2023 LSBC 49
Hearing File No.: HE20200030
Decision Issued: November 20, 2023
Citation Issued: May 22, 2020

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 date:	April 11 to 14, 2023
Panel:	Catherine Chow, Chair Paul Ruffell, Public Representative Tony Wilson, KC, Bencher
Discipline Counsel:	J. Kenneth McEwan, KC Saheli Sodhi
Counsel for the Respondent	David E. Gruber Christina Joynt
Written reasons of the Panel by:	Catherine Chow

INTRODUCTION AND OVERVIEW

[1] The citation in this matter was authorized by the Discipline Committee on April 29, 2020 and issued on May 22, 2020 (the "Citation").

[2] Pursuant to the Citation, the allegations against the Respondent, Hong Guo, between approximately September 2012 and February 2017, in the course of representing her client ZZ (the "Client") in an immigration investment scheme, are the following:

1. On or about September 29, 2012, in the course of acting for your client ZZ in relation to a business immigration application, you misappropriated or improperly handled approximately $13,049 received as a retainer from your client by failing to deposit the trust funds into a pooled trust account, contrary to Rule 3-51 (1) [now Rule 3-58(1)] of the Law Society Rules.

This conduct constitutes professional misconduct or a breach of the Act or rules pursuant to s. 38(4) of the *Legal Profession Act.*

2. On or about January 22 and 24, 2013, in the course of acting for your client ZZ in relation to a business immigration application ("Application"), you improperly handled approximately $257,562 received from your client as investment funds for the Application, by doing one or more of the following:

   (a) failing to deposit the trust funds into a pooled trust account, contrary to Rule 3-51(1) [now Rule 3-58(1)] of the Law Society Rules;

   (b) depositing the trust funds into a bank account in China and using a different source of funds in Canada to make payment on behalf of your client;

   (c) failing to record the receipt of funds as required by Rules 3-59 and 3-63 [now Rules 3-67 and 3-72] of the Law Society Rules;

   (d) failing to account to the client in writing for all funds received on his behalf contrary to Rule 3-48(1) [now Rule 3-54(1)] of the Law Society Rules.

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

3. On or about January 22 and 24, 2013, in the course of acting for your client ZZ in relation to a business immigration application, you misappropriated or

improperly handled approximately $30,000 of the trust funds identified in Allegation 2 by failing to deposit the trust funds into a pooled trust account and by paying them to yourself or Guo Law Corporation for fees without first preparing and delivering a bill or without keeping a file copy of the bill, or when you knew or ought to have known that those fees were not properly charged to the client, contrary to one or more of Rules 3-51(1), 3-56(1), 3-57(2) and 3-62 [now Rules 3-58(1), 3-64, 3-65(2) and 3-71] of the Law Society Rules.

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

4. On or about December 17, 2013, in the course of acting for your client ZZ in relation to a business immigration application ("Application"), you improperly handled approximately $120,527 received from your client as investment funds for the Application, by doing one or more of the following:

    (a) failing to deposit the trust funds into a pooled trust account, contrary to Rule 3-51(1) [now Rule 3-58(1)] of the Law Society Rules;

    (b) depositing the trust funds into a bank account in China and using a different source of funds in Canada to make payment on behalf of your client;

    (c) failing to record the receipt of funds as required by Rules 3-59 and 3-63 [now Rules 3-67 and 3-72] of the Law Society Rules; and

    (d) failing to account to the client in writing for all funds received on his behalf, contrary to Rule 3-48(1) [now Rule 3-54(1)] of the Law Society Rules.

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

5. Between approximately August 2012 and February 2017, in the course of acting for your client ZZ in relation to a business immigration application ("Application"), you failed to provide the quality of service required of a competent lawyer or failed to act with integrity, or both, or contrary to one or more of rules 2.1-1, 2.2-1, 3.1-2, 3.2-1, and 3.2-7 of the *Code of Professional Conduct for British Columbia* and Chapter 1, Chapter 2 Rule 1, Chapter 3 Rule 2, Chapter 3 Rules 3 and 5, and Chapter 4 Rule 6 of the *Professional Conduct Handbook*. In particular, you did one or more of the following:

(a) prepared or caused to be prepared agreements between your client and other entities ("Transaction Agreements") that:

(i) contained multiple errors, including incorrectly naming the entities who were parties to the Transaction Agreements;

(ii) were not signed by all parties to the Transaction Agreements; and

(iii) could not be reconciled with the business plan that you submitted on behalf of your client to the British Columbia Provincial Nominee Program ("BC PNP");

(b) made representations to the BC PNP which you knew or ought to have known were untrue, including a representation that your client's role in the business requires "his presence and active involvement with the Business Management"; and

(c) failed to properly advise your client about his obligations pursuant to the Transaction Agreements and the Application.

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

ISSUES

[3] The issues before the Panel are:

(i) whether the Respondent committed the acts alleged in allegation 1, 2, 3 and 4;

(ii) whether those actions amount to professional misconduct or a breach of the *Legal Profession Act*, SBC 1998, c. 9 (the "*Act*") or the Law Society Rules (the "Rules"), pursuant to s. 38(4) of the *Act*,

(iii) whether the Respondent committed the acts alleged in allegation 5, and

(iv) whether those actions amount to professional misconduct, pursuant to s. 38(4) of the *Act*.

THE APPLICABLE LAW

Onus and standard of proof

[4] The onus of proof in Law Society hearings is well-known and consistently applied. The standard was articulated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, which held that the onus of proof is on the Law Society to prove the allegations of misconduct on a balance of probabilities, whereby the evidence must be sufficiently clear, convincing and cogent.

Test for professional misconduct

[5] The term "professional misconduct" is not defined in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* ("*BC Code*"), however the test set out in *Law Society of BC v. Martin,* 2005 LSBC 16, has been adopted by numerous hearing panels. In *Martin*, at para. 171, the panel defined professional misconduct to mean "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members."

[6] The *Martin* "marked departure" test is an objective test, as widely accepted by subsequent hearing panels, and affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35.

[7] As set out in *Law Society of BC v. Harding*, 2014 LSBC 52, and adopted by the panel in *Law Society of BC v. Hittrich*, 2019 LSBC 24, the presence of good faith intentions, *bona fides*, will not excuse conduct that is professional misconduct under the marked departure test. Similarly, bad faith intentions, *mala fides*, are not required to prove professional misconduct. The panel in *Harding* concluded on the issue of a respondent's culpability, at para 79:

> 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 part of the

consideration of the circumstances as a whole, may be part of an assessment that the impugned conduct did not cross permissible bounds.

Test for Misappropriation and Improper Handling

[8] The term misappropriation is also not defined in the *Act*, Rules, or *BC Code*., however there are a number of decisions of LSBC Tribunal hearing panels that have considered the meaning of misappropriation.

[9] As applied in *Law Society of BC v. Gellert*, 2013 LSBC 22, misappropriation is where a lawyer takes client's trust funds for a purpose unauthorized by the client, whether knowingly or unknowingly or through negligence or incompetence so gross as to provide a sufficient level of wrongdoing.

[10] It has been described broadly as any unauthorized use of client's funds, as cited in *Law Society of BC v. Gounden*, 2021 LSBC 7. An array of conduct constitutes misappropriation, such as taking client funds by repeated negligence and careless inattention to trust accounting obligations, or willful blindness about whether a client has been billed for disbursements that were not incurred and therefore the lawyer was not entitled to withdraw monies held in trust.

[11] In *Gellert*, while there is a mental element of fault, misappropriation of trust funds does not need to rise to the level of dishonesty. As held in *Law Society of BC v. Sahota*, 2016 LSBC 29, personal gain or benefit to the lawyer is not required, nor is the lawyer's subjective intention in using funds relevant.

[12] We heed the hearing panel's comments in *Law Society of Upper Canada v. Adams*, 2017 ONLSTH 102, at para. 58, that there should not be a too restrictive definition of misappropriation in light of the public interest in the administration of justice.

[13] Hearing panels have typically considered misappropriation and mishandling of trust funds together, without a separate test. The Law Society Rules, including Rule 3-58-1, Rule 3-67, Rule 3-72 and Rule 3-54(1), refer to the "improper handling" of funds.

[14] While the Citation distinguishes between "improper handling" of trust funds in allegation 1 and 3, and "misappropriation" in allegation 2 and 4, there is no clear legal test to differentiate between the two concepts.

[15] With reference to the legal test for misappropriation and the guidance of the Rules for "improper handling", we observe the panel's finding in *Law Society of BC v.*

Lyons, 2008 LSBC 9, where a breach of the Law Society Rules itself did not constitute professional misconduct, at para. 32:

> A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or 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.

[16] The Panel considers the panels' findings in *Gounden*, *Gellert* and *Sahota*, to be helpful in determining whether the Respondent misappropriated or improperly handled funds, with reference to the respective allegations in the Citation. A *prima facie* breach of the Rules in and of itself does not constitute professional misconduct. The "marked departure" test in *Martin* (and as considered in *Harding)* should be applied to determine whether the facts, as made out, amount to professional misconduct.

Test for Standards of Conduct – Quality of Service and Integrity

Quality of Service

[17] Chapter 3, Rule 3 of the *Professional Conduct Handbook* requires a lawyer to serve each client in a conscientious, diligent and efficient manner, to provide a quality of service to her client that would be expected of a competent lawyer in a similar situation. For example, one might ask, has the lawyer kept the client reasonably informed? Did the lawyer do the work in a prompt manner so that its value to the client is not diminished? Are the documents she has prepared or other legal tasks done accurately? Has she disclosed all relevant information to the client and candidly advised them?

[18] The *BC Code* provides as follows:

3.1-1 In this section

"competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

> 3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.
>
> 3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

[19] In part 15 of the commentary to rule 3.1-2, the standard is not perfection: errors or omissions may be actionable but not necessarily constitute a failure to maintain the standard of professional competence. A competent lawyer may still occasionally fail to provide an adequate quality of service: rule 3.2-1 Commentary [2].

[20] As set out in part 2 and 3 of the commentary to rule 3.2-1, the lawyer's duty is "to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation." For example, what is "effective" when considering whether a lawyer has communicated effectively with the client depends on the nature of the retainer, needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[21] It would similarly be expected that lawyers provide quality of work by giving reasonable attention to the preparation and review of documentation to avoid delay and unnecessary costs to correct errors or omissions, and providing the client with complete and accurate information, relevant to the client to make fully informed decisions and provide instructions: rule 3.2-1 Commentary [5].

[22] In *Law Society of BC v Perrick*, 2014 LSBC 39, the panel observed that the cumulative effect of multiple occurrences of concerns over quality of service may constitute a marked departure even when each of the individual occurrences were not sufficient to meet the marked departure test. The panel noted that a marked departure on a question of quality of service is characterized by gross culpable neglect of a lawyer's duties. The panel in *Perrick* further suggested that quality of service issues could be divided into two general categories: the common-sense category where issues can be determined by average common sense and the professional category where evidence from other lawyers practicing in the area may be required.

[23] In both categories, there must be evidence to establish the allegations having regard to the circumstances of the individual case. This is not to suggest that a client's expectations or a client's cultural norms would create a lower standard or excuse or lessen a lawyer's obligation to meet her duty to provide quality of service under the *BC Code*.

Integrity

[24] A lawyer's duty to act honestly and with integrity is not curtailed by client instructions to the contrary. A lawyer is bound by Chapter 2, Rule 1 of the *Handbook*, which provides:

> A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer's professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

[25] We uphold Chapter 2, Rule 1 of the *Handbook* because it is integral to satisfying objective 3 of the *Act*, "to uphold and protect the public interest in the administration of justice", where lawyers must act honestly and with integrity in their dealings with the public. A client's instructions or a client's business cultural norms cannot excuse or lessen that obligation on the lawyer.

[26] As reflected in the commentary to rule 2.2-1 in the *BC Code*, "[i]ntegrity is the fundamental quality of any person who seeks to practise as a member of the legal profession." The public confidence must be maintained: lawyers are held accountable for their professional obligations as practicing lawyers in British Columbia regardless of whether their local or foreign clients expect or know to expect it.

Credibility of Witnesses

[27] Counsel for the Law Society referred the Panel to the Court of Appeal decision in *Faryna v. Chorny*, 1951 CanLII 252 (BCCA), which sets out the principles for the assessment of witnesses' credibility at p. 357:

> … In short, 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 …

[28] Citing *Faryna*, Justice Dillon expanded on the assessment of credibility in *Bradshaw v. Stenner,* 2010 BCSC 1398, and set out the importance of contemporaneous documents, at para. 187:

> It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a "stand alone" basis, followed by an analysis of

> whether the witnesses' story in inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB QB), 12 Alta LR (3d) 298 at para 13 (Alta QB)). I have found this approach useful.
>
> *Most helpful in this case has been the documents created at the time of events, particularly the statement of adjustments. These provide the most accurate reflection of what occurred, rather than memories that have aged with the passage of time, hardened through this litigation, or been reconstructed*. It should also be remembered that the parties used documentation to accomplish undisclosed purposes here, particularly in the Peachland contract. *The inability to produce relevant documentation to support one's case is also a relevant factor that negatively affects credibility*. As well, I have relied upon the evidence of the two lawyers involved, Dhindsa and Hordal, who were independent, professional witnesses who gave their evidence in a fair and objective manner and whose evidence forms a reasonable base for analysis.
>
> [emphasis added]

[29] Counsel for the Respondent urges this Panel to prefer oral evidence that is consistent with the contemporaneous written record, over oral evidence less consistent with the contemporaneous written record.

[30] Indeed, counsel for the Respondent urges this panel to go further to consider contemporaneous documents themselves to be the "weightiest evidence". Citing a decision from the United Kingdom, *Gestmin SGPC SA v. Credit Suisse (UK) Ltd.*, [2013] EWHC 3560 (Comm) (15 November 2013) SRBOA, counsel for the Respondent argues that witness memories are fallible, and factual findings ought to be based on inferences drawn from documentary evidence and known or probably known facts.

[31] We find that the guidance of *Gestmin* is contained in the test articulated in *Bradshaw*, which cites *Faryna*. The credibility of a witness' recollections is judged by 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; accordingly, this has inherent regard to the contemporaneous written record. We do not necessarily agree with counsel for the Respondent that the contemporaneous written record is the "weightiest", but do agree that it may add credibility to the recollection, or may be the only evidence in the absence of a specific recollection.

Notice to Admit and Response

[32] The Respondent was served with a notice to admit (the "NTA"). The Respondent provided a response to the NTA admitting to the authenticity of the documents attached to the NTA and to the facts set out in all but 10 of the 162 paragraphs in the NTA.

[33] The only factual matters that remained contested at the Hearing, for the purposes of the Law Society's case, were those set out in paragraphs 49, 59, 85, 95, 97, 99, 129, 130, 133, and 134 of the NTA which were not admitted by the Respondent in the response to NTA.

[34] A summary of the admitted facts and our findings in relation to the contested facts are discussed below.

The Respondent's Background

[35] The Respondent was called and admitted as a member of the Law Society of Saskatchewan on September 8, 2000, and the Law Society of British Columbia on May 4, 2009.

[36] Since April 2010, the Respondent has practised as a sole practitioner primarily in the areas of real estate, corporate, and administrative law including immigration. From 2012 until 2017, the Respondent also operated a satellite office in Beijing, China.

[37] The Respondent's legal practice was operated under the name, Guo Law Corporation ("GLC").

FACTUAL OVERVIEW

[38] In our reasons below, the Panel summarizes the facts that are relevant to our findings.

[39] In 2012, the Client retained the Respondent for assistance in immigrating to Canada. The Respondent recommended that the Client apply to the BC PNP- a provincially-coordinated immigration program with the federal government to grant permanent residency to approved applicants. As the basis for qualification under the BC PNP, the Respondent assisted the Client with an investment arrangement in a diamond-cutting business in Canada (the "NH Project").

[40] The NH Project involved an equity purchase and loan into a diamond-cutting business, owned by AB. There were a number of corporate and personal entities involved with the NH Project. Those entities and persons have been made anonymous in these reasons with initials or acronyms. The entities are as follows:

(a) NH Ltd;

(b) NH Inc.;

(c) a B.C. numbered company ("095 Ltd."); and

(d) NH Diamonds, a sole proprietorship registered by AB.

[41] NH Ltd. was incorporated on November 4, 2002. In the corporate search record, AB is listed as a director, officer and shareholder, and his wife CD, is also listed as a director and officer of NH Ltd. This entity was ultimately dissolved in 2016, having its last annual filing in 2011, and a prior dissolution notice in 2009.

[42] NH Inc. was never incorporated as a corporation; it appears that the use of the name "NH Inc." in transaction documents was an error, in place of the intended entity "NH Ltd.", and later, 095 Ltd. This error between Inc. and Ltd. later gained importance in the investment transaction as a matter of due diligence, and to the intentions of AB and CD, when 095 Ltd. became the recipient of the investment funds.

[43] 095 Ltd. was incorporated in October 2012 by AB, who was a director, officer and shareholder.

[44] In the summer of 2012 during the Client's visit to Canada, the Respondent introduced the Client to AB and his wife, CD (at that time a practising lawyer at a downtown Vancouver firm) at the NH Project office in Vancouver, where the Client became acquainted with AB and CD and first observed the diamond-cutting process.

[45] On September 28, 2012, the Client signed an agreement entitled, "Canada Immigration Agency Agreement" ("Client Agreement") with the Respondent and

her law corporation, GLC. The Client Agreement was between Party A, "Guo Law Corporation Hong Guo (a lawyer licensed in Canada)", and Party B, the Client, respecting certain services to be provided by GLC and the Respondent to the Client. These services covered two main aspects: first, an immigration application that included, "advice regarding laws", and "collecting, reviewing and submitting" an immigration application and second, a commercial transaction that included "helping [the Client] set up the enterprise" required for the investor immigration application. The minimum investment amount for the Client was $400,000.

[46] In November 2012, the Respondent prepared the business proposal on behalf of the Client and submitted the BC PNP application. The basis of the qualifying business proposal was the Client's $400,000 investment in the NH Project.

[47] On January 2, 2013, AB and the Client entered into a shareholder's agreement ("SHA") in respect of shares of NH Inc. In the recitals of the SHA, the Client would acquire a 50 per cent interest in NH Inc. for $50,000, while the main body of the SHA refers to a transfer of 33 per cent interest. The SHA was the only document describing the Client's share ownership as there was no separate share purchase agreement or share certificate issued.

[48] Also on January 2, 2013, the Client entered into a loan agreement ("Loan" or "Loan Agreement") and a general security agreement in respect of a loan from the Client, as lender, to NH Inc. as debtor, in the principal amount of $450,000.

[49] On January 10, 2013, CD signed a personal guarantee (the "Personal Guarantee") which she drafted, in favour of the Client in consideration of the Loan.

[50] On January 14, 2013, the SHA was amended, and another executed version is on file. At the request of the Client, this version contained a new provision purporting to protect the Client as a "non-active shareholder" from losses and debts as the Client did not have actual involvement with the company at that time.

[51] On January 22 to 24, 2013, by way of three instalment transactions, the Client transferred a total of RMB $1,602,500 (CAD $257,562) into the Respondent's bank account at a bank located in Beijing, China ("the Beijing Account").

[52] The Respondent later used funds in the Beijing Account for the Respondent's family for daily expenses and personal investments in China.

[53] On February 1, 2013, the Respondent caused the transfer of $220,000 to 095 Ltd., which funds came from the Respondent's TD Canada Trust account ("TD General Account").

[54] Six months later on August 7, 2013, AB emailed the Respondent, requesting the balance payable under the Loan, noting that the loan amount of $450,000 was intended to be advanced all at once and not in tranches because only $220,000 was received. On August 14, 2013, AB again made the request for $230,000 but this time on behalf of 095 Ltd., which is not a party to the Loan or SHA.

[55] On November 3, 2013, a general security agreement respecting 095 Ltd. in favour of the Client, was signed by the Client and NH Inc.

[56] Anxious to purchase inventory for the upcoming holiday season, AB and CD met the Respondent at her office on November 5, 2013 to see about the remaining funds. Following that meeting, CD emailed the Respondent noting that there remained $280,000 not yet paid under the SHA and Loan. Again on November 26, 2013, CD emailed the Respondent and stressed the urgent need for payment of the balance of the funds under the Loan otherwise they would miss the opportunity for sales during the holiday season.

[57] From December 2 to 13, 2013, AB corresponded with the Respondent, her then paralegal TE (who is now a lawyer), and GLC about the balance of the funds. The Respondent indicated that she would reach out to the Client to get instructions. During these exchanges, AB said that he would contact the BC PNP office himself, indicating that he wanted to cancel the BC PNP application.

[58] On December 12, 2013, the Respondent's China-based GLC staff member, TX, emailed the Client requesting he remit RMB $690,000, (the equivalent of CAD $120,000) to the Beijing Account, which the Client did on December 16, 2013. The next day, TX confirmed by email to the Client the receipt of the funds into the Beijing Account.

[59] On December 17, 2013, the Respondent transferred $120,000 to 095 Ltd. by way of certified cheque from the TD General Account. As a result, approximately $160,000 remained unpaid for the Client's intended investment.

[60] From April 25 to May 14, 2014, TE, the Respondent, AB and CD exchanged various correspondence during which:

(a) TE requested documents showing the Client's ownership of 50 per cent of the shares of 095 Ltd.

(b) CD requested copies of the BC PNP application and executed copies of agreements.

(c) AB requested the balance of the funds ($160,000) owing under the Loan and SHA.

[61] On June 18, 2014, a general security agreement was registered under the PPSA, naming NH Inc., as the debtor.

[62] On August 26, 2014, AB registered the name "NH Diamonds" as a sole proprietorship owned by 095 Ltd.

[63] Some eight months later on April 7, 2015, AB again emailed GLC to request the outstanding balance under the Loan, and on April 8, 2015, asked GLC for contact information for the Client.

[64] Curious about the use of the Client's funds ($340,000 to date) in the NH Project, the Respondent sent a GLC employee to the NH Project office to obtain financial records on April 8, 2015. The next day, the Respondent emailed AB asking the grounds upon which he thought the Client owed him money.

[65] Tensions rose between AB and the Respondent, and the Respondent with her GLC staff, centered around the entitlement and the advance of the remaining balance under the Loan and SHA. On April 10 to 11, 2015, the Respondent obtained instructions from the Client to not pay the outstanding balance under the Loan and SHA until the Client received a response to his BC PNP application.

[66] On January 27, 2017 (some four years after the BC PNP application was first submitted in November 2012), the BC PNP Advisor contacted the Respondent to provide an opportunity to address concerns regarding what appeared to be the Client's passive investment or immigration-linked investment scheme, which would disqualify him under the BC PNP. Namely, that the application indicated the Client would have a territorial exclusivity in China not Canada, that he would not be present in BC for day-to-day operations, and that he had no directly related experience. The business proposal appeared simply as a capital-raising investment, which was a prohibited objective.

[67] Despite the fact that the Respondent wrote back on February 10, 2017 stating that the Client would be present and actively involved, the BC PNP was rejected on February 15, 2017 on the basis that the Client was a passive investor, and participating in a prohibited immigration-linked investment scheme. The BC PNP Advisor noted that AB was already involved in a similar plan in another concurrently submitted BC PNP application for another investor, raising suspicion as to the legitimacy and authenticity of the subject business proposal with the Client.

[68] About a year later on January 25, 2018, the Client filed a civil claim against the Respondent (the "Civil Claim") because he suspected the Respondent pocketed the funds he had lost in the NH Project investment and the failed BC PNP application. The Respondent settled this Civil Claim in October 2021.

LEGAL ANALYSIS OF THE ALLEGATIONS

Allegation 1

[69] The Citation states:

> On or about September 29, 2012, in the course of acting for your client ZZ in relation to a business immigration application, you misappropriated or improperly handled approximately $13,049 received as a retainer from your client by failing to deposit the trust funds into a pooled trust account, contrary to Rule 3-51 (1) [now Rule 3-58(1)] of the Law Society Rules.
>
> This conduct constitutes professional misconduct or a breach of the Act or rules pursuant to s. 38(4) of the *Legal Profession Act.*

[70] The Respondent admits to receiving approximately $13,049 from her Client, ZZ, on September 29, 2012, and those funds were not deposited into a pool trust account. The funds were deposited by ZZ directly into the Beijing Account, which was not a trust account.

[71] The first step is to determine whether the Client Agreement between ZZ, the Respondent and her law corporation GLC, constituted a retainer agreement for legal services or, as argued by the Respondent's counsel, for "immigration consulting" not legal services. Thereby, such funds would not be subject to the requirement for deposit into a trust account.

[72] We turn our examination to the intention of the parties, and the subject services under the Client Agreement. ZZ's testimony is that he retained the Respondent, as a lawyer licensed to practice in Canada to help him immigrate to Canada and to handle his investment in a Canadian company as part of his immigration. The Respondent's testimony is that the Client Agreement intended to cover her services to prepare and submit a BC PNP application, and the associated services including developing a business plan. In the Respondent's argument, the Client Agreement is an immigration consulting services agreement, not an agreement for legal services.

[73] We find that the Client Agreement is inherently a retainer agreement for legal services because of the witness testimony that described the hiring of "lawyer Guo"

to do certain services which are legal services. The inclusion of the business plan as part of the services does not change the nature of the Client Agreement as a legal services retainer agreement.

[74] The services enumerated within the Client Agreement itself further supports its characterization as a retainer agreement: "advice regarding laws" for the immigration application. It further provided that the Respondent would set up the enterprise for ZZ's investment of a minimum of $400,000.

[75] The Respondent and "Guo Law Corporation" are clearly shown at the top of every page of the seven pages of the Client Agreement. There is no declaration within the agreement to dispel a reasonable person's assumption that the client is hiring a lawyer for legal services. The Client Agreement did not state that the Respondent was being hired in her personal capacity as an immigration consultant and not as a lawyer which her title and letterhead references.

[76] Having found the Client Agreement to be a retainer agreement, counsel for the Respondent argues that the funds amounting to $13,049 were not "*used"* by the Respondent because they were in payment of disbursements to the third-party drafter of the business plan and to the BC PNP office for the BC PNP application fee. Without "*use*", it is argued that there is no misappropriation. It is further submitted that at most such "*use*" would be a mishandling of the funds and does not constitute professional misconduct.

[77] We apply the reasoning in *Gounden*, and this Panel finds that an array of conduct will constitute misappropriation, such as taking client funds by repeated negligence and careless intention to trust accounting obligations, or willful blindness about whether a client has been billed for disbursements that were not incurred. In these instances, the lawyer was not entitled to withdraw monies held in trust, and this constitutes misappropriation.

[78] We also considered the meaning of "misappropriation" as follows, at para. 54, 55, 57 and 59 of *Gounden*:

> [54] "Misappropriation" is not defined in the *Act*, the Rules or the *BC Code*. Rather, it is a concept that has developed through decisions of Law Society hearing panels.
>
> [55] The concept of "misappropriation" was described by the panel in *Law Society of BC v. Ahuja,* 2019 LSBC 31 (reversed on other grounds 2020 LSBC 31), at paras. 83 to 85 and 108, as follows:

Counsel reminded us that "misappropriation" has been defined broadly as any unauthorized use of clients' funds. The Law Society directed us to *Law Society of BC v. Sahota,* 2016 LSBC 29, where the panel set out at paras. 61 to 63 an overview of misappropriation:

> … Any unauthorized use qualifies. It does not need to amount to stealing, as long as there is an unauthorized temporary use for the lawyer's own purpose. Personal gain or benefit to the lawyer is not required.
>
> Further, the panel in *Law Society of BC v. Harder,* 2005 LSBC 48, provided at para. 56 the following helpful language to the quest for clarity on this issue:
>
> > A useful further clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers* 114 NJ 209 @ 221 [SC 1989] where the Court stated:
> >
> > > Misappropriation is "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." …
> > >
> > > The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.
>
> Thus, all that is required is for the lawyer to take the money entrusted to him or her knowing that it is the client's money and that the taking is not authorized.

As to the mental element required to find misappropriation, counsel for the Law Society directed us to *Law Society of BC v. Gellert*, 2013 LSBC 22, where the panel stated at para. 71, in part:

> Misappropriation … occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a

> sufficient element of wrongdoing. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law.

Counsel for the Law Society argued that the range of misconduct that has been described as misappropriation includes:

> (a) taking client funds and returning them in short order or doing so under severe personal financial pressures: see *Gellert* at para. 72;
>
> (b) taking client funds by repeated negligence and careless inattention to trust accounting obligations: see *Sahota*; and
>
> (c) wilful blindness about whether "clients had been billed for disbursements that were not incurred and that [the lawyer] was therefore not entitled to withdraw monies held in trust for them to pay those bills …": see *Law Society of BC v. Sas,* 2015 LSBC 19 at para. 226.

…

We recognize that a finding of misappropriation does not require a mental element that rises to the level of dishonesty as that term is used in criminal law: see *Gellert* at para. 71; and *Harder* at para. 56. As the panel in *Gellert* put it at para. 73:

> The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. … Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out (*Law Society of BC v. Ali,* 2007 LSBC 18, para. 104, 106).

…

[57] Misappropriation is not limited to the taking of client trust funds. The definition of misappropriation is the unauthorized taking of another's property or money and converting it to one's own use: *Law Society of BC v. Hudson,* 2014

> LSBC 2 (CanLII), 2014 LSBC 02 at para. 19, citing *Black's Law Dictionary*, 8th Edition.
>
> …
>
> [59] In summary, misappropriation occurs when a lawyer takes funds for an unauthorized purpose, whether knowingly or through sufficiently culpable negligence or incompetence.

[79] In this case, the Respondent testified that she prepared and provided a proper invoice to ZZ for the $13,049 transfer. However, ZZ testified that he did not receive such an invoice, there is no file or email documentation of the invoice being prepared, provided or referred to.

[80] The Respondent provided an invoice in Chinese dated September 20, 2012 for a service fee of $13,000 (for work including drafting the business plan, reviewing and translating ZZ's documents, and corresponding with immigration officials). This contradicts the metadata on documents provided to the hearing panel by TE, that indicate the business plan was not created until September 28, 2012 and last modified on November 20, 2012. While the Respondent claims the business plan was completed in July 2012 in advance of the September 20, 2012 invoice and in advance of the September 29, 2012 Client Agreement, the metadata implies a later completion date.

[81] For the second disbursement, the BC PNP application fee of $3,000 was not incurred until November 5, 2012, when the application was submitted. The Respondent's invoice of September 20, 2012 again pre-dates the actual use of the funds. There are further accounting inconsistencies with the English version of an invoice (prepared by the Respondent's Richmond, BC office), which suggests only $6,000 was paid as a fee for the business plan preparation.

[82] We find that the funds were deposited into her personal Beijing Account, and that the Respondent had not yet incurred or paid those third-party disbursements or billed the client for such disbursements when she received those funds. Such conduct, at a minimum, amounts to willful blindness which according to *Gouden* constitutes misappropriation.

[83] We find that the Respondent's conduct was also an improper handling of trust funds contrary to Rule 3-51 (1) [now Rule 3-58(1)] of the Law Society Rules.

[84] Applying the hearing panel's decision in *Lyons*, a *prima facie* breach of Rules does not in and of itself constitute professional misconduct.

[85] Contrary to the argument made by counsel for the Respondent, we find that the absence of *mala fides* in the Respondent's conduct is not germane to whether the breach of the Rule is professional misconduct.

[86] We must apply the "marked departure" test referred to in the cases of *Martin* and *Harding* to determine whether the breach is a mere inattention to the administrative side of the practice or conduct is a marked departure, that constitutes professional misconduct.

[87] The Respondent's conduct in accepting funds into her Beijing Account without having incurred disbursements, without having provided an invoice, and providing an invoice for disbursements that were not incurred at the time of the invoice, amount to professional misconduct. The Respondent accepted the funds which were intended to pay for disbursements and the Respondent's fees for her services. Then there is a discrepancy between the timing of disbursements, and the production of Chinese and English invoices by her office which do not correlate. This is not mere "inadvertence", "not grave", or "inattention to the administrative side of practice". We find it is a pattern of willful disregard for the sanctity of a client's trust in placing funds with a lawyer. Together with the clear breach of the Rules, this conduct in our view constitutes professional misconduct.

Allegation 2

[88] Allegation 2 of the Citation states:

> On or about January 22 and 24, 2013, in the course of acting for your client ZZ in relation to a business immigration application ("Application"), you improperly handled approximately $257,562 received from your client as investment funds for the Application, by doing one or more of the following:
>
> (a) failing to deposit the trust funds into a pooled trust account, contrary to Rule 3-51(1) [now Rule 3-58(1)] of the Law Society Rules;
>
> (b) depositing the trust funds into a bank account in China and using a different source of funds in Canada to make payment on behalf of your client;
>
> (c) failing to record the receipt of funds as required by Rules 3-59 and 3-63 [now Rules 3-67 and 3-72] of the Law Society Rules; and
>
> (d) failing to account to the client in writing for all funds received on his behalf contrary to Rule 3-48(1) [now Rule 3-54(1)] of the Law Society Rules.

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

[89] The Respondent admits to receiving $257,562 from the Client for the NH Project investment on January 22 and 24, 2013. The funds were deposited into the Beijing Account, which was not a trust account. The Respondent further admits that she used funds from a different source in Canada to make payments to the NH Project on behalf of the Client.

[90] Moreover, the Respondent admits and acknowledges that she now knows not to use her bank accounts "this way", and that she admits that there "should have been a step" by transferring funds from her personal account to her trust account as soon as practicable, before making payments. Coupled with the Respondent's acknowledgements, we find that allegations 2(a) and (b) are established in fact.

[91] With respect to allegation 2(c), the Respondent testified that she did record receipt of the funds, and that those records were kept by her Beijing office, although those records have been lost. Apart from the Respondent's testimony, there is no evidence it was recorded in accordance with Rules 3-59 and 3-63 [now Rules 3-67 and 3-72]. The Rules also require the Respondent to maintain and keep accounting records, and the Respondent lost custody and control of those records, if they were indeed recorded. We find that allegation 2(c) is established.

[92] We do not find that the Respondent failed to account to the client in writing for all funds received on his behalf. There are a series of emails from the Respondent's Beijing staff to the Client that acknowledge the specific receipt of RMB funds into the Beijing account, which emails were sent to the Client's email addresses. Accordingly, we do not find the facts underlying allegation 2(d) to be established.

[93] Counsel for the Respondent argues similarly to the Respondent's submissions with respect to allegation 1 of the Citation, that:

(a) first, the absence of *mala fides* characterizes the conduct as a simple mistake;

(b) second, the Client was not harmed;

(c) third, the conduct is a record keeping error; and

(d) finally, these *prima facie* breaches of the Rules are not professional misconduct.

[94] We do not agree with the Respondent's counsel's submission that because the Client did not expect or understand his funds were to be deposited into a trust account, that it would either excuse or lessen the Respondent's conduct in having not deposited the funds as soon as practicable into her trust account. The obligations placed upon a lawyer practicing in British Columbia are the Rules, not the mindset or expectation of a lay person resident in a foreign country.

[95] Counsel also argues that a breach of 2(b) as alleged in the Citation, is not a specific breach of the Rules. Deposits made to a non-trust account, and using a non-trust account to make payments on behalf of a client is not a breach of the Rules

[96] We find the conduct in allegations 2(a), (b) and (c) established in fact, and taken together, in our view, are a breach of the Act or rules, and in all of the circumstances do amount to professional misconduct when we apply the marked departure test in *Martin*.

Allegation 3

[97] Allegation 3 of the Citation states:

> On or about January 22 and 24, 2013, in the course of acting for your client ZZ in relation to a business immigration application, you misappropriated or improperly handled approximately $30,000 of the trust funds identified in Allegation 2 by failing to deposit the trust funds into a pooled trust account and by paying them to yourself or Guo Law Corporation for fees without first preparing and delivering a bill or without keeping a file copy of the bill, or when you knew or ought to have known that those fees were not properly charged to the client, contrary to one or more of Rules 3-51(1), 3-56(1), 3-57(2) and 3-62 [now Rules 3-58(1), 3-64(1), 3-65(2) and 3-71] of the Law Society Rules.
>
> This conduct constitutes professional misconduct or a breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

[98] The facts established in allegation 2 include the approximately $30,000 of the $257,562 in funds which are the subject of Allegation 3. In this regard, we find the factual basis that the Respondent failed to deposit the trust funds of $30,000 into a pool trust account established. The examination turns next to whether the Respondent paid herself or Guo Law Corporation for fees without first preparing and delivering a bill or without keeping a file copy of the bill, when the fees were not properly charged to the client.

[99] The Respondent argues that the payment of $30,000 was made pursuant to the Client Agreement which was not a retainer agreement. We have found the retainer agreement to be a retainer agreement for legal services, in which case the Respondent concedes that the funds were misappropriated and improperly handled, but that the conduct does not constitute professional misconduct.

[100] Even with the Respondent's concession, this Panel must consider whether the Respondent's conduct in the misappropriation or improper handling of amounts paid to her Beijing account is professional misconduct. Counsel for the Respondent argues again that the handling was not a marked departure for reasons stated in *Lyons*.

[101] The Respondent has since that time taken various trust accounting courses, and recognizes that it is a mistake to take the $30,000 without first preparing a bill or delivering a copy of the bill to the client.

[102] In our view, this is not a simple mistake. The conduct shows a lack of knowledge of or blatant disregard for the Respondent's professional obligations, and a lack of respect for the client's right to proper invoicing and information about the use of his funds. This type of behaviour and its gravity erodes the public's confidence in the legal profession, and we find it amounts to a marked departure from the standard expected of lawyers and rises to the level of professional misconduct.

Allegation 4

[103] Allegation 4 of the Citation states:

> On or about December 17, 2013, in the course of acting for your client ZZ in relation to a business immigration application ("Application"), you improperly handled approximately $120,527 received from your client as investment funds for the Application, by doing one or more of the following:
>
> (a) failing to deposit the trust funds into a pooled trust account, contrary to Rule 3-51(1) [now Rule 3-58(1)] of the Law Society Rules;
>
> (b) depositing the trust funds into a bank account in China and using a different source of funds in Canada to make payment on behalf of your client;
>
> (c) failing to record the receipt of funds as required by Rules 3-59 and 3-63 [now Rules 3-67 and 3-72] of the Law Society Rules; and
>
> (d) failing to account to the client in writing for all funds received on his behalf contrary to Rule 3-48(1) [now Rule 3-54(1)] of the Law Society Rules.

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

[104] The events surrounding the $120,527 transfer were tense. In November and early December 2013, AB and CD were looking to purchase rough-cut diamonds from Belgium to meet the holiday sales season – during which a majority of a jeweler's annual sales occur.

[105] At that time, through a series of emails and a face-to-face meeting at the Respondent's office, AB and CD pressured the Respondent to obtain from her client the balance of the $280,000 not yet paid by ZZ under the SHA and Loan to NH Ltd. During these exchanges, AB said that he would contact the BC PNP office himself, indicating that he wanted to cancel the BC PNP application.

[106] Since late summer and through the fall of 2013, the Respondent reviewed the SHA and Loan Agreement to provide her client with advice on the legal basis of AB and CD's 'demand for funds. The Respondent consulted with her Client, ZZ who ultimately deposited the $127,527 into the Respondent's Beijing Account on December 16, 2013. The next day, Guo transferred $120,000 to 095 Ltd. by way of certified cheque from the TD General Account.

[107] It is established that on these facts the Respondent failed to deposit the $120,527 in trust funds into a pooled trust account. Corroborating with witness testimony, there is a documentary trail showing that the Respondent made payment on behalf of ZZ using a different source of funds in Canada. It is also established that the Respondent did not make any accounting record of the receipt of funds. In this regard, allegations 4(a), (b) and (c) are established.

[108] With regards to allegation 4(d), we find that the Respondent's staff in China did account to the client in writing for the $120,527 in funds received as evidenced in emails to ZZ. This part of the allegation in the citation has not been established.

[109] We find the conduct in allegations 4(a), (b) and (c) established in fact, when taken together are a breach of the Act or rules, and do amount to professional misconduct when we apply the marked departure test in *Martin*. We do not agree with counsel for the Respondent that the conduct being not grave, absence of *mala fides*, the shortness of the conduct, and that the client benefited from such conduct, renders the conduct acceptable, or not amounting to professional misconduct.

[110] We find that the funds were "improperly handled" because the Respondent did not make the necessary inquiries for the handling of the funds deposited into her Beijing account, whether the funds were applied for disbursements incurred or to

be incurred, and whether a proper invoice was produced prior to the use of the funds. The Respondent herself admits that the funds should have been deposited into a trust account before being remitted to NH Diamonds.

[111] We ask ourselves: Does the Respondent's improper handling, even if characterized as an administrative mistake breaching the Rules, amount to professional misconduct?

[112] When we look at the totality of surrounding circumstances, we find the Respondent's conduct to be a marked departure. The Respondent's careless use of the Beijing Account to receive trust funds from her client is serious misconduct. The integrity and public confidence of a lawyer's trust is at stake. Lawyers are entrusted to receive, hold and act as a gatekeeper of trust funds. The Beijing Account was not a trust account and it was also located in foreign country outside of jurisdictional reach and purview and supervision of the Respondent herself.

Allegation 5

[113] Allegation 5 of the Citation states:

> Between approximately August 2012 and February 2017, in the course of acting for your client ZZ in relation to a business immigration application ("Application"), you failed to provide the quality of service required of a competent lawyer or failed to act with integrity, or both, or contrary to one or more rules 2.1-1, 2.2-1, 3.1-2, 3.2-1, and 3.2-7 of the *Code of Professional Conduct for British Columbia* and Chapter 1, Chapter 2 Rule 1, Chapter 3 Rule 2, Chapter 3 Rules 3 and 5, and Chapter 4 Rule 6 of the *Professional Conduct Handbook*. In particular, you did one or more of the following:
>
> (a) prepared or caused to be prepared agreements between your client and other entities ("Transaction Agreements") that:
>
> (i) contained multiple errors, including incorrectly naming the entities who were parties to the Transaction Agreements;
>
> (ii) were not signed by all parties to the Transaction Agreements; and
>
> (iii) could not be reconciled with the business plan that you submitted on behalf of your client to the British Columbia Provincial Nominee Program ("BC PNP");
>
> (b) made representations to the BC PNP which you knew or ought to have known were untrue, including a representation that your client's role in the business

requires "his presence and active involvement with the Business Management"; and

(c) failed to properly advise your client about his obligations pursuant to the Transaction Agreements and the Application.

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

[114] The issue to be considered here is whether the totality of the facts and circumstances constitute professional misconduct. This of course is viewed in the context of whether the established conduct is mere incompetent performance or negligence, or framed more accurately, whether the conduct is a marked departure that constitutes professional misconduct.

[115] We refer to part 5 of the commentary to rule 3.2-1: the standard is the lawyer's duty to quality of work by giving reasonable attention to the preparation and review of documentation to avoid delay and unnecessary costs to correct errors or omissions, and providing the client with complete and accurate information, relevant to the client. As held in *Perrick*, the cumulative effect of occurrences of concerns over quality of service may constitute a marked departure, thereby constituting professional misconduct rather than a mere mistake.

[116] Under allegation 5, the first alleged conduct involves errors in the named parties, execution and misstatements surrounding the impugned Transaction Agreements and the business plan/BC PNP application (Application) (together, the "Transaction Documents") which are:

(a) SHA;

(b) Loan Agreement;

(c) security agreements;

(d) Personal Guarantee; and

(e) BC PNP application.

[117] We note that certain customary documents for the commercial transaction for the NH Project were not drafted, such as a share purchase agreement or subscription agreement, and a share certificate. The absence of which suggests that the transaction(s) being the loan and share purchase, were viewed by the parties as perfunctory. Both the loan and the share purchase did not receive customary and

adequate care and attention, nor proper due diligence and documentation as expected of such transactions.

[118] When we examine the Transaction Documents in detail, the following errors occur:

(a) in relation to the SHA,

(i) the recital references NH Inc. when it should be NH Ltd.;

(ii) the recital references "X" which should have been the Client's name;

(iii) there is confusion as to whether the Client would acquire 50 per cent as stated in the recitals or 33 per cent as stated in s. 12.1 in the body of the agreement of the shares from AB;

(iv) the recitals reference a "Share Transfer Agreement" that was not drafted;

(v) date of agreement suggests that the Client owned 50 per cent of the Class A voting shares but it does not specify the transfer date or effective date of ownership and whether the ownership is contingent upon the receipt of $50,000; and

(vi) no share certificate was issued;

(b) in relation to the Loan Agreement,

(i) the borrower is identified as NH Inc. when it should be NH Ltd.;

(ii) it does not state the intention that the loan advance is contingent upon the BC PNP approval, or that demand of repayment is contingent;

(iii) numerous copies of the Loan Agreement and signature pages were circulated, creating confusion as the intended or final version;

(iv) later versions of the Loan Agreement identify the numbered company 095 Ltd. as the Borrower, instead of NH Inc, or NH Ltd.; and

(v) the Loan is made to a different entity than stated in the SHA and different than the entity identified in the BC PNP;

(c) in relation to the security agreements and Personal Guarantee,

(i) the borrower is identified as NH Inc. when it should be NH Ltd.;

(ii) one version of the Loan Agreement is with 095 LTD., not with NH Ltd.; and

(iii) there are at least two versions of the general security agreement which identify 095 Ltd., and NH Ltd. or Inc., being unclear as to the borrower and indebtedness referenced;

(d) in relation to the BC PNP application,

(i) the Applicant's fluency in English does not accord with the declared fluency on the federal immigration application;

(ii) it was stated that the Client would maintain day-to-day involvement with the management and operation of the NH Project, but then also the Client wished for section 4.6 to be inserted into the SHA, stating that the Client was not to have a day-to-day role; and

(iii) if there was a time frame for passive involvement before BC PNP approval, to then become an active involvement after BC PNP approval, that was not set out clearly and is an error;

(e) in relation to all documents,

(i) due to the errors in entities, and various versions and execution pages being circulated, it is unclear whether the correct parties were identified and executed the documents.

[119] We find the Transaction Documents to be deficient in that key documents such as the share transfer agreement are missing, and the Transaction Documents contain multiple key errors in identification of the key parties and the timing or mechanisms of the intended transaction(s) to accord with the BC PNP approval.

[120] We accept that at one point in time, the Client wished to be absolved from potential liabilities as a shareholder of the NH Project, and then later intended to immigrate to Canada upon approval of the Client's BC PNP application. The error exists where the change of intention from passive to active investor is not properly documented in the Transaction Documents. We see this active/passive discrepancy and the discrepancy in share ownership in the business plan that was submitted as

part of the BC PNP application because of a lack of attention and care to the detail and frankly, incompetency in capturing the timing and mechanism of the transactions.

[121] We find these to be significant errors and failures to meet the quality of work expected of lawyers: the errors, omissions, and inaccuracies in the Transaction Documents, and the perfunctory treatment of the important commercial transaction (a share purchase and loan agreement) underlying the BC PNP application. We find the Respondent failed to provide the quality of service required of a competent lawyer.

[122] We do not agree with the Respondent's argument that the errors on the documents are mere typos or mistakes between "Ltd." versus "Inc." At one point, the 095 Ltd. party is introduced as the Borrower, when 095 Ltd. is not the entity of which the Client was a shareholder nor had a shareholder loan. This is a fundamental error that goes to the heart of the documents.

[123] We find allegation 5(a) to be established.

[124] For allegation 5(b), the Law Society alleges that the Respondent made representations to the BC PNP which the Respondent knew or ought to have known were untrue, including a representation that the Client's role in the business requires "his presence and active involvement with the Business Management."

[125] The citation alleges that the Respondent made misrepresentations to the BC PNP. Accordingly, we first examine the signature page of the BC PNP application. We find that it is the Client and his spouse who signed the Application which contains a four-part declaration requiring the Client to declare:

- I confirm that the information I have provided for this Application is to be the best of my knowledge true, correct and complete.

- I understand that if any of the information in this Application is found to be false or intentionally misleading, that the Province of British Columbia may refuse my application to the Province Nominee Program and, if applicable, my nomination for permanent residence.

- I understand that the information provided in this form may be used for purposes of evaluating the Provincial Nominee Program.

- I understand all of the foregoing statements, having asked for and obtained explanations on every point which was not clear to me.

There is no requirement for a witness, and it does not have to be sworn before a lawyer or notary public.

[126] We note that the Respondent's signature appears on a different form, entitled "BC Provincial Nominee Program – Business Authorized Representative Form." The purpose of this form is to appoint and authorize the release of the Client's information to his designated representative, being the Respondent. The Client again makes a declaration that the information given is true, complete and correct, and that he understands all of "the foregoing statements, having asked for and obtained an explanation for every point that was not clear to me."

[127] Below the Client's declaration on the Business Authorized Representative Form, is a different signature box, where the Respondent's signature appears. It states: "I understand and accept that I am the person appointed by the Applicant to act as a representative in all dealings related to the BC PNP immigration application process." It indicates her acceptance to act as the Client's representative for the application and does not require the Respondent to make a declaration.

[128] However, the Respondent is more than just the Client's appointed representative, a role that could be held by any natural person. She is the Client's lawyer; the Respondent's job was to draft and prepare the BC PNP application competently and accurately, ensuring that it contained no false statements or misrepresentations.

[129] We find this situation similar to when a lawyer prepares and witnesses an affidavit on behalf of a client; the obligations of the lawyer are such that the lawyer must have a reasonable factual basis for the statements made in the affidavit, and in circumstances that are warranted be duly diligent that the statements are in fact true. This does not mean the lawyer needs to independently verify each and every fact made in an affidavit, but it does mean that a lawyer cannot draft statements that they know or ought to know are not true or include statements that have no reasonable basis in truth.

[130] An affidavit is solemnly regarded as sworn statement, which differs from oral or written submissions which are advocacy and may contain a selection of facts. An affidavit is relied upon by courts and attracts criminal charges such as perjury if such statements are demonstrably false. A lawyer must prepare the affidavit accurately, explain the contents of the affidavit to the Client and give advice as to the seriousness and consequences of swearing false affidavits.

[131] An application submitted to a government agency that requires a declaration might contain limited elements of advocacy but most certainly, if it is prepared by a lawyer, must be free of statements that are known our ought to be known as untrue

by the lawyer. It ought to be free of misleading statements akin to "spin doctoring", or "sales marketing" that are likely to be confused or misinterpreted.

[132] Applying that standard of due diligence required of lawyers in government applications to the Respondent, we find that the Respondent did take a number of steps with the preparation and submission of the BC PNP application: the Respondent interviewed her client, collected personal information, commissioned a third party business plan, had the BC PNP application and the Business Plan translated into the Client's native language, sent the translated versions to her Client in advance for review, and had telephone discussions with the Client to review the contents of the BC PNP application. The testimony of both the Respondent and the Client is that the Client read the translated documents, reviewed the documents with the Respondent, and that he understood them.

[133] With respect to allegation 5(b) specifically, we must determine whether the Respondent knew or ought to have known that the representation regarding the Client's "presence and active involvement with the Business Management" was actually "untrue."

[134] The Respondent explains that she knew that the Client was not in Canada and did not want to be responsible for the NH Project business, but then once the BC PNP was approved, that the Client intended to immigrate to Canada and become actively involved. The statement in the BC PNP application that the Client would be actively involved was intended to apply to the period of time *after* the Client immigrated. The Respondent's understanding is corroborated by the Client's testimony that he could not live in Canada and be active in the business unless and until his immigration was approved.

[135] We find this explanation to satisfactorily clarify the Respondent's knowledge that the statements were not wholly untrue when the BC PNP application was submitted.

[136] There was no evidence that she had a willfully blind or reckless disregard for the accuracy of the statements made in the application in order to get it approved. Indeed, she took steps to interview the Client for personal information, draft, translate and review the Application with her Client, before the Client signed his declaration on the Application. The Respondent's evidence that she thought all along that the Client intended to move to Canada and take an active role in the business *after* his immigration application was approved, is corroborated by her Client.

[137] Accordingly, we find that the Respondent's statement about the Client's active involvement was not untrue. The Respondent did not have a willfully blind or reckless disregard for the accuracy of the statement. It was ambiguous or sloppy drafting because it failed to include the timeframe and contingency of being approved in the BC PNP.

[138] With respect to allegation 5(b), we find that it was the Client who made the declaration in the BC PNP application. As the Client's lawyer, the Respondent nonetheless had a positive obligation to be duly diligent to avoid submitting misleading or untrue statements to government agencies. We find that the Respondent took steps to prepare the Application and reviewed the translated version of the Application with the Client. We find that the representation made in regard to the Client's role in the business was not made when the Respondent knew or ought to have known it was untrue.

[139] Therefore, we do not find allegation 5(b) to be established.

[140] Finally, allegation 5(c) of the Citation alleges that the Respondent failed to properly advise the Client about his obligations pursuant to the Transaction Agreements and BC PNP application (Transaction Documents).

[141] The Law Society alleges that the Respondent failed to advise her Client of two key obligations under the Loan Agreement. Firstly, the obligation to advance the loan funds in one single tranche upon demand by the borrower, and secondly, that the demand could be made at any time and was not contingent upon the BC PNP approval.

[142] We accept that the Respondent in late 2013 did correctly advise her Client that he was under obligations in the Loan Agreement to advance the full loan amount, in one tranche upon written demand. This is the plain reading and correct interpretation of the Loan Agreement in late 2013. However, the Respondent's failure to properly advise her Client occurred much earlier in 2012 at the time of drafting and execution of the Loan Agreement.

[143] At the outset, the Client told the Respondent that he intended to pay as little as possible until his BC PNP application was approved, but his intention and instructions were not reflected in the Transaction Documents whatsoever. The Respondent did not advise the Client that the loan funds were due in one tranche at any time prior to late 2013. Advising the Client of this correct reading of the improperly drafted contract in late 2013 does not vindicate the Respondent from having failed to properly advise her Client in the first place.

[144] The Client testified that he received translated versions of the Loan Agreement, but the Respondent did not review or explain the terms of the contract to him.

[145] The Respondent also failed to advise the Client of his obligations to advance the loan funds to the proper borrower under the Loan Agreement which was either NH Inc. or Ltd., instead of 095 Ltd. to which the funds were actually advanced.

[146] With respect to the SHA, the Respondent failed to properly inform the Client of his obligations under that agreement as well. This accords with the Client's concern that being a mere shareholder and director would give rise to liabilities for the company, which the Respondent advised could be averted by inserting section 4.6 into the SHA.

[147] The Respondent failed to advise her Client when the purchase price for the shares would be due. Indeed, there are multiple conflicting errors on the Client's share purchase, for which the Respondent failed to advise him properly, including: the percentage of ownership, when the $50,000 would be due, when he became a shareholder whether active or passive, and what would trigger a shareholder to become liable for the liabilities of a company.

[148] The Respondent's failure to properly advise her Client about his obligations under the SHA accords with the Respondent's failure to properly advise her Client on his *rights* as a shareholder. The Respondent failed to advise him with respect to: the number of directors on the board that AB (but not the Client) could appoint, conflict resolution of a 50-50 per cent interest or the rights of a 33 per cent minority interest, and remote or in-person attendance at board meetings. The failure of the Respondent to properly advise her Client of his obligations under the Loan Agreement and SHA is part of the wider failure to properly advise the Client on the commercial transaction itself, including: the need to conduct any basic due diligence on NH Inc. or Ltd., the importance of reviewing the minute book, the valuation of the company supporting the $50,000 purchase price, the tax and accounting implications of a $50,000 equity investment, the immediate or contingent timing of the share purchase and due date of payment, the need for a Share Transfer Agreement, and the importance of obtaining a share certificate.

[149] We disagree with the Respondent's argument that the failure to properly advise her Client, and the errors in the Transaction Documents, caused no harm and were not made out of *mala fides*. In the Respondent's case, the series of multiple errors are emblematic of an over-committed lawyer with a practice in Canada and China, whose files and practice were not properly supervised. The series and types of errors the Respondent made are indeed emblematic of a marked departure from the competency expected of a lawyer. The Respondent's Client lost $340,000 to AB

and CD, and some five years of stress and uncertainty waiting for immigration and not knowing what was happening with his money in Canada. The Client was harmed, and the Respondent benefited by having collected her legal fees in advance without having issued an account, whether that is due to an overly busy practice or otherwise.

[150] Regardless of the presence or degree of harm and *mala fides* -which are not necessary to find in order to establish misconduct but relevant when determining disciplinary action-, we find that the Respondent failed to properly advise her Client about his obligations under the Loan Agreement and SHA.

[151] With respect to the BC PNP application, the Respondent made a series of similar mistakes as she did with the other Transaction Documents. We find that the Respondent failed to properly advise her client when she failed to advise the Client that the BC PNP program required that her Client would need to be involved with the day-to-day operations of the business, contrary to the insertion of s. 4.6 of the SHA.

[152] We find the conduct in allegation 5(a) and (c) to be established in fact. When taken together, we find this conduct to constitute professional misconduct when we apply the marked departure test in *Martin*. We do not agree with counsel for the Respondent that the conduct did not harm the Client or that there was a complete absence of *mala fides*. Indeed, the Respondent's persistent failure to properly advise her Client is a marked departure from the conduct expected of lawyers.

CONCLUSION

[153] We have found the following:

1. Allegation 1 - The Respondent committed professional misconduct and breached the *Act* or rules, when she misappropriated approximately $13,049 from her Client and improperly handled the funds by failing to deposit the trust funds into a trust account when she accepted the funds into her personal bank account in China.

2. Allegation 2 – The Respondent committed professional misconduct and breached the *Act* or rules, when she improperly handled approximately $257,562 of her Client's funds when she failed to deposit the trust funds into a trust account, when she accepted the funds into her personal bank account in China, and failed to record the receipt of funds. The Panel finds that the

underlying facts for allegation 2(d) were not made out and that sub-allegation is dismissed.

3. Allegation 3 - The Respondent committed professional misconduct and breached the *Act* or rules, when she misappropriated approximately $30,000 from her Client, and improperly handled the funds when she failed to deposit the trust funds into a trust account, when she accepted the funds into her personal bank account in China, and failed to first prepare and deliver a bill or keeping a copy of the bills, and when she knew or ought to have known that those fees were not properly incurred and charged to the Client.

4. Allegation 4 - The Respondent committed professional misconduct and breached the *Act* or rules, when she improperly handled approximately $120,527 of her Client's funds, when she failed to deposit the trust funds into a trust account, when she accepted the funds into her personal bank account in China, failed to record the receipt of funds, and failed to account to the Client in writing for all funds. The Panel finds that the underlying facts for allegation 4(d) were not made out and that sub-allegation is dismissed.

5. Allegation 5 – The Respondent committed professional misconduct as alleged in allegations 5(a) and (c). We did not find the underlying facts in allegation 5(b) to be established and that sub-allegation is dismissed. However, when the proven conduct alleged in paragraphs 5(a) and (c) of the Citation is taken together, we find this conduct to constitute professional misconduct when we apply the marked departure test in *Martin*.