of Provincial Employees v. United Nurses of Alberta, Local 168*, 2009 ABCA 33, the Court said:
>
> > 30 Consent can overcome many problems relating to conflicts of interests: *R. v. Parsons* (1992), 1992 CanLII 7131 (NL CA), 100 Nfld. & PEIR 260, 72 CCC (3d) 137 (Nfld. SC - CA). There are undoubtedly limits. There are some situations where consent is

> simply ineffective, notwithstanding the good faith and intentions of the lawyer and the clients. There will be situations where matters unfold in such a way that the lawyer simply cannot continue to act, regardless of the consent obtained. Those situations may arise from the fiduciary duties of lawyers as set out in *Neil*, or from the passage of confidential information described in *MacDonald Estate v. Martin,* 1990 CanLII 32 (SCC). The ultimate question on this appeal is whether that point was ever reached in this case.

In *United Nurses*, the Alberta Court of Appeal upheld a "preferred client" term in an oral retainer agreement which provided that in the event a conflict arose, the lawyers would cease to act for one client and keep acting for the other "preferred" client. The lawyers were entitled to rely and act upon this provision on the basis that the client had understood and had consented to the arrangement, this despite the fact that the retainer was never reduced to writing: *United Nurses* at paras. 4, 32 and 38. Still further, the court rejected an attempt by the client to revoke its consent after the conflict arose, holding that a client is not entitled to withdraw its consent in "a way that would undermine the essential nature of the retainer agreement": *United Nurses* at para. 37.

[188] The Respondent makes much of the Law Society's failure to produce any evidence of retainer agreements that the Respondent may have breached by acting for multiple clients as she did. With respect, however, retainer agreements do not supplant the duties of loyalty set out in the *Handbook* and the *BC Code*. Retainer agreements may modify those obligations, but in the absence of a retainer agreement, those obligations form the basis of the solicitor-client relationship. While this is not a reverse onus case, if the Respondent wished to assert that a retainer agreement existed that limited her duty of loyalty to each client, then the obligation would be on the Respondent to produce that document. Again, further to *Diamond* and *Lessing*, the Respondent has a positive obligation to assist the Law Society in their investigation. Had such retainer agreements existed, it would be the Respondent's obligation to produce them at the time she was requested to provide copies of all files relating to the Investigation; it is not the Law Society's obligation to find them. This is particularly the case when the Respondent is positing that such retainer agreements may have limited her duty of loyalty or the scope of her retainer such that there could be no conflict as alleged by the Law Society.

[189] Beyond the absence of any retainer agreements, in testimony, the Respondent's answers in relation to many of the allegations underlying this part of the amended citation highlighted a peculiar understanding of the solicitor-client relationship, and of the obligations owed to a client as a result of that relationship.

[190] It is clear that all of the named parties were the Respondent's clients, or at least former clients, during the period from 2012 to 2016. The Respondent first met JY in 2010 and acted for him periodically on various matters, including the potential purchase of an acupuncture business in 2013, subsequent to the purchase of M Ltd. The Respondent did not deny that all of the named parties had been her clients. Moreover, there is no question that the Respondent provided advice and the benefit of her legal judgment to her clients. Accordingly, as set out in the *BC Code* and commentary at Chapter 3.4 *Conflicts* and particularly 3.4-1 *Duty to Avoid Conflicts*:

> [4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The Respondent consistently gave her clients advice, and the benefit of her judgment, regarding the relative transactions between clients. The problems arise when one tries to determine how the Respondent distinguished between when a person was or was not, a client, as it is clear she did not have the commentary to 3.4-1 in mind.

[191] The Respondent testified as to the scope and extent of her obligations to the clients. The Respondent repeatedly stated, when asked about the reasons why she did not inform JY of actions taken by F Corp. or ZZ, or why she did not inform ZZ, CL, JZ, YZ and JY of ongoing matters regarding M Ltd. and F Corp., that they were "no longer her clients." It is the Respondent's assertion, therefore, that when she advised ZZ against investing with JY because he was a bad risk, she was not breaching any obligation to JY to protect his interests because he was no longer her client.

[192] In the absence of some document, agreement or other limitation expressly setting out a limitation on the solicitor-client relationship, however, this is an untenable interpretation of the duties owed to a client in respect of joint representation, or of representation in ongoing matters.

[193] The Respondent's view of her solicitor-client relationship with JY, for example, appears to be strictly transactional. She testified that, as of the moment when F Corp. obtained 90 per cent of the shares of M Ltd., she was no longer acting for JY but rather, solely for F Corp., and as such, she no longer had obligations to protect JY's interests. Therefore, when she advised ZZ against investing with JY in

August 2015, the Respondent maintains that he was not her client at that time, so that she had no obligation towards him nor to keep his information private.

[194] This Panel finds that the named clients were all the Respondent's clients and, in the absence of any agreement, express or implied, limiting her obligations, she owed a duty of undivided loyalty to all of them. This obligation survived the transfer of shares or purchase of M Ltd. and is, therefore, subject to the strictures regarding conflicts of interest as set out by the courts in *Strother*, *McKercher* and *Mickelson*. Moreover, the duty of loyalty survives the end of a retainer; a lawyer may not act contrary to the interests of a client, even in an unrelated matter, when the lawyer has confidential information arising from the previous representation.

[195] While it may be true that none of the clients had ongoing or immediate legal interests that would engage the "bright line" rule, their commercial interests did engage the "substantial likelihood" category of conflicts. Moreover, the Respondent confirmed that she neither obtained consent from JY regarding the F Corp. deal with M Ltd., nor did she inform JY, ZZ, CL, JZ and YZ of the multiple use of M Ltd. in the BCPNP process, nor ZZ of the apparent deal for M Ltd. with JZ and YZ.

[196] The Respondent made much of the BCPNP process and how using one business for multiple applications is not, in and of itself, problematic. It is not that, however, of which the citation complains. The issue arose when the Respondent proposed M Ltd. as the subject business for BCPNP for CL, JZ and YZ, without informing or obtaining the consent of JY, ZZ, F Corp. and others. As of the time of completing the BCPNP process with the M Ltd. information, the Respondent's clear obligation to her clients, as is made apparent by the various BCPNP applications, is to ensure either that the business opportunity included in the application remains available to them until they either change their mind or are rejected, or make it clear and obtain their consent to having that opportunity used multiple times. Absent such consent or commitment, in the event that two BCPNP applications for the same opportunity with M Ltd. advanced all the way through the approval process, there would be two (or more) clients with an interest in the same property, both of whom were represented by the Respondent. As the BCPNP application proceeded through the approval process, the possibility of conflict increases. The Respondent admitted that she never sought, nor obtained consent, nor informed the clients of this potential conflict; she simply did not turn her mind to it.

[197] The issue of conflicts arising in the Respondent's representation of JY and ZZ is clear and immediate, even if, not being strictly "legal", it does not meet the "bright line" test. JY retained the Respondent to purchase M Ltd. Regardless of the

parties' conflicting evidence as to the nature of that purchase or how the business was to be run subsequently, that fact is agreed. JY had previously retained the Respondent for the purchase of property and businesses, and did so again in May 2013, some ten months after the purchase of M Ltd. As a result, and in the absence of any agreement limiting or otherwise varying her obligations, the Respondent owed JY an undivided duty of loyalty that continued past the closing of the M Ltd. deal.

[198] Despite this undivided duty of loyalty, the Respondent advised ZZ not to invest with JY, arranged for the transfer of the M Ltd. shares to ZZ without informing JY of the transaction, and at a minimum, arranged for CZ and JZ to present to BCPNP the appearance of wholly owning M Ltd. without informing either ZZ or JY of that transaction.

[199] By informing ZZ that JY was a poor risk for investment, by advising JY that if he did not provide the funds his shareholding would be diluted, by transferring JY's shares to ZZ without his consent, and by papering at least the appearance of a transfer of M Ltd. to CZ and JZ, the Respondent acted against JY's interests.

[200] The Respondent owed a similar duty of undivided loyalty to ZZ, F Corp., CZ, JZ and CL. As such, by acting so as to actually or potentially compromise their interest, real or potential, in the business or operations of M Ltd., and without their consent, she acted in conflict with that duty.

[201] The Respondent testified that JY "disappeared" around the time of the closing of the M Ltd. deal and that, in any event, he had stated that he could not come up with the funds. This did not authorize the Respondent to approach ZZ to save the deal without JY's consent or informing him of her intent. The Respondent testified that she did not get written consent from any party regarding the transactions. Moreover, in closing the deal by way of transferring JY's shares to F Corp., and having ZZ purchase the shares through F Corp., but without obtaining the consent of F Corp., ZZ and JY to this set of transactions, she acted for each party without their consent to the joint representation.

[202] The Respondent testified that her actions were undertaken to "help" JY and ZZ and that she did not turn her mind to issues of informed consent. The Respondent submitted that as it was clear the clients were happy, essentially, there was "no harm no foul." This is not commensurate with the strict compliance with the rules required to protect the public interest.

[203] This Panel finds that the Respondent's actions regarding her intertwined dealings with JY, ZZ, F Corp., M Ltd., CL, JZ and YZ did place her in a position where she

was acting in a conflict of interest, in particular in the instances outlined in subparagraphs (a) through (g) of the allegation. This conduct serves as a marked departure from that conduct the Law Society expects of lawyers and constitutes professional misconduct.

Provision of legal services while having direct or indirect financial interest

[204] The matter to be considered here is whether the Respondent, or MG, had a direct or indirect financial interest in M Ltd. or F Corp. while, at the same time, providing legal services for various clients in connection with the purchase and operation of M Ltd.

[205] This question is determinable on the documentary evidence provided; either MG and the Respondent had a direct or indirect financial interest, or they did not. Further, either the clients with whom their financial interests may or may not have been involved were aware and had independent legal advice regarding the transactions, or they did not. The relevant provisions of the *Handbook* and *BC Code* provide that:

Handbook

> **Direct or indirect financial interest**
>
> 1. Except as otherwise permitted by the *Handbook*, a lawyer must not perform any legal services for a client if:
>
> (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
>
> (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgement.
>
> **Financial or membership interest in the client**
>
> 2. A lawyer must not perform any legal services for a client with whom or in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a financial or membership interest that would reasonably be expected to affect the lawyer's professional judgement.

Transaction with a client

3. A lawyer must not purchase anything from or sell anything to a client of the lawyer's firm unless the transaction is clearly severable from any legal work performed by the lawyer or by another lawyer in the firm for the client, and either:

(a) the transaction is of a routine nature to and in the ordinary course of business of the client, or

(b) the client is independently represented in all aspects of the transaction.

Client loan, credit or guarantee

4. Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client.

Financial interest in a client

5. A lawyer must not acquire a financial interest in a client of the lawyer's firm unless:

(a) the acquisition is effected on or through the facilities of a stock exchange, or

(b) the client:

(i) acknowledges in writing that the lawyer is not representing the client in the acquisition and the client will not rely on the lawyer's advice in the matter, and

(ii) is independently represented in all aspects of the acquisition.

Ancillary business or occupation

6. A lawyer must not carry on any business or occupation other than the practice of law in such a way that a person might reasonably:

(a) find it difficult to determine whether in any matter the lawyer is acting as a lawyer, or

(b) expect that in the carrying on of the other business or occupation the lawyer will exercise legal judgement or skill for the protection of that person. A lawyer who concurrently practises law and carries on another business or occupation must not act for a client if the client's interests and the lawyer's business or occupational interests differ.

Investing a client's funds

7. A lawyer must not invest the funds of a client of the lawyer's firm or advise such a client to invest the client's funds in anything in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a personal interest, if that interest would reasonably be expected to affect the lawyer's professional judgement.

BC Code

Doing business with a client

Independent legal advice

3.4-27 In rules 3.4-27 to 3.4-43, when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflicting interest in the matter.

…

3.4-28 Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

…

Investment by client when lawyer has an interest

3.4-29 Subject to rule 3.4-30, if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's consent.

[206] The Respondent argued strenuously that the business practices and nature of her practice demanded that she act as she did and that any irregularities could be explained through goodwill and wanting to assist her clients in a manner with which they were comfortable.

[207] Again, however, this Panel had difficulties with the Respondent's asserted priorities in regards to how she viewed her obligations to those whom she only periodically recognized as her clients, set against her clear obligations in respect of her duties as counsel.

[208] The Respondent frequently adverted to her intention to "help" her clients out and keep them happy. TE, as referenced earlier, confirmed his belief that everyone seemed happy, so he thought things were fine. That is not, however, the test of whether a lawyer is meeting their professional obligations (nor, in this case, is it true, since at least JY made a complaint).

[209] The Law Society *Handbook* and the *BC Code* are clear about the requirements and limitations regarding financial involvement with clients. At the very least, such engagements must involve formal consent, disclosure and strict adherence to the requirements for independent legal advice.

[210] Again, there are difficulties with the records provided by the Respondent in respect of her position that there were clear trails of loans between her various Chinese and Canadian banks that showed the transfers of moneys between China and Canada. These difficulties relate to the inconsistencies between funds being drawn on the Joint Account as opposed to any of G Corp.'s accounts, to the Respondent's assertion that funds were "loaned" to clients and then repaid through Chinese accounts, without any apparent reconciliations between either trust or other accounts, and a complete lack of instructions or retainer agreements documenting such blanket authorizations.

[211] In fact, the Respondent admitted that her practice in this respect had been deficient, in that she saw herself as "helping" her clients and keeping them happy, without paying attention to the Law Society requirements for tracing such funds. This

discrepancy lies at the heart of the Respondent's argument that her practice was culturally and temporally appropriate, given the expectations of the Chinese business community at the time and, therefore, any delict should be accepted by the Law Society as being acceptable in context.

[212] To be clear, however, the Respondent admitted that the Law Society's concerns, at least regarding her "loans" to clients to bridge financing that were subsequently repaid through a Chinese account – none of which was demonstrated through financial or other records – was a practice that she has since ceased, as she now understands that it is not appropriate. The Respondent acknowledged that using personal accounts to effect firm business, and advancing funds without any documentation, is not acceptable practice.

[213] In brief, and in strict response to this allegation, the Respondent:

(a) Loaned money to clients through the Joint Account to bridge financing until the money in China could be transferred into a Chinese account. With respect to ZZ, JY and the other clients listed in the citation, none of these loans could be verified through the Respondent's accounting records, and there are no written instructions, records of independent legal advice, or consents to such actions on the files. The Respondent also used her personal accounts to pay DP and GS, and other payments.

(b) Acted as signing officers to the bank accounts and other records for F Corp. and M Ltd. in the absence of any written instructions to act as agent or otherwise. While the Respondent insisted she was acting as agent for ZZ, there is no documentary evidence to support this, such as retainer agreements or even notes of conversations. From all appearances, and in accordance with the evidence of TE, the Respondent was the operating mind and was running the operations of M Ltd. and F Corp.; again, this supposition is supported by the Respondent's use of personal cheques to pay GS and DT, as well as the financial and e-mail records showing the Respondent's involvement with the daily running, hiring and operations of M Ltd.

(c) While the Respondent insists her husband did not receive a salary, the records suggest he did. The documentary evidence suggests that, contrary to the *Handbook* and the *BC Code*, her family member was receiving a direct benefit (salary) from M Ltd., and that no one at M Ltd. had been offered independent legal advice, or asked for their consent, for his involvement.

[214] The Respondent produced no documentation to suggest that any of JY, ZZ, M Ltd. or F Corp., all of whom may be considered her "clients", were recommended to obtain, or received, independent legal advice regarding the Respondent's representation of them, including loaning money to bridge the period while funds were apparently transferred in China (none of which records have been produced), having the Respondent's husband and other employees on the payroll, leasing premises apparently owned by the Respondent, nor having the Respondent or MG continue as signing and representative officers. At no time has the Respondent provided copies of retainer agreements, or instructions from the clients, authorizing the Respondent to run a business on their behalf as agent or otherwise, nor has the Respondent provided any documentation suggesting that the clients had independent legal advice regarding her intense personal and financial involvement in the businesses.

[215] By listing her husband as an employee, having herself and MG as signing officers and directors without any apparent authorizations or agency agreements, by using the Joint Account and personal accounts to transfer funds and make "loans" while funds were transferred in China (for which records still have to be produced), by leasing property apparently owned by the Respondent to the corporations, by having employees in common and on the payroll between the client companies and G Corp., and by, to all appearances, personally running the business but having no documentation suggesting that she was doing so as agent, the Respondent clearly involved herself, her firm, and her family members in the running and financing of her clients' operations, contrary to the requirements of the *BC Code* and the *Handbook*. In the absence of any documentation regarding her clients having independent legal advice, or even suggesting that they should seek independent legal advice, the Respondent breached her obligations under the *BC Code* and the *Handbook.* Such conduct amounts to a marked departure from the standards the Law Society expects of lawyers. With specific reference to the *Lyons* factors, there were numerous breaches that persisted throughout the period in question, they involved the financial interests of the Respondent and her clients in ways that form a clear breach of the *Handbook* and the *BC Code*, and the Respondent admitted at the hearing that her behaviour in loaning funds to clients was inappropriate such that she does not act in this fashion any more. While there was no *mala fides* underlying the Respondent's actions, the misconduct was serious, occurred in numerous instances, and lasted for a significant period of time.

[216] The Respondent admitted that her practice had been deficient in this respect, that she had been trying to keep people "happy" by "helping" them, that she recognized that this was not good practice and that she would no longer assist clients by lending them money or otherwise acting as she had in relation to JY, ZZ, M Ltd.

and F Corp. The Respondent admitted that these practices had been a regular part of her practice but that she had since changed. This recognition, however, does not change the fact that this Panel finds the Respondent's actions to have been contrary to the *Handbook* and the *BC Code* and a marked departure from that conduct expected of counsel.

Failure to respond or cooperate with Investigation

[217] As discussed previously in the consideration of the duty to cooperate as articulated in *Diamond*, it is not an answer to an allegation of failing to cooperate that a lawyer "eventually" did so. The duty to cooperate is a positive and current obligation that requires immediate and ongoing attention. To deny the Law Society access to documentation, or to deny knowledge or awareness of the basis for concerns at an early stage, followed up later by partial or even full acknowledgement, serves only to delay and therefore hamper an investigation. This is contrary both to the public interest in having Law Society investigations proceed in a timely and efficient fashion, and to a lawyer's obligation to the Law Society, as set out in the *Act*, the Rules, the *Handbook* and the *BC Code*, to cooperate with any investigation. To suggest that a lawyer cooperated "eventually" is to fundamentally misunderstand the duty to cooperate and to respond substantially and fully to any inquiry made by the regulator.

[218] The failures noted by the Law Society in the third allegation of the amended citation are documented fully in the NTA and witness testimony. The Respondent attempts to make much of the passage of time and wealth of investigations as a justification for her memory lapses, and points to her subsequent acknowledgements and rationalizations of any initially incorrect statements as being due to confusion or misunderstandings.

[219] The Respondent made unilateral and unequivocal denials of many facts that were later shown by documentary evidence obtained through the Law Society's investigative team (including the forensic accountants) to be true. The Respondent's subsequent acceptance of the truth of the documentary record, contrary to her earlier denials, is insufficient to avoid the allegation that she failed to respond fully or misled the Law Society regarding said allegations.

[220] The Respondent's assertions that the passage of time impaired her memory such that it would be unreasonable to expect her to remember the details as set out by the Law Society are similarly unconvincing; the interviews with Mr. Forstrom occurred between 2014 and 2015, regarding incidents that happened between 2012 and 2014, and incidents that, moreover, had been kept active in the Respondent's attention by

the ongoing nature of the Investigation. While the Respondent's memory by the time of the hearing starting in 2019 may be impaired, the time gap between the events that form the *locus quo* of the Investigation and the Investigation itself is significantly less, and as such, cannot excuse her lack of contemporaneous recollection of events.

[221] The Respondent is expected, and obligated, to be aware of events occurring within her practice. If she is unsure of such events, she has an obligation, when faced by a Law Society investigation, to provide responsive and truthful answers, even if it requires further correspondence to do so. This cannot be accomplished by denying the Law Society's allegations, and then only subsequently, upon being provided with documentary evidence of the truth of a fact, acknowledging that fact. Such behaviour merely extends any investigation, and acts contrary to the public interest by prolonging investigations into which, based on an accurate documentary record produced by the lawyer, should be relatively straightforward. The Respondent sought, whether consciously or otherwise, to avoid the obligation to answer fully, truthfully and completely, only acknowledging a delict when the Law Society could produce documentary evidence of it. This Panel finds such behaviour to be a marked departure from that expected of a lawyer. The Respondent's actions were repeated, flew in the face of available evidence, were repeated throughout the course of the Investigation, and unnecessarily lengthened the Investigation by requiring Mr. Forstrom to repeatedly ask the same questions in respect of the interactions between the various clients and corporations. Unnecessarily lengthening investigations is contrary to the public interest as it presents the image of lawyers avoiding sanction by avoiding responding to the regulator. This undermines the effectiveness of the Law Society's investigations, and consequently the public interest in a timely and effective investigation. This Panel, therefore, finds that the Respondent's failure to answer the Law Society's inquiries fully and truthfully and her failure to cooperate with the Investigation in so doing, serves as a marked departure from the standards expected of a lawyer, and that in respect of allegations 3(a), (b), (d), (e) and (f), the Law Society has demonstrated that the Respondent committed professional misconduct.

[222] Within the context of this allegation, however, it is noted that allegation 3(c) is not made out. Allegation 3(c) suggests that the Respondent "knew or ought to have known" the legal name of YW, whom she knew by a nickname, by virtue of being on the payroll of G Corp.

[223] This Panel finds that, in this instance, the Law Society has not shown that the Respondent knew or ought to have known her employee's full name. While it would be admittedly careless not to pay attention to employees' legal names, it is

indisputable that people adopt common names that may be completely unrelated to their legal names. It is also indisputable, following the evidence of TE, that the Respondent's law firm was busy and chaotic. The Respondent herself testified that she did not pay attention to such small things as payroll and related matters, relying on her accountant or bookkeeper to maintain and check the records.

[224] This Panel, therefore, finds it entirely plausible that the Respondent may not have been aware of the legal name of her employee YW, nor that the person known by a nickname and YW were the same person. While it is certainly evidence of a degree of carelessness and lack of attention to detail that the Respondent did not check for whom she was signing payroll, this Panel cannot find that such a failure is evidence of anything more. Accordingly, we find that it does not amount to a "marked departure" of the behaviour expected of lawyers and allegation 3(c) is dismissed.

[225] Allegation 3(g) deserves special mention as it is here that some of the longest delay and confusion in the Investigation may be ascribed. The Respondent never independently disclosed, despite being asked for full client files and documentation, her and her clients' involvement with M Ltd. and BCPNP. The Respondent maintained at all times that any simultaneous involvement was justifiable as a consequence of an immigration practice, but failed to lead any evidence on this point. Ms. Gosden testified that investigators were only able to find about ten per cent of the Respondent's total immigration files; the Respondent did not offer any explanation for this scarcity of information, other than to suggest that, if the Law Society had a native-language speaker searching the databases, they might have found more.

[226] Again, however, this is a misapprehension of the Respondent's duty to cooperate with the Law Society. If documents existed and were readily available, the Respondent, *qua Lessing* and *Diamond*, had an obligation to produce them, regardless of the language in which they were written. The fact that the Law Society did not find them and that they were not made available, lead to the inevitable conclusion that they do not exist. Accordingly, the Respondent's failure to disclose that she acted for all of the clients listed in 3(g), in relation to the common company M Ltd. in applications to BCPNP, and her failure to produce documents relating to the various clients' retaining of her firm in relation to these applications, is a clear violation of the duty to cooperate. Either these documents do not exist, which poses problems relating to competence of practice, duties to avoid conflicts of interest, and the like, or the Respondent refused to produce them. Either way, the absence of any such documentation provides a full evidentiary basis for allegation 3(g).

[227] With specific reference to the factors in *Lyons*, and with the exception of the allegation set out in 3(c), as discussed above, this Panel finds that the failure to respond or cooperate fully with the Law Society, and the provision of incorrect or misleading information in the course of an investigation as set out above, is among the gravest forms of misconduct; the Law Society's ability to investigate client complaints and lawyer misconduct goes to the heart of its obligations under section 3 of the *Act* to protect the public. These breaches were numerous, lasted throughout the Investigation over a number of years, and the implicit harm to public interest by hampering or delaying the Investigation cannot be overstated. Accordingly, this Panel finds that the Respondent's behaviour and conduct during the Investigation breached both the Rules and the *BC Code*, and that her behaviour discloses a marked departure from that conduct the Law Society expects of lawyers.

Failure to provide competent service

[228] There is no question that the documentation found by the Law Society in the Respondent's client files with respect to the investigation of the matters involving JY, ZZ, M Ltd. and F Corp. was sparse. When faced with the lack of written instructions, or notes documenting any instructions with respect to, for example, the agreements relating to wood chips, the transactions surrounding the share purchase by F Corp. and any related assignments, to document advice given to JY regarding becoming a minority shareholder or committing to a shareholder's agreement regarding such actions, to document the discussions that led to the apparent purchase by JZ and YZ of M Ltd. (as witnessed by the documents and correspondence with BCPNP), and the failure to keep notes or other documentation regarding advising JZ and YZ about the interest of F Corp. in the lands occupied by M Ltd., the Respondent frequently stated that she believed things were done, or that she did not remember. Ultimately, however, the Respondent testified that things should have been done differently and that she no longer practises without reducing agreements between clients and others to writing.

[229] The lack of documentation bearing out the Respondent's assertions that things such as instructions, agreements and notes had been kept, however, suggests otherwise. The pattern of the Respondent's behaviour throughout the period in question was clearly not to reduce things to writing, nor to expect her clients to do the same. The Respondent appears to have viewed herself as a conduit or facilitator for her clients' businesses, and to have forgotten that, as counsel, her obligations to her clients included keeping them fully informed of the consequences of actions, such as becoming a minority shareholder, and ensuring that they were advised of the consequences of their actions.

[230] That JY was, and remains, unclear as to the relationship between F Corp. and M Ltd., was apparent from his testimony and expectations. There were no notes in what documentation was found by the Law Society indicating that the Respondent attempted to clarify what, if any, consideration JY was to receive from F Corp. for the assignment, nor any documentation indicating any discussions between the Respondent and JY regarding the Respondent's, MG's and ZZ's involvement and role in F Corp. and its relationship to M Ltd. The Respondent stated that JY was unavailable or unreachable in the period when F Corp. and ZZ took assignment of the M Ltd. shares to save the purchase, so such discussions could not be had. However, the inability to have such discussions did not authorize the Respondent to act without instructions to assign or otherwise deal with JY's interests. Moreover, when JY reconnected after the sale closed, there is no documentation to suggest that the Respondent attempted to clarify the situation with JY.

[231] This failure to keep JY informed, to clarify instructions with respect to the assignment of JY's contract to F Corp., and to ascertain the terms, if any, of any consideration JY was to receive as a result of the assignment, constitutes a clear failure to diligently or conscientiously provide a quality of service that a client can expect from a lawyer.

[232] The Respondent stated repeatedly that her clients expected to do business without writing things down, and that it would have been culturally inappropriate for her to expect them to do so. As already stated, however, the standards that may apply between two private individuals doing business together are different to those expected of a lawyer. As a result of the Respondent's failure to ensure agreements were in writing, whether regarding the wood chip agreement or the agreement to purchase M Ltd. through F Corp., and promptly document any agreements relating to the M Ltd. purchases and sales by ZZ, JY, YZ or ZZ, there is left a lack of clarity or understanding regarding the clients' relationships to each other and the Respondent that is beyond regrettable.

[233] Agreements that affect a client's interests should be clear, concise and understood by the client, for the protection of both the client and the lawyer. It is a lawyer's clear and present obligation to explain the consequences of such agreements to the client and to ensure that the client is fully informed and advised regarding the consequences of any actions taken, or not taken, under an agreement. The Respondent's failure to ensure that the agreements referenced in the allegations under 4(b), 4(c) and 4(g) were reduced to writing at all, and the related failure to explain to JY the consequences of becoming a minority shareholder, or to understand the consequences of reducing or changing his interest in the businesses in question, constitute a failure to serve JY's interests in a conscientious, diligent

and efficient manner so as to provide a quality of service equal to that expected of a competent lawyer in similar circumstances.

[234] As a result of the Respondent's failure to reduce agreements or instructions to writing, there is no record to indicate that the clients had instructed the Respondent to act, what the clients wanted to achieve, that the clients consented to the outcomes produced, nor that the clients understood what they had agreed to. In the absence of written agreements, the clients have nothing to refer to that clarifies their business relationships, nor to show others to demonstrate their relationships or ability to act regarding the subject matter of those agreements.

[235] By not advising JY about the consequences of becoming a minority shareholder, the Respondent failed to serve JY's interests in a conscientious and diligent manner. By not ensuring that JY understood or had copies of the agreements regarding the share transfers between M Ltd. and F Corp., and the nature of JY's interest in F Corp., the Respondent failed to keep him aware or informed about the transactions with which he was involved, and accordingly, failed to serve his interests in a conscientious, diligent or efficient manner so as to provide a quality of service at least equal to that expected of a competent lawyer in a similar situation. It is no defence to argue, as the Respondent did, that her clients did not expect agreements, instructions or related matters to be in or to be reduced to writing; it was her obligation as a lawyer to do so in the interests of serving her clients, and in the absence of any instructions or agreements to the contrary, that obligation remained.

[236] It is clear that none of the agreements listed in allegation 4 of the amended citation were reduced to writing. It is also clear that JY was never informed that he was a minority shareholder in F Corp., the consequences of his becoming a minority shareholder in F Corp., the relationship and involvement of ZZ, the Respondent and others in F Corp., nor of the interest of F Corp. in the lands occupied by M Ltd. Similarly, there were no written (or any) instructions or retainer agreements, notes regarding conversations or advice regarding the impugned transactions, or any other file documentation one would expect in transactions of these natures. By failing to reduce the agreements to writing, failing to inform or advise her clients about the consequences of those agreements, and failing to ensure agreements that were in writing were completed promptly, the Respondent put her clients' interests at risk (or ignored them outright), and as a result, failed to serve her clients in a conscientious, diligent and efficient manner.

[237] Again, with reference to the *Lyons* factors, the disregard for JY's interests, the failure to ensure agreements were put in writing promptly (or at all), and the failure

to ensure the clients were informed of the status of their interests in the transactions, were repeated breaches of the *Handbook* and the *BC Code* that gravely affected the Respondent's clients' interests, and particularly JY's interests. These transgressions occurred over a period of years and again, go to the heart of the lawyer-client relationship. Although it is clear there was no *mala fides* behind the Respondent's actions – indeed, she expressed that she just wished to help her clients and make them happy – her disregard for her obligations as counsel is of serious concern, and is a marked departure from that conduct the Law Society expects of lawyers.

CONSTITUTIONAL QUESTION

Notice of constitutional question

[238] Prior to making her closing submissions, the Respondent gave notice under section 8(2)(a) of the *Constitutional Question Act*, RSBC 1996, c. 68, of her intention to make submissions alleging that her constitutional right of equality before the law enshrined in section 15 of the *Charter* had been engaged, infringed or denied. The constitutional question she raised concerns the *Charter's* application in an administrative law context. Only the Respondent and the Law Society made submissions.

Equality rights

[239] Section 15(1) of the *Charter* states:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Respondent's position

[240] The Respondent submits that the Panel must find, on a balance of probabilities, that a systemic bias against Asian women lawyers exists within the Law Society's disciplinary process. Given that finding, the Panel must then substitute a different test for the usual test of determining whether a breach of the *Act*, the Rules or the *BC Code* has occurred and whether that breach represents a "marked departure" such that a finding of professional misconduct is warranted (the "Marked Departure Test"). The Respondent submits that the test to be applied is to weigh the evidence

of public harm against the right to equal treatment (the "Public Harm Test") and only convict the Respondent if the Law Society can show, on clear and cogent evidence that harm to the public will result if the lawyer is not disciplined. The Respondent submits that this is the balancing exercise set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395.

Judicial notice

[241] The Respondent submits that the Panel can take judicial notice of all the evidence it needs in order to find that a systemic bias against Asian women lawyers exists within the Law Society's disciplinary process. The Respondent submits that the facts, which are capable of immediate and accurate demonstration, are found in the published decisions of the Law Society between 2016 and November 2020 and in certain other historical publications.

[242] The test for judicial notice, and the parties and the Panel agree, is set out in *R. v. Find*, 2001 SCC 32, [2001] 1 SCR 863, at para. 48, where McLachlin CJC described the doctrine as follows:

> In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[243] The Respondent relies on the second part of the test and asks the Panel to take judicial notice of the following:

(a) A review of historical references to anti-Asian bias in the BC legal profession culminating with a quote from the Law Society of British Columbia's 2012 Equity and Diversity Report:

> While overt discrimination based on race and gender is arguably less prevalent today than 30 years ago … visible minority lawyers and Aboriginal lawyers … face systemic barriers in the profession created by unconscious bias, resulting in more insidious, albeit unintended, forms of discrimination.

(b) Law Society panels in Canada have agreed that systemic bias exists broadly in the profession but have never considered it at the facts and determination stage, only at the penalty stage.

(c) In the published disciplinary decisions of the Law Society between 2016 and November 2020, there were 105 named lawyers disciplined and three anonymous male lawyers. Of the 105 named lawyers, the Respondent submits that 21 are members of a minority group based on their name. Ten of the 105 were identifiable as Asian: seven men and three women.

(d) There are approximately 12,000 practising lawyers in BC (no source was cited).

(e) The Law Society estimates its total, non-Indigenous, visible minority population in the period 2016 to 2020 as 14 to 16 per cent, which equates to a population of 1,960 racialized lawyers and 10,080 non-racialized lawyers.

(f) The Law Society's 2012 Diversity Report said that 8.3 per cent of practising lawyers in British Columbia were from Asian-Canadian minority communities, which produces an estimated Asian-lawyer population of 996.

(g) According to the Law Society's 2016 report on retention of women lawyers, women constitute 35 per cent of the profession.

(h) The penalties in the 105 decisions were set out in an appendix attached to the Respondent's submissions.

[244] Using the information above, the Respondent embarked on a series of calculations designed to show a systemic bias by the Law Society's discipline process against female Asian lawyers.

[245] The Respondent stated her position as follows:

> Once the Panel has determined, on a balance of probabilities, that systemic bias against Asian women exists within the LSBC's process, then the prosecution of the Respondent represents an *ipso facto* infringement of her section 15 equality rights: the Respondent, an Asian female lawyer, is confronted by disadvantages that non-racialized lawyers, male or female, do not face.

> At this point, *Doré* does not require a section 1 analysis to determine whether the infringement is justified. Instead, the infringement must be weighed against the legitimate public interest in the discipline of the lawyer.
>
> In this case, the balancing statutory objective is the protection of the public. Given the seriousness of the s.15 infringement (that is, subjecting a racialized person to a system biased against her race), then prosecution and conviction can only be upheld where the Law Society can show, on clear and cogent evidence, that harm to the public will result if the lawyer is not disciplined. And moreover, that the nature of any discipline imposed is indicated by the degree and/or extent of the putative harm.
>
> This test – weighing evidence of public harm against the right to equal treatment – then replaces or supplements the 'ordinary' test of determining whether a breach of the *Act, Rules* and *Code* constitutes "professional misconduct".

[246] The Respondent submits that it is not necessary to demonstrate that *her* treatment was affected by the systemic bias. However, the Respondent argues that a probable inference could be drawn that her treatment was affected by accumulated, systemic biases in her case, including the following:

(a) a "target fixation" interpreting every misstatement as an attempt to mislead the Law Society;

(b) every piece of evidence, however neutral-seeming, as inculpatory;

(c) a shift in the aftermath of the trust fund theft in 2016 from taking measures to assist the Respondent to improve her practice to ensuring that she would be suspended or disbarred;

(d) not recognizing the Chinese name of an employee known to her by another name;

(e) a strained narrative of conflict surrounding the "Minoru office lease agreement";

(f) another very strained exercise based on a minor edit in two versions of a draft affidavit;

(g) The investigator refusing to explain the basis of his investigation to the Respondent, preventing her from obtaining a copy of her interview

transcript from the court reporter and failing to accommodate the Respondent's challenges communicating in English;

(h) the behaviour of Discipline Counsel at this hearing, the subject of a separate complaint of abuse of process;

(i) The Respondent has been singled out for "special treatment" by the Law Society. She complains that the Law Society has initiated a "war of attrition" through simultaneous investigations, each investigation producing a separate citation and a discrete hearing instead of being condensed into a single hearing;

(j) two failed attempts to suspend the Respondent during an investigation on the assertion that her continuing to practise constitutes a risk to the public; and

(k) a disciplinary investigation of counsel for the Respondent in the summer of 2020. This was alleged to be on its own motion, however, counsel for the Respondent advised the Panel that it was the result of a complaint made by Mr. Grosz and the investigation was subsequently dropped.

The Law Society's position

[247] The Law Society submits that the Respondent seeks to have the Panel decline to perform its statutorily assigned task to determine whether the conduct captured in the citation represents a marked departure from that conduct expected by the Law Society and to substitute a different test of whether the harm to the public arising from her conduct deserves recrimination in light of the systemic bias she says exists in the Law Society's processes. The Law Society submits that the Respondent's misapplication of the *Doré/Loyola* (*Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12) framework is wholly inconsistent with the Law Society's statutory mandate.

[248] The Law Society submits that the protection of *Charter* guarantees is a fundamental obligation in any adjudicated forum and administrative decision-makers are "always required to consider fundamental values, including those enshrined by the *Charter*." However, the Respondent has failed to demonstrate that the Law Society disciplinary process engages her section 15(1) *Charter* rights through the use of the unsubstantiated evidence of systemic bias.

[249] The Law Society submits that the Respondent must prove a *prima facie* case of discrimination against her, which could include her being a member of a group, as long as there was evidence of some connection between the group-based protection and the alleged adverse impact on the claimant. This evidence must amount to more than a "web of instinct" as described *in Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, at paras. 18 to 20.

Judicial notice

[250] The Law Society criticizes the Respondent's statistical analysis as "fundamentally flawed" rendering any observations drawn therefrom meaningless.

[251] The Law Society agrees that the test for judicial notice is as set out in the Supreme Court of Canada decision in *Find.* The Law Society objects to the scope of the evidence that the Respondent submits can be accepted through judicial notice on the following basis:

(a) Some of the information used was not provided by the Law Society;

(b) Identifying a person's culture, ethnicity or race from their last name is never more than a guess;

(c) The Respondent only considers gender and/or race as the causes of Law Society citations and penalties. This ignores that the Law Society's disciplinary process is driven by the amount and severity of the complaints it receives so those factors must form part of any analysis;

(d) The Law Society has no control over the amount and severity of the complaints made and is bound to consider every complaint;

(e) Other factors that would need to be considered include the firm size, practice type, race of complainant and whether a lawyer under investigation had legal representation;

(f) The Respondent's calculations contain errors and inconsistencies including:

(i) that there are 12,000 members of the Law Society for each of the four years analyzed when the data shows that in three of those years, the membership was more than 12,000 members;

(ii) inconsistent female/male divisions, sometimes 50/50 and sometimes 35/65;

(iii) diversity statistics from 2012 are compared with punishment statistics from 2016 to 2020;

(iv) the Law Society does not require members to provide information regarding gender and/or race so the information used is only what is provided voluntarily; and

(v) the Law Society submits that using the Respondent's methods of predicting the chance of being a respondent in a disciplinary action also produces the following results:

- any male lawyer: 1 in 111; any female lawyer: 1 in 168. But the Respondent does not claim that Law Society disciplinary proceedings are biased against men;
- any Asian man: 1 in 167; any Asian woman 1 in 71. But the Respondent does not say that the disciplinary process is not biased against Asian men;
- any South Asian man: 1 in 33; any South Asian woman: 1 in 258. But the Respondent does not say that South Asian women are not victims of systemic bias; and
- any non-racialized man: 1 in 75; any male lawyer: 1 in 111. But the Respondent does not claim that the Law Society's disciplinary process is biased against non-racialized men.

[252] The Law Society does agree that a section 15(1) inquiry could consider the other sources of information such as academic, sociological, public and jurisprudential sources to demonstrate present and historical challenges that racialized lawyers experience. However, the Law Society submits that that evidence does not eliminate the need for evidence directed to the discriminatory impact on the individual.

DECISION

[253] The issue raised by the Respondent is a serious one. All parties before this Tribunal are entitled to the protection of their *Charter* rights in an administrative context. All parties are entitled to the protection of the balancing test as set out by the Supreme Court of Canada in *Doré* and referred to again in *Loyola*.

[254] The statutory objective of the Law Society is the protection of the public. That duty is set out in section 3 of the *Act* as follows:

> **3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

[255] The statutory objective of protecting the public in the disciplinary process requires the Law Society to respond to complaints made, to investigate and issue citations where a lawyer might have committed professional misconduct, and to convene a hearing before a panel that has been selected and trained to conduct such hearings. The process is set out in Parts 4 and 5 of the *Act*.

[256] The Supreme Court decision in *Doré* requires this Panel to exercise its statutory discretion in accordance with *Charter* protections and to remain conscious of the fundamental importance of *Charter* values in the analysis.

[257] The court in *Doré* posed this question, at paras. 55 to 58:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 SCR 528, the

twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oake*s context [*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103]. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 SCR 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[258] In *Loyola*, the Supreme Court expanded on the use of the balancing exercise in *Doré* per Justice Abella:

> This Court's decision in *Doré* sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. *Doré* succeeded a line of conflicting jurisprudence which veered between cases like *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, and *Multani* that applied s. 1 (and a traditional *Oakes* analysis) to discretionary administrative decisions, and those, like *Lake*, which applied an administrative law approach. The result in *Doré* was to eschew a literal s. 1 approach in favour of a *robust* proportionality analysis consistent with administrative law principles.
>
> Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.
>
> …
>
> The *Doré* analysis is also a highly contextual exercise. As under the minimal impairment stage of the *Oakes* analysis, under *Doré* there may be more than one proportionate outcome that protects *Charter* values as fully as possible in light of the applicable statutory objectives and mandate: *RJR-MacDonald*, at para. 160.
>
> *Doré's* approach to reviewing administrative decisions that implicate the *Charter*, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular facts in their statutory decisions: para. 47; see also David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues After *Multani*" (2006), 21 *NJCL* 127, at p. 149; and Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?" (2010), 55 *McGill L.J.* 641. As Lorne Sossin and Mark Friedman have observed in their cogent article:

> While the Charter jurisprudence can shed light on the scope of Charter values, it remains for each tribunal to determine ... how to balance those values against its policy mandate. For example, while personal autonomy may be a broadly recognized Charter value, it will necessarily mean something different in the context of a privacy commission than in the context of a parole board. [p. 422].

[emphasis in original]

Loyola, at paras. 3, 4, 41 and 42

Judicial notice

[259] This Panel cannot take judicial notice of the evidence that the Respondent says proves she is part of a group that suffers systemic discrimination in the Law Society's disciplinary process. The evidence and inferences that the Respondent proposes are not "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy." The use of surnames alone to determine ethnicity is flawed. The statistics used are not precise. Evidence that could support such a serious allegation should be led in a hearing where it would be presented under oath and tested through cross-examination.

The Marked Departure Test v. the Public Harm Test

[260] This Panel does not accept that *Doré* creates a different test for lawyers who are members of a group suffering discrimination. The test for the Panel remains the Marked Departure Test. *Doré* simply requires the Panel to balance the relevant *Charter* value with the statutory objectives. The two tests are not mutually exclusive. The Panel specifically rejects the Respondent's submission that lawyers who are members of a group suffering discrimination should be treated differently than other lawyers. The public would not be adequately protected if certain lawyers were immune from discipline unless the Law Society could show "on clear and cogent evidence that harm to the public will result if the racialized lawyer is not disciplined." The public is entitled to the same level of protection regardless of the race of the lawyer involved.

Specific evidence of discrimination against a member of a group

[261] This Panel does not agree that membership in a group suffering discrimination represents an *ipso facto* infringement of section 15 equality rights. There must be

specific evidence of discrimination against the individual member per the decision in *Taypotat.*

[262] *Taypotat* was a case involving Chief Louis Taypotat, 76. He had been chief of the Kahkewistahaw First Nation for a total of more than 27 years. While he was chief, the Kahkewistahaw First Nation developed its own community Election Code that required candidates for Chief or Band Councillor to have at least a grade 12 education. Chief Taypotat tried to run for chief again in 2011, but his documents were rejected because he did not have grade 12. Chief Taypotat brought an application for judicial review of the *Kahkewistahaw Election Act* process arguing that the grade 12 educational requirement violated section 15(1) of the *Charter* because "educational attainment is analogous to race and age" for the purposes of section 15(1). The application was dismissed in Federal Court on the grounds that education was not an analogous ground for the purposes of section 15. On appeal, Chief Taypotat argued that being a residential school survivor without a grade 12 education constituted an analogous group for the purposes of section 15. The Federal Court of Appeal did not deal with this new argument but decided, on its own initiative, that an education requirement had a discriminatory impact on the basis of age and that it also discriminated on the basis of "residence on a reserve". In the Supreme Court of Canada, Chief Taypotat argued that the education requirement violates section 15(1) because it has a disproportionate effect on older community members who live on a reserve. His appeal failed because there was no evidence linking the requirement to a disparate impact on members of an enumerated or analogous group. At para. 21, Abella, J. wrote:

> To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect *on the claimant* based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, at para. 38; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 SCR 61, at para. 327.
>
> [emphasis added]

[263] The Panel notes that the *Taypotat* decision involved a *Charter* challenge to a law, the *Kahkewistahaw Election Act*, which would invite an *Oakes* test. However, we find that in the context of a *Charter* challenge in administrative law, there still must be evidence of an impact to the Respondent herself, and not just membership in a group that has experienced historical discrimination. The Law Society referred to

several decisions in which the court refused to assume that evidence of discrimination against a group generally meant that the rights of a member of that group had necessarily been infringed. In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, the Supreme Court of Canada observed, at para. 88, that:

> It cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground under the [Quebec] *Charter*. In practice, this would amount to reversing the burden of proof in discrimination matters. Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct.

Discrimination against the Respondent

[264] This Panel does not agree that the examples outlined by the Respondent represent discriminatory treatment or an infringement of the Respondent's section 15(1) *Charter* rights. This disciplinary hearing is an adversarial process in which the Law Society must prove professional misconduct on a balance of probabilities. The Respondent is represented by counsel, and she does not say that she has not had adequate time to prepare; the evidence was heard over a ten-month period; and submissions were made orally and in writing nearly four months after the evidence. The allegations against the Respondent are clearly set out in the citation and the Panel is only considering this citation based on the evidence led in this hearing. The parties were invited to apply to lead further evidence and no applications were made. The allegations in the citation began with a complaint from a former client of the Respondent. The Law Society was required to investigate such complaint.

[265] This Panel finds that the Respondent's *Charter* rights have not been engaged, infringed or denied.

CONCLUSION

[266] This Panel, therefore, finds that the Respondent's behaviour amounted to a marked departure from the standards the Law Society expects of lawyers with respect to all of the allegations set out in the amended citation, excepting only allegation 3(c), and that this behaviour amounted to professional misconduct.

[267] This Panel finds that the Law Society has not met the onus of showing with evidence that is clear, convincing and cogent, the facts necessary to support a finding of professional misconduct on a balance of probabilities with respect to allegation 3(c) of the amended citation.

ORDER TO PROTECT CONFIDENTIAL AND PRIVILEGED INFORMATION

[268] The Law Society seeks an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public. Recent amendments to the applicable rules have made the order unnecessary, as explained in *Law Society of BC v. Edwards*, 2020 LSBC 57 at paras. 118 to 121. Like the panel in *Edwards* and others that have followed its decision, we decline to make the order sought.