2023 LSBC 10
Hearing File No.: HE20210060
Decision Issued: March 10, 2023
Citation Issued: November 8, 2021

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

NICKOLAUS HAROLD MACDONALD WEISER

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	October 24 and 25, 2022
Written submissions:	November 14, 2022
Panel:	William R. Younie, KC, Chair Kris Gustavson, Public representative Georges Rivard, Bencher
Discipline Counsel:	Ilana Teicher
Appearing on his own behalf:	Nickolaus Harold MacDonald Weiser
Written reasons of the Panel by:	William R. Younie, KC

BACKGROUND

[1] The Respondent, Nickolaus Harold MacDonald Weiser, was called and admitted to the Law Society of British Columbia on May 10, 1984, and has practised as a sole practitioner since April 2010. At all times material to the Citation described below, the Respondent carried on his sole practice under the firm names of Webber Weiser McKinley and Kay ("WWMK") and Webber Weiser.

[2] This matter arises from a citation authorized by the Discipline Committee on October 28, 2021 and issued on November 8, 2021 (the "Citation").

[3] The Citation contains the following six allegations:

1. Between approximately January 2013 and September 2016, in relation to the estate of RD (the "RD Estate"), you acted in a conflict of interest when you jointly represented I Inc., a company in which you had a direct or indirect financial interest, and TD, the executor of the RD Estate, in one or more of the following matters, contrary to one or more of rules 2.1-3(b), 3.4-1, 3.4-2, 3.4-5, 3.4-26.1, 3.4-28, 3.4-29, and 3.4-34 of the *Code of Professional Conduct for British Columbia* and your fiduciary duties to your clients:

    (a) the preparation of an $8,000 loan from I Inc. to TD;

    (b) the preparation of a mortgage in favour of I Inc. and registered against the title to a property in which TD had an interest; and

    (c) a foreclosure proceeding.

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

2. In approximately September 2015, in relation to the estate of WB (the "WB Estate"), you acted in a conflict of interest when you jointly represented I Inc., a company in which you had a direct or indirect financial interest, and AB, the executor of the WB Estate, in respect of a $15,000 loan from I Inc. to AB, contrary to one or more of rules 2.1-3(b), 3.4-1, 3.4-2, 3.4-5, 3.4-26.1, 3.4-28, 3.4-29 and 3.4-34 of the *Code of Professional Conduct for British Columbia,* and your fiduciary duties to your clients.

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

3. In approximately September and October 2013, in relation to a refinancing transaction, you acted in a conflict of interest when you jointly represented the borrowers in the transaction, SR and CR, and the lender, I Inc., a company in which you had a direct or indirect financial interest, contrary to one or more of rules 2.1-3(b), 3.4-1, 3.4-2, 3.4-5, 3.4-26.1, 3.4-28, 3.4-29 and 3.4-34 of the *Code of Professional Conduct for British Columbia*, and your fiduciary duties to your clients.

   This conduct constitutes professional misconduct, contrary to section 38(4) of the L*egal Profession Act*.

4. In approximately September and October 2013, in relation to a refinancing transaction, you acted in a conflict of interest when you jointly represented the borrowers in the transaction, SR and CR, and the lender, S Holdings, contrary to one or more of rules 2.1-3(b), 3.4-1, 3.4-2, 3.4-5, 3.4-26.1, and 3.4-28 of the *Code of Professional Conduct for British Columbia*, and your fiduciary duties to your clients.

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

5. Between approximately August 2014 and June 2016, you borrowed some or all of $366,545 from your client, I Inc., contrary to rule 3.4-31 of the *Code of Professional Conduct for British Columbia*.

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

6. On or about January 10, 2020, in relation to a loan renewal for U Ltd., you failed to act honourably and with integrity when you purported to commit LM to be the personal guarantor for the loan renewal without the knowledge or consent of LM, contrary to one or both of rules 2.2-1 and 2.2-2 of the *Code of Professional Conduct for British Columbia*. In particular, you:

(a) affixed your signature above the printed name ‘LCAM’ on behalf of U Ltd.; and

(b) affixed your signature above the printed name ‘LCAM’ as personal guarantor.

This conduct constitutes professional misconduct or conduct unbecoming the profession, contrary to section 38(4) of the *Legal Profession Act*.

[4] Service of the Citation on the Respondent as required by Rules 4-19 and 10-1 of the Law Society Rules (the “Rules”) was effected on November 8, 2021. The Respondent also admits service of the Citation pursuant to the NTA as defined below in these reasons.

[5] For the following reasons, we find the Respondent’s conduct as proven with respect to each of allegations 1 to 6 in the Citation constitutes professional misconduct.

NOTICE TO ADMIT

[6] A notice to admit dated July 7, 2022 (the “NTA”) was served on the Respondent by the Law Society on July 7, 2022 by posting the NTA on the Respondent’s portal and notifying the Respondent by email. This service method is prescribed by the Rules. Rule 5.4-8 obliged the Respondent to serve any response to the NTA he intended to submit within 21 days of service. The Respondent delivered no response to the NTA within the time required, or at all.

[7] Accordingly, pursuant to Rule 5-4.8, the Respondent is deemed to admit, for the purposes of this hearing only, the truth of the facts and the authenticity of the documents contained in the NTA.

EVIDENCE

[8] Evidence tendered by the Law Society and admitted in this hearing consists of copies of the Citation, the Affidavit of Julie Erskine #1 affirmed October 21, 2022 and the NTA filed in this proceeding.

[9] During the hearing, the Respondent applied to the Panel, without prior notice, to file certain documentary evidence being copies of the following:

(a) an April 11, 2014 bank draft in the sum of $5,000 payable to GH;

(b) an April 11, 2014 land contract of purchase and sale, with addendum, showing the Respondent or assignee/nominee as buyer and GH as seller, and further including a right of assignment;

(c) an April 7, 2014 BC land title search for the property that is the subject matter of the said contract;

(d) a 2019 BC land title search in the name of U Ltd., a British Columbia company, as registered owner, and further showing a bank as first mortgagee and holder of an assignment of rents;

(e) a filed copy of the said mortgage and assignment of rents; and

(f) a July 28, 2014 bank offer of credit to U Ltd. stating, in part, that the additional loan security is to include a personal guarantee from the Respondent

(collectively the "Documents").

[10] Copies of the Documents were delivered by the Respondent to counsel for the Law Society one day prior to the commencement of this hearing. The Respondent submitted that he thought the Documents were in the possession of LM's wife, but that he found the Documents the day previous in his residence.

[11] The Documents originate from the Respondent's client files.

[12] The Respondent submitted that the Documents should be admitted because they are relevant to all six allegations in the Citation, but in particular, are relevant to allegations 5 and 6. The Respondent submitted that the Documents confirmed he was a signing authority of U Ltd. with respect to a certain land purchase transaction in 2014, and also that he had a long-standing financial relationship with two individuals being LM and LM's wife. The Respondent submitted that the 2014 land transaction documents establish that throughout various time periods, he had signing authority on behalf of U Ltd. and that the Documents would exonerate him.

[13] The Law Society submitted that the Documents are not relevant to any matters or issues before the Panel, that the Respondent's application sought to indirectly contradict the facts established by the NTA and that because the Respondent did not provide the Law Society copies of the Documents within the time stipulated by both the Rules and Practice Direction 9-5, the Panel should refuse to admit the Documents. The Law Society further submitted that to allow the admission of the Documents would be highly prejudicial as the Law Society had no pre-hearing

notice of the Respondent's intention to seek admission of the Documents, and the Law Society presented its case relying on the facts established by the NTA.

[14] The Panel ruled the Documents inadmissible for the following reasons:

(a) the Documents relate to a 2014 land transaction that has no legal or factual connection relating to allegations 1 to 4 in the Citation. The Documents identify a seller and an institutional mortgage lender that are in no way connected to any of the transactions giving rise to the Citation;

(b) the essence of allegation 5 in the Citation is the Respondent's improper borrowing of money from I Inc., a British Columbia company; and

(c) the essence of allegation 6 in the Citation is whether the Respondent purported to commit both U Ltd. as borrower and LM as personal guarantor by signing a loan extension agreement in 2019. Whether or not the Respondent was an authorized signatory of U Ltd. in 2014 is not relevant to the material time referenced in allegation 6, being on or about January 6, 2020. Further, the NTA establishes the Respondent did not have signing authority on behalf of U Ltd. in relation to the loan transaction being the subject matter of allegation 6.

[15] The Respondent further submitted that he wished to testify himself during the hearing.

[16] In seeking to testify, the Respondent submitted that he wanted to be sworn for evidence and refute the NTA. The Respondent wished to testify in respect of the Documents and put evidence before the Panel clearly not included in the NTA.

[17] The Law Society objected to the Respondent seeking to testify and submitted that:

(a) the NTA clearly states that if the Respondent did not serve a response to the Law Society in accordance with Rule 5-4.8 within 21 days, the Respondent is deemed to admit, for the purposes of this hearing, the truth of the facts and the authenticity of the documents contained in the NTA;

(b) the NTA was served on the Respondent on July 2, 2022, well before commencement of the hearing;

(c) the Respondent did not at any time deliver to the Law Society a list of witnesses the Respondent intended to call, as required by Practice Direction 9.5(1)(b);

(d) no application to withdraw any admissions was made by the Respondent at any time;

(e) the Law Society presented its case relying substantially on the NTA and it would be highly prejudicial to the Law Society's case if the Respondent was permitted to testify;

(f) the application is a collateral attack on the NTA and effectively an attempt to do an "end run" around the NTA;

(g) granting the Respondent's application to testify would be procedurally unfair and further undermine public confidence in the hearing process;

(h) the Law Society would be required to seek an adjournment of the hearing and if an adjournment was granted, the Law Society would consequently have to call several witnesses to give *viva voce* evidence; and

(i) a balancing of the interests in this matter requires that the Respondent's application to testify be denied.

[18] After hearing submissions, the Panel ruled the Respondent could not testify in the hearing, ruling that to grant the application would be contrary to public interest, would be prejudicial to the Law Society and would necessitate an adjournment application by the Law Society that, if granted, would result in delaying the completion of the hearing.

ISSUES

[19] The Panel must determine whether the Respondent's conduct as alleged in the Citation is proven and, if so, whether such conduct amounts to professional misconduct or, with respect to allegation 6 only, either professional misconduct or conduct unbecoming the profession.

FACTS

[20] The following facts are found by the Panel and are based on, and established by, the NTA. As earlier stated, these facts are deemed admitted by the Respondent pursuant to Rule 5-4.8.

Background

[21] The Respondent has been personal friends with LM and his wife (collectively the "Ms") and has had a business relationship with them since approximately 1985.

[22] In November 2009, the Respondent and the Ms incorporated I Inc., with the Ms as the sole directors and shareholders.

[23] The Respondent and the Ms each contributed funds to start I Inc.; however, as per the Respondent's wishes, his involvement in I Inc. was not formally documented.

[24] From the time of incorporation to all material times of the Citation, the Ms were the only shareholders, directors and officers of I Inc.

[25] From the time of incorporation to all material times of the Citation, the Respondent asserted a 50 per cent beneficial shareholder interest in I Inc.

[26] At all material times of the Citation, I Inc. was in the business of making "small consumer loans".

[27] At all material times of the Citation, I Inc. was a client of the Respondent.

[28] Between 2011 and 2016, the Respondent acted for I Inc. with respect to ten loans.

[29] At all material times of the Citation, SK was the Respondent's legal assistant.

[30] At all material times of the Citation, the Respondent received half of the profits and fees, including interest, charged by I Inc. on the loans.

[31] On January 5, 2021, the Respondent commenced an action against the Ms and I Inc. alleging that 50 per cent of the shares in I Inc. were subject to a constructive trust in his favour and seeking transfer of those shares, and shares in companies owned by I Inc., to him.

Allegations 1(a), (b) and (c)

TD Loan

[32] TD was executor of the RD Estate. She retained the Respondent to assist her in probating the RD Estate. The RD estate held a one-quarter interest in a piece of land in British Columbia (the "RD Lands").

[33] In January 2013, TD told the Respondent that the RD Estate did not have sufficient funds to pay probate fees and would like to borrow funds to pay the probate fees.

[34] In February 2013, the RD Estate's interest in the RD Lands was transmitted to TD in her capacity as executrix following an application submitted by the Respondent.

[35] Subsequently, the Respondent acted for I Inc. in relation to an $8,000 principal loan from I Inc. as lender to TD as borrower (the "TD Loan") for estate expenses including probate fees. The TD Loan was documented in a loan agreement and a promissory note, both dated February 12, 2022 (collectively the "TD Loan Documents").

[36] The TD Loan Documents were prepared by the Respondent and provided that the TD Loan would bear interest at ten per cent per annum and would be secured by a second mortgage against the RD Lands.

[37] On February 12, 2013, the Respondent prepared, and witnessed TD's signature on, both a form B mortgage from the RD Estate to I Inc. and a direction to pay, the latter of which authorized the funds from the TD Loan to be disbursed from the Respondent's trust account as follows:

Payee	**Purpose**	**Amount**
I Inc.	commitment fee	$1,500.00
I Inc.	interest adjustment	$ 30.68
TD	balance of loan proceeds	$1,619.32
I Inc.	transfer to RD Estate file	$4,000.00
WWMK	legal fees	$ 850.00

[38] The funds were in fact disbursed as follows:

Payee	**Purpose**	**Amount**
I Inc.	commitment fee	$1,500.00
I Inc.	prepaid interest	$ 824.09
TD	balance of loan proceeds	$1,619.32
I Inc.	transfer to RD Estate file	$3,206.59

WWMK	legal fees	$ 850.00

[39] The Respondent deposited the TD Loan proceeds into his trust account on February 14, 2013, and on February 18, 2013, he caused both the registration of the form B mortgage against the RD Lands and the disbursement of the TD Loan proceeds in accordance with the direction to pay.

[40] On April 3, 2013, a bank ("Bank A") commenced foreclosure proceedings against the RD Lands. The Respondent arranged for Graham Kay, a lawyer in the same firm as the Respondent, to prepare a response to the foreclosure proceedings on behalf of both the RD Estate and I Inc.

[41] Subsequent to commencement of the foreclosure proceedings by the Bank, the Respondent:

(a) wrote to I Inc. on several occasions for the purposes of providing information regarding the foreclosure and the ability of the RD Estate to pay out the Bank A mortgage;

(b) wrote to Mr. Kay on behalf of I Inc. on two occasions;

(c) wrote to counsel for Bank A on two occasions and confirmed the Respondent was the lawyer for TD in her capacity as executrix of the RD Estate;

(d) continued to act for both I Inc. and TD from November 2014 to February 2016 in negotiating the foreclosure proceedings; and

(e) caused a notice of change of lawyer confirming he had been appointed to act as the lawyer for both the RD Estate and I Inc. in the foreclosure matter.

Allegation 2

AB Loan

[42] AB was executor of the WB Estate. AB retained the Respondent in connection with probating the WB Estate. The WB Estate held a registered interest in a parcel of land in British Columbia (the "WB Lands").

[43] In October 2015, the WB Estate's interest in the WB Lands was transmitted to AB in his capacity as executor.

[44] Subsequently, the Respondent acted for I Inc. in relation to a $15,000 principal loan from I Inc. as lender to AB as borrower (the "AB Loan") for estate expenses including, but not limited to, probate fees. The AB Loan was evidenced in a loan letter and a promissory note, both in writing, dated September 15, 2015 (collectively the "AB Loan Documents").

[45] The AB Loan Documents were prepared by the Respondent and provided that the AB Loan would bear interest at ten per cent per annum and would be secured by a mortgage and an assignment of rents (collectively the "WB Security") against the WB Lands.

[46] The Respondent prepared the WB Security from the WB Estate to I Inc. and on September 15, 2015, he witnessed AB's signature on the WB Security and a direction to pay, the latter of which authorized disbursement of the AB Loan proceeds from the Respondent's trust account as follows:

Payee	**Purpose**	**Amount**
Webber Weiser	account payment (probate)	$5,795.45
Minister of Finance	tax deferment	$2,990.66
Webber Weiser	account payment (mortgage docs)	$1,500.00
I Inc.	commitment & administration fee	$2,000.00
I Inc.	prepaid interest	$1,500.00
AB	balance	$1,213.89

[47] On September 16, 2015, the Respondent deposited the AB Loan proceeds received from I Inc. into his trust account.

[48] The AB Loan proceeds were disbursed on September 23 and 28, 2015 in accordance with the direction to pay previously approved and signed by AB.

[49] On December 3, 2015, the Respondent caused the registration of the WB Security against the WB Lands.

Allegations 3 and 4

Background

[50] In 2011, the Respondent acted for SR and CR (collectively the "Rs") in their purchase of a property (the "Rs Property").

[51] In approximately September 2013, the Rs retained the Respondent to assist with refinancing the Rs Property. The Respondent opened file 61158-001 "[Rs]; Remortgage of Property" (the "Rs Refinancing Matter").

[52] The Respondent took instructions from, and reported to, the Rs, and took steps to refinance the Rs Property with a bank.

S Holdings loan to the Rs (allegation 4)

[53] In approximately September 2013, the Respondent also assisted the Rs in obtaining a second mortgage in favour of S Holdings. The Respondent opened file 61166-001 "S [Holdings] RE: Loan to [Rs]" (the "Rs-S Holdings Loan Matter").

[54] The Respondent's client trust ledgers indicate that S Holdings had been the Respondent's client since 2010.

[55] The Respondent prepared a loan letter dated September 19, 2013 (the "Rs Loan Agreement"), which indicates as follows:

(a) the lender was S Holdings;

(b) the borrower was the Rs;

(c) the purpose of the loan was to complete refinancing of the Rs Property;

(d) the loan amount was $107,800 (the "Rs Loan Funds");

(e) the interest rate was 12 per cent per annum;

(f) the commitment/administration fee was $4,200;

(g) the security was to be a second mortgage securing the loan against the Rs's interest in the Rs Property; and

(h) legal fees payable to the lender's solicitor were $1,500.

[56] The Respondent also prepared the following documents:

(a) Order to Pay indicating "Proceeds of second mortgage in favour of S [Holdings]" that was signed by the Rs on September 20, 2013; and

(b) Direction to Pay "RE: Second Mortgage in favour of S [Holdings]" that was signed by the Rs on September 20, 2013.

[57] In a letter dated September 20, 2013, the Respondent's legal assistant, SK, wrote to an insurance broker as follows, *inter alia*:

> Re: [Rs]
> [address], Kamloops BC
>
> We are solicitors acting on behalf of the above-named clients who are in the process of refinancing the above noted property and in that regard we require confirmation of insurance …

[58] In a different letter dated September 20, 2013, SK wrote to a bank as follows, *inter alia*:

> Re: BORROWER: [Rs]
> ACCOUNT: [number] (LOC)
> LTO REG NO.: [number]
> PROPERTY: [address], Kamloops, BC
>
> We are the solicitors for the Borrowers who have instructed us to payout the above-noted mortgage (LOC) in your favour.

[59] In a different letter dated September 20, 2013, the Respondent wrote to the Rs as follows, *inter alia*:

> Re: Lender: S [Holdings] …
> Civic: [address], Kamloops, BC
>
> We are the solicitors for the Lender and, as such, we cannot offer any legal advice to you with respect to this transaction. With this letter we enclose the following for your review and/or execution **in the presence of your lawyer** …
>
> [emphasis in original]

[60] In a letter dated September 23, 2013, SK wrote to another insurance broker as follows, *inter alia*:

> Re: [Rs]
> [address], Kamloops BC
>
> We are solicitors acting on behalf of the above-named clients who are in the process of refinancing the above noted property and in that regard we require confirmation of insurance …

[61] On September 26, 2013, the Respondent deposited certified cheque #0197 for $107,800 issued by S Holdings to his then law firm, WWMK, and credited the funds to the Rs-S Holdings Loan Matter.

[62] On September 26, 2013, the Respondent disbursed the Rs Loan Funds as follows:

Date	**Description**	**Amount**
September 26, 2013	transfer to Rs file 61158-001	$91,758.24
September 26, 2013	S Holdings	$ 4,200.00
September 26, 2013	S Holdings	$ 141.76
September 26, 2013	E Corp.	$10,200.00
September 26, 2013	retain pending WWMK account	$ 1,500.00

[63] On September 26, 2013, the Respondent then distributed the Rs Loan Funds on the Rs Refinancing Matter.

[64] The Respondent prepared a statement of account for the Rs dated September 26, 2013 “RE: 2nd Mortgage to [S Holdings]: [address] …” listing the Respondent’s fees and disbursements of $1,500 including interest.

[65] The Respondent prepared a statement of account dated September 26, 2013 “RE: Mortgage to [name] Bank: [address] …” listing the Respondent’s fees and disbursements of $1,200 including taxes.

[66] On September 26, 2013, the Respondent caused the registration of the bank’s interest on the Rs Property.

[67] On October 10, 2014, the Respondent caused the registration of S Holdings’s interest on the Rs Property.

I Inc. loan to the Rs (allegation 3)

[68] The Rs owed a $35,000 brokerage fee to E Corp. on the Rs Refinancing Matter.

[69] In a letter dated September 30, 2013, on behalf of the Rs, the Respondent enclosed a trust cheque in the amount of $29,037.55 toward the E Corp. invoice of $35,000, leaving a $5,962.45 shortage.

[70] In or before September 2013, the Respondent opened file 61174-001 "[I Inc.] loan to Rs" (the "Rs-I Inc. Loan Matter").

[71] In an email dated September 27, 2013, the Respondent wrote to E Corp. proposing that he "draft a promissory note from [Rs] in the sum of $5,962.45 payable at 0% interest with 12 equal payments …" and advising that he had "someone who [would] 'buy' the note for $4,000.00."

[72] In a reply email dated September 27, 2013, E Corp. wrote that they would accept the $4,000 offer to satisfy the debt.

[73] In a letter dated September 30, 2013, the Respondent wrote to the Rs with the subject *inter alia*, "RE: [E] Corp. Remaining Balance of Broker Fees", which requested the Rs sign the enclosed promissory note in favour of I Inc.

[74] On September 18, 2013, cheque 000001 was issued for $5,000 from GB (the "GB Funds") to "Nick Weiser".

[75] The Respondent arranged for $1,000 of the GB Funds to be issued as a general cheque to Nick Weiser and $4,000 of the GB Funds to be transferred in trust for the Rs-I Inc. Loan Matter.

[76] In a letter dated October 7, 2013, the Respondent wrote to the Rs with the subject line, *inter alia*, "RE: [E] Corp. Revised Promissory Note", which requested the Rs sign the enclosed revised promissory note in favour of I Inc.

[77] The Respondent prepared a promissory note dated October 17, 2013 (the "Rs Promissory Note"), which stated the following:

(a) the Rs promise to pay I Inc. $5,962.45;

(b) there would be no interest charged;

(c) the Rs would pay 12 equal payments to repay the loan; and

(d) the Rs signed on October 17, 2013.

[78] In a letter dated October 18, 2013, the Respondent wrote to the Rs and enclosed a copy of the Rs Promissory Note and the Rs's post-dated cheques.

[79] On October 21, 2013, the Respondent issued trust cheque #4938 for $4,000 to E Corp.

[80] On or about October 21, 2013, the Respondent sent a letter to I Inc., attention LM, with part of the subject line "Unsecured Loan – Promissory Note" and wrote that $4,000 had been received from I Inc. and paid to E Corp.

[81] The $4,000 paid from I Inc. to E Corp. was drawn from the GB Funds.

[82] The Respondent prepared an invoice to I Inc. dated October 24, 2013, "RE: [I INC.] RE: Loan to [Rs] … Promissory Note: $5,962.45" on I Inc. file number 61174-001, with no charge.

[83] The Respondent provided his own funds to I Inc. for the purchase of the Rs Promissory Note.

Conflict of interest

[84] Regarding allegations 1, 2 and 3, the Respondent did not:

(a) advise his clients that he had a financial interest in I Inc.;

(b) advise his clients that I Inc. was also his client;

(c) disclose and explain to TD or I Inc. either the nature of the conflicting interest or how or why a potential conflict might develop between the Respondent, I Inc. and TD regarding the loan from I Inc. to the RD Estate;

(d) disclose and explain to AB or I Inc. either the nature of the conflicting interest or how or why a potential conflict might develop between the Respondent, I Inc. and AB regarding the loan from I Inc. to the WB Estate; or

(e) disclose and explain to the Rs or I Inc. either the nature of the conflicting interest or how or why a potential conflict might develop between the Respondent, I Inc. and the Rs regarding the loan from I Inc. to the Rs, recommend or require the Rs or I Inc. to obtain independent legal advice in relation to the Rs Refinancing Matter or the Rs-I Inc. Loan Matter;

(f) recommend or require his clients to obtain independent legal advice; or

(g) obtain his clients' consent to the Respondent acting for both parties.

[85] The Respondent acted in a conflict of interest by performing legal services for TD and I Inc., AB and I Inc., and the Rs and I Inc. when he had a direct or indirect financial interest in the subject matter of the legal services.

[86] Regarding allegations 1 to 4, at no time, and particularly at the commencement of the retainers, did the Respondent, as required by the *Code*:

(a) explain to each client the principle of undivided loyalty;

(b) advise each client that no information received from one of them as part of joint representation could be treated as confidential as between them;

(c) receive from all clients fully informed consent related to the course of action to be followed in the event the Respondent received from one client, in his separate representation of that client, information relevant to the joint representation; or

(d) secure the informed consent of each client (with independent legal advice, if necessary) as to the course of action that would be followed if a conflict arose between the parties.

[87] Regarding allegation 4, the Respondent did not:

(a) advise S Holdings that the Rs were his clients;

(b) disclose and explain to the Rs or S Holdings either the nature of the conflicting interest or how or why a potential conflict might develop between the Respondent, S Holdings and the Rs regarding the loan from S Holdings to the Rs;

(c) recommend or require the Rs or S Holdings to obtain independent legal advice in relation to the Rs Refinancing Matter or the Rs-S Holdings Loan Matter; or

(d) obtain the Rs's or S Holdings's consent to the Respondent acting for both parties.

Allegation 5

[88] From August 8, 2014 to June 8, 2016, the Respondent received a total of $366,545 from I Inc. The Respondent caused these payments to be made by either cheques or bank drafts drawn on I Inc.'s account.

[89] The Respondent takes the position that the $366,545 he received from I Inc. were non-repayable loans.

[90] The following table truly and accurately summarizes the eight instances the Respondent received funds from I Inc. between August 2014 and June 2016:

Date	**Amount**
August 8, 2014	$ 9,900
August 13, 2014	$100,000
August 25, 2014	$ 24,265
December 10, 2015	$ 7,380
December 11, 2015	$ 30,000
February 25, 2016	$ 65,000
June 6, 2016	$ 65,000
June 8, 2016	$ 65,000

[91] The Respondent prepared and signed, as maker, the following promissory notes (the "Notes") documenting six of the I Inc. loans:

(a) August 8, 2014 for $9,900 in favour of I Inc.;

(b) August 13, 2014 for $100,000 in favour of I Inc.;

(c) August 25, 2014 for $24,265 in favour of I Inc.;

(d) December 10, 2015 for $7,380 in favour of I Inc.;

(e) December 11, 2015 for $30,000 in favour of I Inc.; and

(f) February 25, 2016 for $65,000 in favour of I Inc.

[92] Each of the Notes provided that the Respondent pay interest at a rate stipulated, and each were payable on demand.

[93] The Respondent did not prepare a promissory note for the I Inc. loan of $65,000 on June 6, 2016 or the I Inc. loan of $65,000 on June 8, 2016.

Allegation 6

[94] U Ltd. is a British Columbia company that was incorporated on May 14, 2014.

[95] The NTA establishes that at all material times to the Citation:

(a) the Respondent was a director of U Ltd.;

(b) the Respondent was not a shareholder of U Ltd.; however, he was a shareholder of I Inc., which was a shareholder of U Ltd.;

(c) the Respondent did not have signing authority for U Ltd.;

(d) LM was not a director of U Ltd.;

(e) LM did not have signing authority for U Ltd.;

(f) U Ltd. was the Respondent's client; and

(g) U Ltd. owned property in Kamloops, BC (the "U Ltd. Lands").

[96] In May 2018, a loan agreement was entered into between U Ltd. and a bank ("Bank B") in relation to the U Ltd. Lands (the "Original Loan").

[97] The Original Loan was due in 2019. Bank B prepared a loan renewal agreement dated December 27, 2019 (the "Loan Renewal Agreement").

[98] The Loan Renewal Agreement includes two signature spaces (the "Signature Spaces").

[99] One of the Signature Spaces provided for a signature on behalf of LM for U Ltd. and the other of the Signature Spaces provided for a signature for LM as personal guarantor of the Loan Renewal Agreement.

[100] On January 10, 2020, the Respondent signed the Signature Spaces on the Loan Renewal Agreement in the presence of Bank B manager AT.

[101] When the Respondent signed the Loan Renewal Agreement on January 10, 2020, he knew or ought to have known that LM did not want to remain as guarantor for the Loan Renewal Agreement.

[102] The Respondent did not have LM's permission to sign the Loan Renewal Agreement on his behalf as guarantor.

[103] The Respondent told LM and his wife that he signed the Loan Renewal Agreement to extend the loan but did not tell them that he had also signed to extend the personal guarantee.

[104] In June 2020, Bank B called in the loan to U Ltd. on the basis that it had become aware that LM had not signed the renewal of his personal guarantee.

[105] The Respondent signed the Loan Renewal Agreement even though he did not have signing authority for U Ltd.

[106] The Respondent knew or ought to have known that signing the Loan Renewal Agreement on the Signature Spaces above LM's name could result in LM being committed as the personal guarantor.

[107] When the Respondent signed the Loan Renewal Agreement, he purported to commit LM to be the personal guarantor.

WRITTEN SUBMISSIONS

[108] At the conclusion of the second day of this hearing, being October 25, 2022, the Law Society and the Respondent agreed closing submissions would be in writing and the parties were so directed by this Panel. The Law Society delivered its submissions on October 24, 2022. The Panel ordered the Respondent deliver written submissions by November 14, 2022 (the "Filing Date"), being the date put forward by the Respondent. The Respondent did not file written submissions by the Filing Date.

[109] On November 18, 2022, a memorandum ("Memorandum #1") was delivered to counsel for the Law Society and to the Respondent. In Memorandum #1, the Panel set out its requirements of the Respondent for applying to late-file his written submissions, and that failure to comply with those requirements would result in the Panel determining the matter and giving its reasons without written submissions on behalf of the Respondent.

[110] The Respondent did not apply to late-file written submissions. On November 25, 2022 (after Memorandum #1 was delivered to the parties on November 18, 2022), the Respondent forwarded his written submissions via email without, we emphasize, any concurrent application to late-file as required by Memorandum #1. The Respondent stated in his further November 28, 2022 email that he had written down the incorrect filing date.

[111] When the Respondent failed to file his written submissions by the Filing Date, the Panel issued Memorandum #1. The requirements of the Respondent as stated in Memorandum #1 were clear and understandable. The Respondent did not adhere to those requirements.

[112] The Panel determined that it is in the public interest that this hearing proceed in a timely and efficient manner.

[113] The Respondent did not comply with the initial filing date, did not make any application to late-file as required by the Panel pursuant to Memorandum #1, and provided no reason why the application procedure of Memorandum #1 was not complied with. That procedure was a fair process established by this Panel to permit the Respondent to make application to late-file his written submissions for consideration by this Panel.

[114] Accordingly, this Panel ordered that in accordance with Memorandum #1, the Panel would render its decision on Facts and Determination in this matter without considering the Respondent's written submissions, and the Panel has not considered the Respondent's written submissions. This decision was communicated to the parties in a memorandum issued by the Panel on December 12, 2022.

LEGAL FRAMEWORK

Onus and standard of proof

[115] The Law Society bears the onus of proving, on a balance of probabilities, that the facts alleged constitute professional misconduct or, with respect to allegation 6, professional misconduct or conduct unbecoming the profession: *Foo v. Law Society of British Columbia*, 2017 BCCA 151, at para. 63.

Test for professional misconduct

[116] There is no statutory definition of professional misconduct. However, it is well settled by prior decisions that professional misconduct is conduct that is a marked departure from that conduct reasonably expected of lawyers.

[117] In *Law Society of BC v. Seeger*, 2022 LSBC 08, the definition of professional misconduct is identified and stated as follows:

> [15] Professional misconduct is a marked departure from that conduct the Law Society expects of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171. The test is objective. The panel must 'consider the appropriate standard of conduct expected of a lawyer, and then determine if the lawyer falls markedly below that standard': *Law Society of BC v. Edwards*, 2020 LSBC 21, at paras. 44 to 46.

Test for conduct unbecoming the profession

[118] Section 1 of the *Act* defines conduct unbecoming the profession as follows:

> **"conduct unbecoming the profession"** includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board,
>
> (a) to be contrary to the best interest of the public or of the legal profession, or
>
> (b) to harm the standing of the legal profession.

[119] Whereas professional misconduct arises out of a lawyer's professional activities, the authorities confirm that conduct unbecoming the profession is normally concerned with a lawyer's conduct in their private life: *Law Society of BC v. Bauder*, 2012 LSBC 13, at para 9.

[120] The need to regulate lawyers with respect to their private conduct is explained in *Law Society of BC v. Riddell*, 2021 LSBC 32:

> [21] The Law Society, as a self-governing profession that regulates in the public interest, has an obligation, where appropriate, to discipline for misconduct in a lawyer's life that falls outside of the professional practice of law. The rationale for regulating the

private lives of lawyers was stated succinctly in *Law Society of BC v. Berge*, 2007 LSBC 7 (CanLII), 2007 LSBC 07 at para. 38:

> The Benchers find that lawyers in their private lives must live up to a high standard of conduct. A lawyer does not get to leave his or her status as a lawyer at the office door when he or she leaves at the end of the day. The imposition of this high standard of social responsibility, with the consequent intrusion into the lawyer's private life, is the price that lawyers pay for the privilege of membership in a self-governing profession.

ANALYSIS

Allegations 1 to 4

[121] In assessing the Respondent's conduct, the Law Society submits the following rules of the *Code* are applicable:

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

(ii) the matters are unrelated;

(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

3.4-5 Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

3.4-26.1 A lawyer must not perform any legal services if there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

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.

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.

> **2.1-3(b)** A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interests between the lawyer and a client or between clients.

[122] The Law Society referred the Panel to the following decisions, which the Panel has considered:

Law Society of BC v. Hart, 2020 LSBC 51;

Law Society of BC v. Sprague, 2002 LSBC 26; and

Law Society of BC v. Kornfeld, 2020 LSBC 05.

[123] The Law Society submits that in determining lawyers' professional obligations, the *Code* must be consulted in its entirety and lawyers should be guided by the *Code* in their conduct.

[124] The Law Society submits that the *Code* rules are clear: a lawyer, who is a fiduciary to any client, cannot represent a client whose legal interests are directly adverse to or in conflict with another client; a lawyer cannot act for a client if the lawyer has a direct or indirect financial interest in the client matter, unless the *Code* expressly permits same and the lawyer has first completed all requirements the *Code* imposes on the lawyer in the particular client matter.

[125] The Law Society submits that the Respondent breached the conflict of interest protections and principles established by the *Code* and case law, and in particular:

(a) the Respondent acted for both the borrowers and the lender on the same transactions. There is no indication that the clients consented to the conflict;

(b) I Inc. lent money to the Respondent's clients even though the Respondent asserts an ownership/beneficial interest in I Inc.; and

(c) the Respondent did not advise his clients of the fact that he asserts a beneficial interest in I Inc. There is no indication that the clients provided consent to the conflict, or that they were advised to or obtained independent legal advice.

[126] Regarding allegations 1 to 4, the NTA establishes the Respondent acted in a conflict of interest in each matter by performing legal services to lender clients

while simultaneously representing each borrower in the described transactions including, on three occasions, acting as counsel to I Inc., a company in which the Respondent alleges a financial interest.

[127] Rule 3.4-1 prohibits a lawyer from acting or continuing to act where there is a conflict of interest, except as permitted under the *Code*. Rule 3.4-2 further prohibits a lawyer from representing a client in a matter where there is a conflict of interest unless there is an express or implied consent from all clients.

[128] Lawyers must adhere to the rules set forth in the *Code.* The Respondent's actions in representing multiple parties in the circumstances of allegations 1 to 4 when in conflicts of interest were a marked departure from that conduct reasonably expected of lawyers and, accordingly, the Panel finds the Respondent's conduct constitutes professional misconduct.

Allegation 5

[129] The Law Society submits rule 3.4-31 of the *Code* must be considered in assessing the Respondent's conduct under this allegation. That rule states:

> **3.4-31** A lawyer must not borrow money from a client unless
>
> (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
>
> (b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

[130] Nothing in the express wording of the Notes suggests those six transactions were anything other than loans.

[131] The NTA confirms the Respondent's position is not that the transactions were not loans, just that they were not repayable loans. This assertion suggests the loans were, or were to be, forgiven. There is no evidence before the Panel indicating the loans were not repayable by the Respondent.

[132] The loans were made to the Respondent by his client, I Inc., a company in the business of making small consumer loans. There is no evidence I Inc. was an entity described in rule 3.4-31(a) of the *Code*. Even if I Inc. was a related person under

the *Income Tax Act* (Canada), there is no evidence I Inc. received independent legal advice or representation as required by rule 3.4-31(b) of the *Code*.

[133] The Respondent's breach of rule 3.4-31 of the *Code* is a marked departure from that conduct expected of lawyers and constitutes professional misconduct.

Allegation 6

[134] In submitting the Respondent's conduct constitutes professional misconduct under this allegation, the Law Society identifies rules 2.1-1 and 2.2-2 of the *Code*, as follows, as applicable:

> **2.2-1** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> **2.2-2** A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

[135] The Law Society submits a proper finding is one of professional misconduct and, in the alternative, conduct unbecoming a lawyer.

[136] The Law Society submits that the Respondent's signing of the Loan Renewal Agreement purporting to bind U Ltd. and LM demonstrates a flagrant failure of the Respondent's professional duty of integrity imposed by rule 2.2-1 of the *Code* and brings the profession into disrepute. It submits the Respondent's conduct was dishonest and further that the Respondent could have benefited personally from the loan extension because he asserts an ownership interest in I Inc., a shareholder of U Ltd.

[137] The Law Society referred the Panel to the following decisions;

> *Law Society of BC v. Djorgee*, 2008 LSBC 27;
>
> *Law Society of BC v. Hart*, 2007 LSBC 50; and
>
> *Law Society of Ontario v. Manilla*, 2021 ONLSTH 33.

[138] *Djorgee, Hart* and *Manilla* are all cases in which the subject lawyer was clearly counsel in court proceedings relating to their clients. That is a different fact scenario than before the Panel.

[139] In *Manilla,* the lawyer affixed his client's name to five documents without the client's knowledge or consent and subsequently admitted the alleged conduct was a breach of his duty of integrity and constituted profession misconduct.

[140] The question for determination is did the Respondent's signing of the Loan Renewal Agreement occur in his professional or personal capacity.

[141] Examples of behaviour amounting to professional misconduct, as opposed to conduct unbecoming a lawyer, are listed in *Bauder.* There, the panel references *Law Society of Prince Edward Island v. Lawyer 94-01*, [1994] LSDD No. 11, which cites the following acts found to be professional misconduct from the list stated in *Lawyers and Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie, 1993, Carswell, Toronto, at pp. 24 to 26*:*

> (iii) creating false documents;
>
> (v) destroying or concealing documents in furtherance of an unlawful scheme;
>
> (vi) assisting clients in an attempt to defraud creditors;
>
> (x) attempting to mislead clients, other lawyers, the law society, or others;
>
> (xi) attempting to defraud a legal aid plan;
>
> (xii) attempting to obtain financial benefits to which a lawyer is not entitled;
>
> (xiv) suborning perjury or otherwise fabricating evidence.

[142] The Respondent's position is that he made it clear to the Bank manager that at the time the Respondent signed the Loan Renewal Agreement, he was signing only on behalf of U Ltd. However, this submission is inconsistent with the deemed admission by the Respondent in the NTA that he did not have signing authority on behalf of U Ltd.

[143] We concur with the Law Society's submission that the Respondent's conduct in signing the Loan Renewal Agreement without the prior authority or consent of either U Ltd. or LM constitutes professional misconduct.

[144] At all material times to allegation 6, the Respondent was U Ltd.'s lawyer. Any person, including a client, is entitled to expect that a lawyer will not purport to bind

them to any legal obligation unless the lawyer has the prior requisite permission and authority to do so.

[145] Any suggestion that the Respondent was executing the Loan Renewal Agreement on behalf of the company because he was a director or authorized signatory under any other authority is not accepted given the Respondent had no signing authority for U Ltd. There is no evidence the Respondent had any authority to execute the Loan Renewal Agreement to purportedly bind LM as guarantor.

[146] The Respondent's execution of the Loan Renewal Agreement was a breach of his obligation to a client and his duty of integrity, and such conduct diminishes the public's confidence in the profession.

CONCLUSION

[147] The Panel finds with respect to each allegation that the Respondent's conduct was a marked departure from that expected of lawyers and amounts to professional misconduct, contrary to section 38(4) of the *Act.*