2023 LSBC 40
Hearing File No.: HE20210080
Decision Issued: July 27, 2023
Written Reasons Issued: September 20, 2023
Citation Issued: December 9, 2021
Citation Amended: May 25, 2022

THE LAW SOCIETY OF BRITISH COLUMBIA
TRIBUNAL HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

JUSTIN GARNER KATES

RESPONDENT

DECISION OF THE HEARING PANEL ON A JOINT SUBMISSION PURSUANT TO RULE 5-6.5

Hearing Date: July 19, 2023

Hearing Panel: Lindsay R. LeBlanc, Chair
Brendan Matthews, Public representative
Maia Tsurumi, Lawyer

Counsel for the Law Society: Marsha Down
Mandana Namazi

Counsel for the Respondent: Ian Donaldson, KC
Jaia Rai

Written Reasons of the Panel by: Maia Tsurumi

INTRODUCTION

[1] The Law Society issued a citation against the Respondent on December 9, 2021, which was amended on May 25, 2022 (the "Citation").

[2] On April 14, 2023, the Respondent signed a letter of admission of a disciplinary violation, admitting professional and other misconduct and consenting to a specific disciplinary action and costs to the Law Society of $3,500.

[3] The parties provided joint submissions, written arguments and an Agreed Statement of Facts (the "ASF"), to the Panel on misconduct and disciplinary action (the "Joint Submission") under Rule 5-6.5 of the Law Society Rules (the "Rules").

[4] The Hearing occurred on July 19, 2023. Both parties made oral submissions and they also provided thorough written submissions well in advance of the Hearing.

[5] The parties ask the Panel to find that allegations 1, 2, 3 and 5 in the Citation constitute professional misconduct and allegations 4, 6, 7 and 8 constitute breaches of the *Legal Profession Act* (the "*Act*") or the Rules but not professional misconduct. The requested disciplinary action is a two-month suspension of the Respondent. The parties also submit the Respondent should pay $3,500 in costs.

[6] In addition to the Joint Submission, the Respondent sought an expanded non-disclosure order.

[7] At the Hearing, the Respondent said he had arranged for management of his practice during his suspension and therefore asked to start his suspension on July 28, 2023. The Respondent agreed to waive his right to raise prejudice due to a delay in rendering reasons as a ground of appeal if the Panel ordered his suspension effective July 28, 2023, with written reasons to follow.

[8] The Panel accepted the Joint Submission, including the ASF, and made an order on July 27, 2023, with written reasons to follow.

[9] These are the Panel's written reasons.

CITATION

[10] The Citation arose from a compliance audit in September 2019 for May 1, 2018 to September 6, 2019.

[11] The allegations in the Citation relate to the Respondent's representation of a Canadian company, including incorporation and share acquisition of its American counterpart.

[12] Allegations 1 and 2 allege that, between approximately August 9, 2019 and September 27, 2019, in relation to his client C Inc., later known as B Inc., the Respondent permitted $9,450,667.36 to be paid into and withdrawn from his firm's trust accounts when:

(a) the funds were not directly related to legal services provided by him or his firm, contrary to Rule 3-58.1 (version in force at the time); and

(b) he failed to make reasonable inquiries or a record of any results of inquiries about the circumstances of the transaction, including, but not limited to: (i) the subject matter and objectives of his retainer; (ii) the source of the funds; and (iii) the lawfulness of payments from trust accounts.

[13] Allegation 3 alleges that, between approximately August 9, 2019 and August 13, 2019, in relation to C Inc., later known as B Inc., the Respondent circumvented, or assisted his client in circumventing, the Bank of Montreal's (the "Bank") refusal to permit the transfer of approximately USD$6.4 million (the "US Funds") to the US from C Inc.'s account, in circumstances where he ought to have known that there were questions or concerns about transferring the US Funds to the US.

[14] It also alleges he did one or more of the following, contrary to one or both of *Code of Professional Conduct for British Columbia* (the "Code") rule 2.2-1 and rule 3.2-7:

(a) changed, or assisted in changing, C Inc.'s name to B Inc.;

(b) did not advise the Bank that B Inc. was the same company as C Inc.; and

(c) permitted the transfer of the US Funds through his firm's trust account, rather than C Inc.'s bank account at the same Bank.

[15] Allegation 4 alleges that, on approximately June 19, 2019, January 27, 2020, and January 28, 2020, in relation to his client C Inc., later known as B Inc., the Respondent released, permitted or authorized or failed to prevent the release of money from a trust account, when releasing the money was without required authorization and to parties not entitled to receive the money, and in so doing he did the following:

(a) failed to honour a trust condition;

(b) failed to comply with, or failed to ensure compliance with, an escrow term; and

(c) failed to comply with Rule 3-64(1).

[16] Allegation 5 alleges that, on or about September 19, 2019, in response to queries from a Law Society auditor, the Respondent provided a response that he ought to have known was misleading or incomplete, contrary to one or both of rule 7.1-1 of the *Code* and Rule 3-85(2). In particular, he:

(a) failed to advise the auditor he had not or may not have obtained a copy of the identification of his client SK prior to the auditor's email;

(b) failed to advise the auditor he only obtained a copy of SK's identification after receiving the auditor's email; and

(c) provided the identification SK had just sent him to the auditor in a manner that did not make it apparent he had just received it.

[17] Allegations 6 and 7 allege that, in approximately April 2019, the Respondent failed to make reasonable efforts to obtain, record and retain a record of client identification information for:

(a) SK and LB in relation to incorporation of C Inc., contrary to Rules 3-100(1)(b) and 3-107(3); and

(b) SK in relation to C Inc., and later B Inc., contrary to Rules 3-100(1)(c) and 3-107(3).

[18] Allegation 8 alleges that, between approximately May 2019 and January 2020, in relation to his client C Inc., later known as B Inc., the Respondent failed to do the following in respect of one or more financial transactions listed in Schedule "A" to the Citation:

(a) take reasonable steps to verify the identities of one or more of SK, LB and PK and obtain and retain a copy of every document used to verify their identities, contrary to Rules 3-102 and 3-107; and

(b) take the required steps to verify the identity of LB and retain a copy of every document used to verify his identity, contrary to Rules 3-104(2) and 3-107.

[19] The Respondent admits he was served with the Citation on December 10, 2021 and served with an amended Citation, in accordance with Rule 4-19 of the Rules.

FACTS

[20] The facts set out below are summarized from the ASF and other exhibits.

Respondent's Background

[21] The Respondent was called and admitted as a member of the Law Society of British Columbia on September 2, 2009. Since November 29, 2011, he has practiced at DuMoulin Black LLP ("DB Firm"). He has been a partner and signatory on DB Firm's trust accounts since 2016 and primarily practises securities law.

Circumstances Leading to the Misconduct Alleged in the Citation

[22] This disciplinary matter arises from DB Firm's representation of C Inc. / B Inc., a cannabis company, including its incorporation, three rounds of equity financing and its share acquisition of its American counterpart by way of a reverse takeover. The Respondent and DB Firm provided considerable legal services to C Inc. / B Inc.

[23] At the material times, the Respondent was aware that cannabis production, sale and possession was unlawful under federal law in the US, although permitted under California state law. The Respondent did not know whether US federal law applied to C Inc.'s American counterpart and he had no formal legal training or education regarding US cannabis law.

[24] On April 11, 2019, DB Firm incorporated C Inc. in BC at the request of SK. LB was the sole director. On behalf of C Inc., LB signed a retainer agreement with DB Firm, authorizing DB Firm to take instructions from SK, although SK's position with C Inc. was not recorded.

[25] C Inc. decided to do three rounds of equity financing via share issuances through private placements. Subscription proceeds were deposited into DB Firm's trust account. Subscription agreements were used for each of the private placements, with DB Firm as escrow agent. The agreements required some of the subscription proceeds held in DB Firm's trust account under escrow terms (the "Escrow Terms") and specified a particular form of release document (the "Release Document") before DB Firm was authorized to release the escrow funds (the "Escrow Funds").

[26] Three private placement proceeds were paid to DB Firm in trust. The proceeds were deposited to C Inc.'s bank account at the Bank and from there into DB Firm's trust account at the same Bank. Some of the subscription monies were Escrow Funds. On directions from SK, on behalf of C Inc., and PK, a director of B Inc., this money was disbursed from DB Firm's trust account.

First Private Placement

[27] On June 18, 2019, SK instructed the Respondent to wire $3,482,600 from the first private placement, including $992,000 in Escrow Funds, into C Inc.'s account at the Bank. DB Firm did so on June 19, 2019, although the Respondent did not have a Release Document in the precise form set out in the Escrow Terms.

Second Private Placement

[28] Between July 8, 2019 and July 29, 2019, DB Firm received into trust $9,038,130.69 in subscription proceeds from the second private placement. LB directed DB Firm to wire transfer $9,037,080.69 from DB Firm's trust account to C Inc.'s account at the Bank. LB provided a Release Document in the form required by the Escrow Terms. On July 31, 2019, the Respondent transferred the directed amount from DB Firm's trust account to C Inc.'s Bank account.

Use of DB Firm's Trust Account for Banking Purposes

[29] On August 8, 2019, the Bank refused to send a wire transfer of $5 million from C Inc.'s account to the US. The Respondent knew about this and knew the Bank's Risk and Compliance, Personal and Commercial Banking group had also sent a letter to C Inc. ending the Bank's relationship with C Inc. because its business activities fell outside the Bank's risk tolerance. In the letter, the Bank asked C Inc. to close its accounts.

[30] The Respondent and DB Firm did not directly obtain any information from the Bank about why it had refused the wire transfer. The Respondent understood the Bank had "frozen" C Inc.'s account because it did not like that the company was involved in US cannabis operations.

[31] At this time, SK instructed the Respondent to change C Inc.'s name. The Respondent understood the name change request was connected to C Inc.'s problems with its Bank account on August 8, 2019.

[32] On August 9, 2019, the Chief Financial Officer of C Inc., delivered a bank draft from C Inc.'s Bank account, payable to DB Firm, in the amount of $9,435,667.36 (the "C Inc. Funds").

[33] On August 12, 2019, DB Firm, with the Respondent's knowledge and approval, deposited the C Inc. Funds into its trust account at the Bank with the description: "For general operating expenses and asset acquisition." DB Firm received the C Inc. Funds intending to facilitate the transfer of this money to the US for C Inc.

[34] The Respondent did not confirm the C Inc. Funds were the same first and second private placement funds DB Firm had wired to C Inc. on June 19, 2019 ($992,000) and July 31, 2019 ($9,037,080.69), respectively, although there was nothing to indicate they were anything other than those funds.

[35] The Respondent authorized the use of DB Firm's trust account to receive the C Inc. Funds. The Respondent believed there were other lawyers at DB Firm who were aware of what he was doing and had authorized it. There is no evidence about what others at DB Firm did or did not know or authorize.

[36] The Law Society says by accepting the C Inc. Funds back into DB Firm's trust account, the Respondent created a situation where it could be concluded that DB Firm was carrying out a banking function for its client, rather than providing substantial legal services directly connected to trust matters. The Respondent does not dispute this. However, he does not admit any dishonest or intentional misconduct and the Law Society does not seek to establish such conduct.

[37] The Respondent hoped to assist C Inc. in having the Bank carry out the wire transfer but the Respondent and others at DB Firm were concerned that the transmission of funds might again be disrupted by the Bank.

[38] The Respondent was concerned that the Bank might refuse to transmit the C Inc. Funds again if DB Firm attempted to wire the same funds to the US, as it was DB Firm's practice to disclose client names in wire payment information.

[39] On August 13, 2019, DB Firm determined the easiest way to get money to C Inc.'s US affiliate was to complete the name change and then initiate the wire transfer under the new company name. DB Firm changed C Inc.'s name at the BC Registry to B Inc. The Respondent believed one of the purposes of the name change was that banks would likely be more receptive to providing banking services to the company because the new name did not refer to cannabis.

[40] Also on August 13, 2019, PK directed DB Firm to pay the US Funds (USD $6.4 million) to a lawyer in Florida ("AM") from the C Inc. Funds in DB Firm's trust account. The Respondent authorized the transfer of this money from DB Firm's trust account, which was completed on August 14, 2019.

[41] The Respondent did not record any inquiries in relation to the transfer. He did not discuss the payment of funds with AM, was not aware of what advice AM had given C Inc.'s US affiliate in relation to the transaction and had no details about the disposition of the funds once they were placed in AM's account. The Respondent relied on the fact that American law firms were involved, without ensuring that he, or the client, obtained legal advice from a lawyer in the US regarding the legality of sending funds to that country to fund C Inc.'s US affiliate's cannabis operations.

[42] The Respondent authorized or approved four further disbursements of the C Inc. Funds from DB Firm's trust accounts, including one more to AM.

[43] In summary, the Respondent changed C Inc.'s name to B Inc. before submitting the wire transfer request and then processed the wire from DB Firm's trust account using "B Inc." This allowed C Inc. to circumvent the Bank's refusal to transfer funds to the US from C Inc.'s Bank account.

Third Private Placement

[44] Between November 2019 and January 2020, DB Firm, with the Respondent's knowledge and approval, received $232,903.50 in subscription proceeds into trust from C Inc.'s third private placement. These were all Escrow Funds. DB Firm, with the Respondent's knowledge and approval, disbursed these funds on January 27 to 28, 2020, as directed by PK, although the Release Document was not in the precise form set out in the Escrow Terms.

Failure to Follow Law Society Client Identification and Verification Rules

[45] The Respondent also did not take all steps required by the Law Society's client identification and verification Rules to verify the identities of SK, LB and PK as instructing individuals for C Inc. and DB Firm did not retain copies of every document used to verify their identities.

Law Society Complaint and Investigation

[46] From September 9 to 13, 2019, the Law Society did a compliance audit of DB Firm. As part of this audit, the Law Society auditor asked the Respondent if he had

obtained and retained a copy of SK's identification as an instructing individual for C Inc.

[47] In response, the Respondent called SK and asked for a copy of his identification, which the Respondent then forwarded to the Law Society. Although the Respondent was aware the Law Society's client identification and verification Rules require retention of copies of documents verifying identity, he did not tell the auditor that he had just received the identification from SK or that he may not have had a copy of this identification before it was requested by the Law Society.

[48] The Respondent denies he intended to mislead the Law Society and the Panel accepts his submission. However, he should have known his response to the auditor could have been misleading.

[49] On April 14, 2023, the Respondent sent a letter to the Law Society admitting his misconduct listed in the Citation and consenting to a specified disciplinary action and costs.

LEGAL FRAMEWORK

Joint Submissions

[50] Joint submissions regarding disciplinary action are statutorily prescribed by Rules 5-6.5(1) to (3), which says:

> 5-6.5(1) The parties may jointly submit to the hearing panel an agreed statement of facts and the respondent's admission of a discipline violation and consent to a specified disciplinary action.
>
> (2) If the panel accepts the agreed statement of facts and the respondent's admission of a discipline violation
>
> > (a) the admission forms part of the respondent's professional conduct record,
> >
> > (b) the panel must find that the respondent has committed the discipline violation and impose disciplinary action, and
> >
> > (c) the Executive Director must notify the respondent and the complainant of the disposition.

> (3) The panel must not impose disciplinary action under subrule (2) (b) that is different from the specified disciplinary action consented to by the respondent unless
>
> > (a) each party has been given the opportunity to make submissions respecting the disciplinary action to be substituted, and
> >
> > (b) imposing the specified disciplinary action consented to by the respondent would be contrary to the public interest in the administration of justice.

[51] Rule 5-6.5(3) reflects the principles set out in *R. v. Anthony-Cook*, 2016 SCC 43, at paras. 31, 34, 36 to 40, including certainty for the parties, eliminating the negative aspects involved in requiring witnesses to testify and creating efficiencies in the system.

[52] The public interest test in *Anthony-Cook* requires a trial judge to accept a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest: *Anthony-Cook*, at paras. 32, 41 to 43. A joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system": *Anthony-Cook*, at para. 33.

[53] Thus, a joint submission should not be rejected lightly, "[r]ejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold": *Anthony-Cook*, at para. 34.

[54] Law Society discipline decisions have applied the *Anthony-Cook* test when assessing the appropriateness of joint submissions under Rule 5.6.5: see e.g. *Law Society of BC v. Davison*, 2022 LSBC 23, at paras. 10 to 11; *Law Society of BC v. Lang*, 2022 LSBC 4, at paras. 27 to 28, citing *Law Society of Upper Canada v. Archambault*, 2017 LSDD No. 100, at para. 15; *Law Society of BC v. Shabestari*, 2022 LSBC 44, at paras. 37 to 39; *Law Society of BC v Klaassen*, 2023 LSBC 27.

[55] The Panel agrees the *Anthony-Cook* test applies in the context of joint submissions on disciplinary action in Tribunal disciplinary hearings.

Onus of Proof and Test for Professional Misconduct

[56] The Law Society bears the onus of proving on a balance of probabilities that the facts alleged constitute professional misconduct: see *Foo v. Law Society of BC*, 2017 BCCA 151, at para. 63.

Assessing Professional Misconduct

Professional misconduct generally

[57] There is no statutory definition of professional misconduct. However, prior Tribunal decisions hold that professional misconduct is a marked departure from conduct reasonably expected of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171; see also e.g. *Law Society of BC v. Edwards*, 2020 LSBC 21, at paras. 44 to 46.

[58] *Martin* is an objective test and has been accepted by many Tribunal panels and affirmed by a review panel in *Re: Lawyer 12*, 2011 LSBC 35.

Breach of the Act or Rules that is not professional misconduct

[59] A breach of the *Act* or Rules may be a "Rules breach" and not amount to professional misconduct: *Law Society of BC v. Lyons*, 2008 LSBC 9, at para. 32. This occurs when the conduct did not result in any loss to a client and was not 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.

[60] In determining whether a particular set of facts constitutes a breach of the *Act* or Rules but not professional misconduct, panels must consider several factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides* and the harm caused by the respondent's conduct: *Lyons*, at para. 35.

ANALYSIS

[61] The Panel finds the ASF has no evidentiary conflicts and no issues of credibility. The Panel also finds the ASF establishes sufficient facts on which to determine

whether the Respondent's conduct amounted to professional misconduct or a breach of the *Act* or Rules not amounting to professional misconduct.

Professional Misconduct

[62] The Respondent admits, and the Panel finds, he:

(a) used DB Firm's trust account to transfer money on C Inc. / B Inc.'s behalf, which was not directly related to legal services provided by him or DB Firm, contrary to Rule 3-58.1 (allegation 1);

(b) failed to make reasonable inquiries or a record of any results of inquiries about the circumstances of the transaction described in subparagraph (a) above (allegation 2);

(c) circumvented, or assisted his client in circumventing, the Bank's refusal to permit transfer of the US Funds to the US from C Inc.'s account in circumstances where he ought to have known that there were questions or concerns about transferring the US Funds to the US (allegation 3); and

(d) provided a response that he ought to have known was misleading or incomplete to the auditor's queries, contrary to one or both of rule 7.1-1 of the *Code* and Rule 3-85(2) (allegation 5).

[63] For the reasons below, the Panel finds the Respondent's actions described in allegations 1 to 3 and 5 of the Citation were professional misconduct.

[64] Allegations 1 to 3 relate to the Respondent's failures with respect to DB Firm's trust account.

[65] Rule 3-58.1 of the Rules in force in August 2019 provided:

> 3-58.1(1) Except as permitted by the Act or these rules or otherwise required by law, a lawyer or law firm must not permit funds to be paid into or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

[66] On August 9, 2019, the Respondent received the C Inc. Funds into DB Firm's trust account and these were not directly related to legal services he or DB Firm provided to C Inc. On August 14 and September 27, 2019, he disbursed the C Inc. Funds from DB Firm's trust account and this was also not directly related to legal services he or DB Firm provided to C Inc. Thus, he breached Rule 3-58.1 in force at the time and allegation 1 is established. Although the Respondent believed the

receipt and disbursement of the C Inc. Funds was directly related to legal services provided by DB Firm to C Inc., he now admits, and the Panel finds, they were not.

[67] With respect to allegations 2 and 3, lawyers are gatekeepers of their trust accounts and have duties to make inquiries. Rule 3.2-7 of *Code* provides:

> 3.2-7 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

[68] Lawyers have a duty to make inquiries about the reason for the use of their trust accounts: *Law Society of BC v. Gurney*, 2017 LSBC 15 ("*Gurney F&D")*, at para. 80; *Law Society of BC v. Yen*, 2020 LSBC 45 ("*Yen F&D*"). This is to prevent lawyers from unknowingly facilitating illegal activities: *Yen F&D*, at para. 37; *Law Society of BC v. Daignault*, 2020 LSBC 18, at paras. 65 to 66.

[69] The lawyer's duty to make reasonable inquiries arises when, on an objective basis, they become suspicious that the transaction is illegitimate: *Gurney F&D*, at para. 80; *Elias v. Law Society of BC*, 1996 CanLII 1359 (BCCA), at para. 9. Professional misconduct can be found even if the underlying transaction cannot be proved to be illegitimate: *Gurney F&D*, at para. 80.

[70] Further, a request to use a lawyer's trust account when there is no immediate and direct connection to the provision of legal services by the lawyer requires the lawyer make inquiries of the client prior to allowing use of the trust account: *Yen F&D*, at para. 44; *Law Society of BC v. Yen*, 2023 LSBC 2 ("*Yen review*"), at para. 47.

[71] The Panel finds allegations 2 and 3 are made out. The Respondent allowed DB Firm's trust account to be used by C Inc. when this transaction was not related to the provision of legal services. He did so when he knew the Bank had refused the wire transfer and had closed C Inc.'s accounts, when he changed C Inc.'s name to B Inc. to facilitate the transfer the Bank refused to make, when he had not confirmed the origin of the money transferred (i.e. whether they were the private placement funds) and when some of the money was transferred to AM in Florida instead of to C Inc.'s US affiliate. These were objectively suspicious circumstances, which required him to make reasonable inquiries of C Inc. prior to letting it use DB Firm's trust account to send money to the US.

[72] Without inquiring further into the matter, the Respondent could not meet the requirements of rule 3.2-7 or his general gatekeeping duty to make reasonable inquiries in order to not facilitate suspicious transactions. As the panel in *Daignault*, at para. 69 said:

> … There is no evidence of fraud in this case. Nonetheless, the lawyer's duty to ensure that their trust account is used for the purposes for which it was intended does not depend on whether the client's eventual use of money paid through the trust account proves to be illicit. To maintain public confidence in the profession, a trust account must only be used for the legitimate commercial purpose for which it was established; it must "not be used as a convenient conduit": *Gurney* [F&D], at paragraph 79.

[73] Allegation 5 relates to the Respondent's misleading and incomplete response to the Law Society's auditor about whether he had verified SK's identification.

[74] Rule 3-85(2) provides:

> (2) When an order is made under subrule (1),
>
> …
>
> (b) on notification of the order, the lawyer concerned must immediately produce and permit the copying of all files, vouchers, records, accounts, books and any other evidence and must provide any explanations required by the person designated under paragraph (a) for the purpose of completing the compliance audit.

[75] Rule 7.1-1 of the *Code* requires lawyers to:

> (a) reply promptly and completely to any communication from the Society;
>
> (b) provide documents as required to the Law Society;
>
> (c) not improperly obstruct or delay Law Society investigations, audits and inquiries;
>
> (d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;
>
> …
>
> (f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[76] Lawyers must be truthful in all representations to the Law Society. The Law Society's ability to properly regulate members of the profession would be seriously compromised if members did not have an unequivocal obligation to take care to be

truthful in all representations to the Law Society: *Law Society of BC v. Botting*, [2000] LSBC 30, at para. 60.

[77] Further, lawyers must provide prompt, candid and complete responses to Law Society inquiries: *Law Society of BC v. Dobbin*, [1999] LSBC 27 at paras. 20 and 23.

[78] A misrepresentation resulting in professional misconduct can occur in the absence of intent to deceive and requires consideration of the entirety of the conduct: *Law Society of BC v. Liggett*, 2011 LSBC 22, at para. 26; *Law Society of BC v. Newcombe*, 2021 LSBC 38 at paras. 47 to 49, 53.

[79] The Respondent was aware the client identification and verification Rules required him to retain copies of documents and verify identification. However, when asked by the Law Society auditor about whether he had obtained and retained a copy of SK's identification, he did not search for it in DB Firm's file materials. Instead, he got a copy of SK's identification from SK and forwarded this to the Law Society without telling the auditor that he had just obtained the copy from SK and may not have obtained this identification prior to the auditor's request.

[80] Thus, the Panel finds allegation 5 is made out. Whether or not he intended to mislead the auditor, the Respondent's response to the auditor misrepresented the situation and was recklessly misleading. A misrepresentation is reckless when it is made with knowledge of a danger or risk and creates a risk that a prohibited result will occur: *Liggett*, at para. 27.

Breaches of the *Act* or Rules not Amounting to Professional Misconduct

[81] The Respondent admits, and the Panel finds, he:

a. failed to honour a trust condition, failed to comply with, or failed to ensure compliance with, an escrow term; and failed to comply with Rule 3-64(1) (allegation 4);

b. failed to make reasonable efforts to obtain, record and retain a record of client identification information for SK and LB (allegations 6 and 7); and

c. failed to take reasonable steps to verify the identities of one or more of SK, LB and PK and obtain and retain a copy of every document used to verify their identities, contrary to Rules 3-102, 3-104(2) and 3-107 (allegation 8).

[82] For the following reasons, the Panel finds the Respondent breached the *Act* or Rules as described in allegations 4 and 6 to 8, but that his conduct did not constitute professional misconduct.

[83] Allegation 4 relates to beaches of trust conditions or escrow terms.

[84] Rule 3-64(1) of the Rules says:

> 3-64 (1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are
>
> > (a) properly required for payment to or on behalf of a client or to satisfy a court order,

[85] Rule 7.2-11 of the *Code* says:

> 7.2-11 A lawyer must:
>
> (a) not give an undertaking that cannot be fulfilled;
>
> (b) fulfill every undertaking given; and
>
> (c) honour every trust condition once accepted.

[86] The Respondent authorized DB Firm's release of C Inc.'s private placement Escrow Funds without obtaining the precise form of the Release Document as follows:

a. $992,000 released to C Inc. on June 19, 2019 in connection with the first private placement; and

b. $232,903.50 released on January 27 to 28, 2020 to two individuals.

[87] Thus, he did not honour all the trust conditions he had accepted. This was a breach of rule 7.2-11 of the *Code*. It was also a breach of Rule 3-64(1) of the Rules because the Escrow Funds were not "properly required for payment" to, or for, C Inc. since DB Firm did not have the proper form of Release Document required by the Escrow Terms to release the money, and with respect to the payments to the individuals, the Escrow Terms did not allow DB Firm to pay funds to third parties or an affiliate of C Inc.

[88] While the Respondent breached Rule 3-64(1), his conduct did not result in loss to C Inc. and there is no evidence it was done with dishonest intent. Thus, the Panel

finds his misconduct amounts to a breach of the Rules that is not insignificant, but does not amount to professional misconduct.

[89] Allegations 6 to 8 relate to the Respondent's failure to follow the client identification and verification Rules in force prior to December 31, 2019 (Rules 3-100(1), 3-102, 3-104(2) and 3-107) and in force from January 1, 2020 to May 2021 (Rules 3-102 and 3-107).

[90] Prior to December 31, 2019, Rule 3-100 required lawyers to make reasonable efforts to obtain, and if obtained, record client verification information when retained by a client.

[91] At all material times, under Rule 3-102(1), client verification was required whenever a lawyer provides legal services in respect of a financial transaction. A "financial transaction" is "the receipt, payment or transfer of money on behalf of a client or giving instructions on behalf of a client in respect of the receipt, payment or transfer of money": Rule 3-98(1).

[92] Rule 3-104(2) prior to December 31, 2019 said if the client is not present in BC, a lawyer must verify the client's identity by getting an attestation from a commissioner of oaths for a jurisdiction in Canada or a guarantor in Canada that the commissioner or guarantor has seen one of the client identification and verification documents.

[93] Also at all material times, Rule 3-107 required lawyers to obtain and keep copies of every document used to verify identity for the purposes of Rule 3-102.

[94] Between April 2019 and January 2020 as set out in the Facts section above, the Respondent did not take all reasonable steps to verify the identities of one or more of SK, LB and PK as instructing individuals for C Inc. and DB Firm did not retain copies of every document used to verify their identities.

[95] As with allegation 4, the Respondent's conduct in allegations 6 to 8 did not result in loss to C Inc. and there is no evidence it was done with dishonest intent. Thus, the Panel finds his misconduct amounts to a breach of the Rules that is not insignificant, but does not amount to professional misconduct.

ANALYSIS

[96] The parties jointly propose a two-month suspension as disciplinary action for the Respondent's professional misconduct and breach of the Rules.

[97] When there are joint submissions on disciplinary action, Rule 5-6.6(3)(b) and *Anthony-Cook* say a panel must not diverge from the specified disciplinary action unless imposing the specified disciplinary action would be contrary to the public interest in the administration of justice.

[98] To determine if the proposed disciplinary action would not be contrary to the public interest in the administration of justice, the Panel must apply the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, [1999] LSDD No. 45:

(a) the nature and gravity of the conduct proven;

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

(f) the number of times the offending conduct occurred;

(g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[99] The above *Ogilvie* factors are often grouped into four overarching, and sometimes overlapping, factors: (1) nature, gravity and consequences of the conduct; (2) character and professional conduct record of the respondent; (3) acknowledgement of the misconduct and remedial action; and (4) public confidence in the legal

profession, including public confidence in the disciplinary process: see e.g. *Law Society of BC v. Dent*, 2016 LSBC 5, at paras. 19 to 23.

[100] The *Ogilvie* factors are applied through the "prism" of public protection: *Law Society of BC v. Gellert*, 2014 LSBC 5, at paras. 44 and 46.

[101] Applying the *Ogilvie* factors to the Respondent's professional misconduct, the Panel concludes the proposed disciplinary action of a two-month suspension is in the public interest in the administration of justice.

Nature, Gravity and Consequences of the Conduct

[102] The nature, gravity and consequences of the conduct ranges from professional misconduct resulting from the Respondent's misuse and mishandling of DB Firm's trust account and misrepresentation to the Law Society, to breaches of the Rules that were administrative in nature and not professional misconduct.

[103] While the Respondent's breaches of the Rules relating to his failure to meet the precise form of trust conditions and failure to follow client identification and verification Rules are troubling, the gravity and consequences of this misconduct would not warrant a two-month suspension.

[104] However, his professional misconduct regarding DB Firm's trust account and misrepresentation to the Law Society is serious and has substantial consequences. The Rules governing trust accounts are key to the Law Society's ability to regulate the financial integrity of the profession and to provide the public with assurances of the financial trust and fidelity of the profession.

[105] Therefore, to maintain the public's confidence in the profession as gatekeepers of the financial system in circumstances where the confidentiality obligations of lawyers raise the risk that money laundering or other dishonest or illegal activity could occur, it is important to treat the professional misconduct relating to DB Firm's trust account as a serious breach requiring a serious sanction: *Yen review*, at para. 101.

[106] The misleading response to the Law Society's auditor adds to the overall seriousness of the Respondent's misconduct.

[107] However, the Panel accepts the Respondent did not have any dishonest intent in facilitating the transfer of significant amounts of money to the US through DB Firm's trust accounts without providing directly related legal services and without

making reasonable inquiries and this makes his professional misconduct less grave than it otherwise would be.

[108] Finally, the breadth and variety of misconduct increases the overall seriousness of the Respondent's conduct.

The Previous Character and Professional Conduct Record of the Respondent

[109] The Respondent has no professional conduct record ("PCR") and this is a mitigating factor.

[110] The Respondent submitted three short reference letters. While a panel may consider good character evidence in determining an appropriate sanction, such evidence has limited weight: *Law Society of BC v. Gregory*, 2022 LSBC 17, at paras. 45 to 49.

Acknowledgement of the Misconduct and Remedial Action

[111] Militating strongly against a more severe disciplinary action is the Respondent's admission of his professional misconduct and other breaches of the Rules and his consent to a specified disciplinary action.

[112] The Respondent's cooperation saved the Law Society time and resources that would have been required to prove the misconduct at a hearing. As stated in *Law Society of BC v. Johnson*, 2019 LSBC 4, at para. 39:

> Joint submissions…are important to the resolution of Law Society proceedings. They are the product of informed discussions between the parties, who are familiar with their respective cases and have agreed on a particular result. …[T]here are often significant costs associated with a contested hearing, not only to the parties but also to the profession. By agreeing to a joint submission, counsel have saved the significant costs associated with a contested hearing.

[113] The Respondent's admission and consent to a two-month suspension allowed the Hearing to proceed efficiently and without requiring the parties to call several witnesses, many of whom were located outside of British Columbia.

Public Confidence in the Legal Profession and the Disciplinary Process

[114] For the public to have confidence in the disciplinary process, as set out in section 3 of the *Act*, it is important to uphold and protect the public interest in the

administration of justice. Without appropriate sanction, the public could lose confidence in both the legal profession and its disciplinary process.

[115] The public has confidence in the legal profession and the disciplinary process when sanctions are proportionate to the misconduct, are fair and reasonable in all the circumstances and provide for specific and general deterrence.

[116] The Panel agrees with the Law Society that, cumulatively, the Respondent's conduct negatively affects the reputation of the legal profession and undermines public confidence in lawyer integrity and competence. Lawyers must be vigilant gatekeepers of their trust accounts (which includes following client identification and verification Rules), responsibly use their trust accounts, adhere to trust conditions and be candid with the Law Society.

[117] A strong response to the Respondent's misconduct is necessary to deter other lawyers from engaging in similar misconduct: *Law Society of BC v. Gurney*, 2017 LSBC 32 (disciplinary action), at para 36. A two-month suspension is a strong response and also addresses specific deterrence.

[118] The panel in *Dent*, held similar types of misconduct should attract similar disciplinary sanctions to give confidence in the disciplinary process. The following authorities presented by the parties indicate a two-month suspension is appropriate:

(a) *Law Society of BC v. Hsu*, 2019 LSBC 29, a junior lawyer with little knowledge of securities law allowed her trust account to be used to process $14 million over five years without making reasonable inquiries or providing legal services and this resulted in financial loss to investors. There were also other discipline violations. There was no finding of dishonesty and no PCR. The lawyer was suspended for three months and restricted from practicing securities law by consent resolution.

(b) *Yen F&D, Law Society of BC v. Yen*, 2021 LSBC 30 (disciplinary action) and *Yen review*, the lawyer received about USD $10 million and CAD $1.27 million into her firm's trust account and disbursed it without any substantial legal services, failed to make reasonable inquiries about the transactions and failed to make a record of inquiries. There were red flags that made the transactions questionable. The review board held the range of penalties in similar situations was a three- to six-month suspension and gave the respondent a three-month suspension.

(c) *Law Society of BC v. Uzelac*, 2020 LSBC 58, a senior solicitor allowed his trust account to be used to process about $1.17 million without

making adequate inquiries or providing substantial legal services. As a result, his client duped a third party into investing in a fraudulent scheme. There was no finding of dishonesty and the lawyer had a substantial PCR. He was suspended for four months.

(d) *Law Society of BC v. Osei*, 2022 LSBC 43, a junior lawyer disbursed over $2.1 million through his trust account in circumstances where he should have made appropriate inquiries about the source or use of the funds and where he provided little or no legal work. Despite a practice advisor suggesting he cease acting for the client, he did not do so. He also failed in his duty to unrepresented persons. The panel accepted a joint submission recommending a four-month suspension.

[119] The Panel accepts a two-month suspension is within the range of sanctions imposed in similar cases.

Determination on Disciplinary Action

[120] After considering the relevant mitigating and aggravating factors above, the Panel concludes the two-month suspension proposed by the parties is proportionate, appropriate and in the public interest in the administration of justice.

[121] The Panel made an order on July 27, 2023, with written reasons to follow (the "Order"). A panel has discretion to impose disciplinary action before written reasons are prepared if the panel accepts a joint submission under Rule 5-6.5: Rule 5-6.4(2). As the Panel accepted the joint submission on disciplinary action, the Panel made its Order about disciplinary action prior to issuing these written reasons.

[122] The Panel exercised its broad powers in section 38(7) of the *Act* to make any other orders and declarations (in addition to its powers under section 38(5), (6) and (6.1)) and ordered the suspension start on July 28, 2023. The Respondent arranged for management of his practice during his suspension and therefore asked it to start on July 28, 2023.

[123] The way the Panel has proceeded in this disciplinary matter, making its order with written reasons to follow, is based on the specific circumstances of this case.

[124] Here, the Panel considered it was in the public interest to have the Respondent's files properly managed during his suspension. Also, the Respondent has taken responsibility for his misconduct and cooperated with the Law Society to provide joint submissions on misconduct and disciplinary action, so both the public interest

and the Respondent's interest are furthered by having the disciplinary action served and the matter concluded without further delay.

COSTS

[125] The Respondent agrees to pay $3,500 in costs to the Law Society. This is the maximum amount available for a Rule 5-6.5 hearing in Item 25 of Schedule 4 – Tariff for Discipline Hearing and Review Costs.

[126] The Panel finds the proposed costs are reasonable and appropriate in the circumstances.

[127] Costs were payable on or before August 28, 2023 (30 days from the Panel's Order).

RULE 5-8(2) ORDER

[128] The Respondent asked the Panel to make an order under Rule 5-8(2) preventing disclosure to the public of any information and documents in the ASF, transcripts or other file materials protected by solicitor-client privilege and confidentiality. He also asked the order to prevent disclosure of the names of all lawyers and other employees of DB Firm to protect their privacy.

[129] The Panel finds a Rule 5-8(2) order is appropriate to shield lawyers and employees of the Firm, whose conduct was not in issue, from publication.

[130] The Panel finds it unnecessary to risk DB Firm's lawyers' and employees' privacy and/or reputations. Privacy is a fundamental consideration in a free society for individuals and society as a whole: *Sherman Estate v. Donovan*, 2021 SCC 25. Also, reputation is an integral and fundamentally important aspect of every individual: *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130. As their conduct is not in question, allowing the names of DB Firm's members to become public is not required to maintain public confidence in the legal profession and its disciplinary process.

[131] However, there is no need for an order under Rule 5-8(2) to prevent the disclosure of materials covered by solicitor-client privilege. While Rule 5-9(2) allows people to obtain copies of transcripts and exhibits, Rule 5-9(3) says this must not be interpreted to permit the disclosure of any information, files or records that are confidential or subject to solicitor-client privilege.

ORDERS

[132] The Panel orders that:

(a) the Respondent is suspended from the practice of law for a period of two months commencing on July 28, 2023;

(b) the Respondent is to pay costs to the Law Society in the amount of $3,500, inclusive of disbursements, payable on or before August 28, 2023; and

(c) a non-disclosure order pursuant to Rule 5-8(2) that the names of lawyers and other employees of the DB Firm not be disclosed to the public.