2023 LSBC 43
Hearing File No.: HE20200003
Decision Issued: November 2, 2023
Citation Issued: February 7, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

SPENCER OWEN MAY

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION ON REHEARING OF PARAGRAPHS 1(c) AND 2(c) OF THE CITATION

Rehearing date:	September 5, 2023
Panel:	Dean Lawton, KC, Chair Michael Dungey, Public representative Monique Pongracic-Speier, KC, Lawyer
Discipline Counsel:	Michael D. Shirreff Gregory A. Cavouras
Counsel for the Respondent:	William G. MacLeod, KC
Written reasons of the Panel by:	Monique Pongracic-Speier, KC

INTRODUCTION

[1] On February 7, 2020, a multi-paragraph citation was issued against the Respondent (the "Citation"). On August 31, 2021, the Panel's decision on facts and determination ("F&D"), indexed at 2021 LSBC 35 (the "*2021 F&D Decision*"), was issued. The parties appealed or cross-appealed aspects of the *2021 F&D Decision*, pursuant to s. 48 of the *Legal Profession Act* (the "*Act*"). The Court of Appeal allowed the appeal and cross-appeal in limited part. The Court remitted paragraphs 1(c) and 2(c) of the Citation back to the Panel for fresh determination. The Court of Appeal otherwise dismissed the appeal and cross-appeal: *May v. Law Society of British Columbia*, 2023 BCCA 218 ("*BCCA Decision*"). These are the Panel's reasons on the allegations remitted to the Panel for fresh determination.

BACKGROUND

[2] The allegations in the Citation arose from the Respondent's representation of two individuals and two corporations in builder's lien and debt claims between 2015 and 2018. Only one of the two corporate clients is relevant to the matters addressed in these reasons. In the *2021 F&D Decision*, this corporation was referred to as "Company 1"; in these reasons, we will refer to it simply as the "Company". As we did in the *2021 F&D Decision*, we will identify the individuals as YZ and ZZ.

[3] Paragraph 1(c) of the Citation alleged that between approximately December 19, 2016 and January 4, 2017, in the course of acting for the Company, YZ and ZZ, in a without-notice hearing in the Supreme Court of British Columbia (the "Supreme Court"), the Respondent failed to act honourably and with integrity, or acted contrary to his obligations to the court, or both, and so committed professional misconduct, by filing or relying upon the affidavit of his paralegal, AC (the "AC Affidavit"), when the Respondent knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between one of the defendants, and an unincorporated entity called Z & Co.

[4] Paragraph 2(c) of the Citation alleged that between approximately March 3, 2017 and March 14, 2017, while acting for the clients in a without-notice hearing in the Supreme Court, the Respondent failed to act honourably and with integrity, or acted contrary to his obligations to the court, or both, and so committed professional misconduct, by offering, presenting, or relying upon an affidavit made by YZ (the "YZ Affidavit"), when the Respondent knew or ought to have known that the affidavit was false or misleading in relation to a purported contract document between one of the defendants and Z & Co.

[5] In the *2021 F&D Decision*, the Panel upheld the allegation of professional misconduct at paragraph 2(c) but dismissed the allegation at paragraph 1(c).

[6] The question of the materiality of the misrepresentations alleged in paragraphs 1(c) and 2(c) of the Citation to the Supreme Court proceedings described in those paragraphs was central to the Panel's determinations in the *2021 F&D Decision*. The Court of Appeal held that the Panel's focus was too narrow and led the Panel to fetter its discretion: *BCCA Decision* at paras. 79 and 80. This was the basis on which the Court of Appeal quashed the determinations and remitted the allegations at paragraphs 1(c) and 2(c) back to the Panel for fresh determinations, taking into account all relevant factors.

ISSUES

[7] Two questions fall to be determined:

(a) Between approximately December 19, 2016 and January 4, 2017, did the Respondent fail to act honourably and with integrity, or did he act contrary to his obligations to the Supreme Court, or both, and so commit professional misconduct, pursuant to s 38(4) of the *Act*, as alleged in paragraph 1(c) of the Citation?

(b) Between approximately March 3 and March 14, 2017, did the Respondent fail to act honourably and with integrity, or did he act contrary to his obligations to the Supreme Court, or both, and so commit professional misconduct, pursuant to s 38(4) of the *Act*, as alleged in paragraph 2(c) of the Citation?

STATEMENT OF FACTS

[8] The factual background to the Citation is intricate. Readers seeking a comprehensive overview of the facts are invited to consult the *2021 F&D Decision*. These reasons address the facts pertinent to the matters referred back to the Panel.

[9] The Respondent was retained by YZ, ZZ and the Company in the summer of 2015 to prosecute a builder's lien action arising from a claim for unpaid work on the renovation of a condominium. During the Respondent's initial meeting with the clients and their solicitor on August 14, 2015, the Respondent was told that the renovation had begun in May 2015 and was finished by the end of June 2015. The work was said to involve painting the "whole house", a kitchen renovation with

new appliances, the installation of hardwood floors, and the provision of antique cabinets valued at $250,000 to $260,000.

[10] The clients did not give the Respondent any contractual documents during the initial meeting. They did, however, provide the Respondent with a copy of a builder's lien registered by "the Company (YZ)". The amount claimed by lien was $500,000, comprised of the following approximate amounts:

(a) $250,000 to $260,000 for the supply of antique cabinets;

(b) $140,000 to $150,000 for work and materials; and

(c) $80,000 for "old work."

[11] The clients also told the Respondent during the initial meeting that the condominium owner had provided a $1,000 deposit towards the renovation work.

[12] The Respondent's firm promptly filed an action in the Supreme Court (the "Action"), to meet the clients' limitation date under the *Builders Lien Act*. In the main, the Action claimed a lien and judgment in the amount of $500,000, plus contractual interest or, alternatively, interest pursuant to the *Court Order Interest Act*. ZZ, YZ and the Company were named as plaintiffs. The owners of the condominium, DT and HX, a married couple, were named as defendants.

[13] On November 9, 2016, the Respondent and AC met with ZZ and YZ, to gather information and documents to substantiate the clients' claim. The clients gave the Respondent a one-page loan agreement, dated March 25, 2015, which documented a loan of $500,000 from YZ to DT to pay for "the mortgage, property tax and previous renovation bills" for the condominium. The document said that the borrower agreed to use the condominium "as collateral for the said loan." The document was signed by DT as borrower, by YZ as lender, and by a witness.

[14] On November 18, 2016, the clients delivered additional documents to AC, three of which are relevant to the matters now at issue.

[15] The first document of note was an invoice, dated May 28, 2014, for the purchase of a "Wood Paitition [*sic.*] Wall" (the "wood partition wall") for $150,000. (This invoice was later replaced with a "corrected" version of the invoice, dated May 28, 2015.)

[16] The second document was a standard form, preprinted renovation contract, which had been partially completed by hand. The renovation contract indicated that it was between the Company as "contractor", and YZ as "owner". The contract also listed

YZ as "project manager." The address of the property to be renovated was the address of the condominium. The description of the work was as follows:

> whole house renovation.
> Paint the whole house. New carpet + hardwood floor.
> Installed [*sic*] a pair of antique wood Paitition [*sic*] Wall.

[17] Labour and materials were at cost plus 45 per cent. The contract price was $240,000. The contract also stipulated a $2,000 deposit – not a $1,000 deposit, as the Respondent was previously told – and provided for a one-year warranty on work and materials. Payment terms were within three days of the completion of the work, with 36 per cent interest per year thereafter on any unpaid balance.

[18] The renovation contract had signatures for the owner, the contractor, and a witness. Names were not written under or next to the signatures, but each signature was dated January 27, 2015.

[19] The third document was a handwritten invoice dated July 4, 2015 from the Company to DT, for "renovations". The total amount charged was $281,680, i.e., more than $41,000 over the renovation contract price. The work listed on the invoice was: changing carpets, changing hardwood flooring, interior painting, installation of an antique wood partition wall, retiling of the kitchen and bathroom, and "clean, garbage." There was no mention of new appliances. Also, the charge for installing the wood partition wall was $217,500, an amount that did not reflect the cost of the installed antique wood cabinets that the Respondent was told about during his initial meeting with the clients in August 2015, but did reflect the cost of the wood partition wall, plus 45 per cent.

[20] On November 22, 2016, AC contacted ZZ with questions about the renovation contract and the invoice for the wood partition wall. Among other things, AC inquired whether the listing of YZ as "owner" in the renovation contract was a mistake. ZZ affirmed that the description of YZ as "owner" was an inadvertent error. He said, however, that DT had actually signed the contract as "owner." ZZ also advised AC that DT had borrowed money from YZ and "[DT] didn't want his wife to know about it", which is why DT had signed the contract but HX had not.

[21] On November 24, 2016, AC met with ZZ again. ZZ gave AC a new first page for the renovation contract, which showed DT as the owner of the property to be renovated and "Z & Co." – not the Company – as the contractor. ZZ advised AC that DT had received a copy of the renovation contract showing him as the owner.

[22] At the hearing of the Citation, the Respondent gave evidence that he understood and treated the new first page of the renovation contract as a "slip sheet."

[23] Returning to AC's meeting with ZZ on November 24, 2016, AC asked why the Company was listed as the contractor in the first version of the renovation contract when the Company had not been incorporated until June 2015. ZZ advised AC that, originally, there was no written contract for the renovation but that the contract was made up later, signed and "pre-dated" to January 27, 2015.

[24] AC spoke with ZZ again in late November 2016, this time to obtain further information about YZ's loan to DT. (It is not clear on the evidence why she did not contact YZ directly.) ZZ advised AC that, on or about December 5, 2014, YZ had loaned US $200,000 to DT. YZ and DT then entered into the loan agreement of March 25, 2015. The agreement "marked up" the loan to CDN $500,000 to take into account interest for late payment of the loan and to encourage DT to pay off the loan more quickly.

[25] AC advised the Respondent of the information conveyed by ZZ. The Respondent then determined that it would be necessary to apply to amend the pleadings in the Action. He received instructions to do so.

[26] On December 15, 2016, the Respondent took the AC Affidavit in support of an application to amend the pleadings in the Action (the "Amendment Application"); this is the affidavit at issue in paragraph 1(c) of the Citation.

[27] The AC Affidavit stated, in part,

> In or about January 2015, the defendant [DT] retained the plaintiffs, [YZ and ZZ] to perform renovation work for the Property [i.e., the condominium]. Now attached to this my affidavit and marked as Exhibit "B" is a true copy of the Renovation Contract entered between [Z & Co.] and the defendant [DT], and dated January 27, 2015.

[28] Exhibit "B" was, in fact, and to the Respondent's knowledge, comprised of the body of the renovation contract delivered by the clients on November 18, 2016 and the new first page provided by ZZ on November 24, 2016.

[29] The Amendment Application was filed on December 19, 2016 and heard without notice to the defendants (who had not entered responses to civil claim in the Action) on January 4, 2017. The Supreme Court granted the orders sought.

[30] On February 10, 2017, the Respondent obtained a desk order for default judgment in the Action, with damages to be assessed. The Respondent then prepared an

application for an assessment of damages, to have a lien declared, and for other relief (the "Remedies Application").

[31] On February 21, 2017, the Respondent took the YZ Affidavit in support of the Remedies Application; this is the affidavit at issue in paragraph 2(c) of the Citation. Among other things, the YZ Affidavit stated:

> In or about January 2015, [DT] retained [ZZ] and me, through [Z & Co.], to perform renovation work for the Property. DT provided a deposit of $1,000.00 to us. Now attached to this my affidavit and marked as Exhibit "B" is a true copy of the Renovation Contract entered between [Z & Co.] and [DT], bearing date January 27, 2015.

[32] The exhibit was the same document as had been exhibited to the AC Affidavit.

[33] The Respondent filed the YZ Affidavit with the other Remedies Application materials.

[34] On March 14, 2017, the Remedies Application was heard on a without notice basis. The Supreme Court granted the following orders:

(a) judgment against DT and in favour of YZ in the amount of US$200,000, plus prejudgment interest at 36 per cent per annum;

(b) damages to ZZ and YZ against DT and HX of $281,680, plus prejudgment interest at 36 per cent per annum against DT;

(c) post-judgment interest and costs; and

(d) a declaration that ZZ and YZ were entitled to a builder's lien in the amount of $281,680 against the condominium.

ANALYSIS

A preliminary issue: the scope of the referral back

[35] Paragraphs 1(c) and 2(c) of the Citation allege that the Respondent failed to act honourably and with integrity, or contrary to the Respondent's obligations to the Supreme Court, or both. In the *2021 F&D Decision*, we held that the Law Society had not shown a breach of the Respondent's duty to act honourably and with integrity, with respect to any of subparagraphs (a) to (c) of paragraphs 1 and 2 of the Citation: *2021 F&D Decision* at paras. 155 to 159. At the Court of Appeal, the

Respondent argued that this finding necessarily foreclosed a finding that the Respondent had failed to fulfil his duty of candour: *BCCA Decision* at paras. 59 to 60.

[36] The Court of Appeal disagreed with the Respondent's submission. The Court quoted from paragraph 155 of the *2021 F&D Decision* as follows:

> In our view, the evidence does not show on a balance of probabilities that the Respondent failed to act honourably or with integrity in respect of the matters alleged in paragraphs 1 and 2 of the Citation. *Charges of dishonourable conduct or a lack of integrity in the course of practice tend to carry a taint of dishonesty, deception or immorality. Such charges are allegations that a lawyer has acted for an improper purpose or with a lack of rectitude. As such, allegations of dishonourable conduct and a lack of integrity in the course of practice necessarily comment on the lawyer's state of mind in respect of the impugned conduct* [citation omitted]. In this case, the evidence does not show that the Respondent was acting immorally or was motivated by an improper purpose.
> [emphasis added by the Court of Appeal]

[37] The Court of Appeal then said,

> [62] … The issue of candour is concerned with the content of the lawyer's presentation to the court of evidence or oral assertions, not necessarily the state of mind of the lawyer. As noted in *Virk* [*v. Law Society of Alberta*, 2022 ABCA 2, discussed below] to be candid "a lawyer must acknowledge when he or she does not know a fact, or does not know whether a statement is true". Infringing this standard, which surely is correctly stated in *Virk*, does not necessarily engage the characteristics of dishonourable conduct or lack of integrity identified by the Hearing Panel.
>
> [63] In other words, *the set of cases of a lack of candour is not a subset of the set of cases of dishonourable conduct or lack of integrity, although the sets may overlap. I conclude it was open to the Panel to distinguish between the fault of failing to act honourably and with integrity, and the fault of a lack of candour to the court.*
> [emphasis added by the Panel]

[38] Given our previous finding that the Law Society had not shown dishonourable conduct or a lack of integrity with respect to any aspect of the allegations in

paragraphs 1 and 2 of the Citation, and given the Court of Appeal's approval of the distinction the Panel drew between conduct which is dishonourable and which displays a lack of integrity, on the one hand, and conduct which fails to fulfil the duty of candour, on the other, we do not understand our task on this referral back to entail reconsideration of whether the Respondent failed to act honourably and with integrity, as alleged in paragraphs 1(c) and 2(c). Rather, and notwithstanding the unlimited nature of the referral back of paragraphs 1(c) and 2(c), we take our task to be deciding if the Respondent committed professional misconduct by acting in a manner that is inconsistent with his duty of candour to the Supreme Court. This is also the basis on which the parties argued the referrals back.

Guidance provided by the *BCCA Decision*

[39] Paragraph 73 of the *BCCA Decision* affirms that there are two questions for the Panel to ask with respect to each allegation:

(a) Is the delict established on the record?

(b) If so, does the delict rise to the level of "a marked departure" from expected conduct?

[40] The Court of Appeal held that determining the materiality of the information the Respondent provided or withheld from the Supreme Court is not, in and of itself, sufficient to answer either question: *BCCA Decision* at paras. 74 and 75. Rather, a range of considerations may weigh in the Panel's decision at both steps of the analysis. These may include, but are not limited to, relevance, materiality, circumstantial complexity, error of judgment, misunderstandings, and degree of diligence: *BCCA Decision* at para. 75.

[41] Referring to counsel's duty of candour, the Court of Appeal noted, at paragraph 75,

> … The circumstances of failure in respect of the duty of candour can range from intentional to unintentional conduct, from inaccurate disclosure to non-disclosure, from deceptive conduct to honest mistake, and may engage degrees of relevancy …

[42] At paragraph 7 of its reasons, the Court of Appeal endorsed and adopted "as equally valid in British Columbia" the following passages from *Virk*:

> [20] … All agree that *intentionally making an inaccurate statement, or the legal equivalent of being willfully blind to the accuracy of a statement, would suffice. Further, recklessness would be sufficient*; if a lawyer made

> an inaccurate statement to the court when indifferent to the statement's accuracy or inaccuracy, that would meet the test.
>
> [21] The duty of candour, however, will be informed by its context, here the duty of a lawyer (as an officer of the court) when making submissions to that court. In that situation*, there is a positive duty on the lawyer to turn his or her mind to the accuracy of statements that are being made. In order to be "candid", the Law Society is entitled to expect that the lawyer was confident that the statement being made was accurate*, which would imply some duty to establish the truth of the statement before making it. From the opposite perspective*, to be candid a lawyer must acknowledge when he or she does not know a fact, or does not know whether a statement is true*. It is not unreasonable to hold a professional who is making representations to a court to a standard of reasonable diligence as to self-informing, coupled with frankness about limitations of his or her state of knowledge, and forthrightness about the extent of what is believed to be accurate.
> [emphasis added by the Court of Appeal]

[43] *Virk* involved an appeal from various findings of misconduct made against the appellant lawyer and a sanction of disbarment. One finding of misconduct was that Virk had failed in his duty to be candid with the court in a family law matter. Virk had tendered a binder of documents as evidence in court and affirmed unconditionally to the trial judge that all documents in the binder had previously been produced to the other party. In fact, some of the documents had not been produced: *Virk* at para. 15.

[44] In proceedings before the Law Society of Alberta, Virk had contended that he had merely misspoke during the court hearing, and that he sincerely believed his representation to be true. The Law Society countered that Virk knew or was willfully blind to the fact that his statement was inaccurate and faulted him for failing to correct his misstatement to the court. The hearing panel found that Virk's statement as to the production of documents was false, and that Virk was "cavalier" with respect to the scope of his representation. An appeals panel upheld the initial determination: *Virk* at paras. 17 to 18. Virk appealed to the Alberta Court of Appeal.

[45] At the Court of Appeal, Virk argued that a "cavalier" misstatement was not sufficient to show that he failed to uphold the duty of candour. He argued that a failure to be candid requires an intention to make a false statement, and that more than negligence is required.

[46] The Court of Appeal denied Virk's appeal. The Court held that the record demonstrated that Virk's statement was "clearly inaccurate", and that the hearing committee was entitled to infer that Virk must have known this. The Court also held that the hearing committee was entitled to consider that Virk had failed to correct the misapprehension he had created.

Provisions of the *Code of Professional Conduct*

[47] Lawyers in British Columbia are bound by all provisions of the *Code of Professional Conduct for British Columbia* (the "*Code*") but the following are particularly germane to the matters before us.

[48] Rules 2.1 and 2.1-2 provide, in relevant part:

> 2.1 Canons of Legal Ethics
>
> …
>
> A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.
>
> In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.
>
> …
>
> 2.1-2 To courts and tribunals
>
> (a) A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
>
> …
>
> (c) A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law …

[49] Rule 5.1-1 provides:

> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

[50] The Commentary to rule 5.1-1 includes the following statement:

> [6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

Burden and standard of proof

[51] The Law Society bears the onus of proving the conduct alleged in paragraphs 1(c) and 2(c) of the Citation and that the conduct amounts to professional misconduct. The standard of proof is the balance of probabilities: *Foo v. Law Society of British Columbia*, 2017 BCCA 151 at para. 63.

[52] Professional misconduct is conduct which is a marked departure from that conduct the Law Society expects of its members: *BCCA Decision* at para. 14.

The parties' submissions on paragraphs 1(c) and 2(c) of the Citation

[53] The parties delivered detailed written and oral submissions in the rehearing of paragraphs 1(c) and 2(c) of the Citation. We are grateful to counsel for their comprehensive arguments. The following does not attempt to summarize every point made by the parties. We confirm that we have considered all of the parties' submissions in reaching our decision.

The Law Society's submissions

[54] The Law Society submits that the Respondent's decision to tender the AC and YZ Affidavits engages his duty of candour to the Supreme Court. Neither rule 2.1-2 nor rule 5.1-1 limits the lawyer's duty of candour. Rather, rule 2.1-2 refers to candour being required "at all times", and the commentary to rule 5.1-1 provides that lawyers must take "particular care" to be accurate, candid and comprehensive when opposing interests are not represented. The Law Society also highlights the discussion of the duty of candour in the *BCCA Decision* and the Court of Appeal's adoption of the comments of the Alberta Court of Appeal in *Virk*. The Law Society also discusses other professional regulation case law which has commented on the

lawyer's duty of candour in presenting evidence to courts. Some of these cases are discussed below.

[55] The Law Society argues that the Respondent was wrong to tender and rely on affidavits exhibiting what purported to be a "true copy" of a written renovation contract between Z & Co. and DT, when the Respondent must have known that the document was not – and could not be – a true copy of an authentic agreement, concluded on January 27, 2015. The Law Society says that the Respondent "simply proceeded to rely on a document in court that was effectively created by his own office." This, the Law Society says, was misleading.

[56] The Law Society also says that even if the Respondent honestly believed that the document exhibited to the AC and YZ Affidavits somehow represented the substance of an agreement between his clients and DT, the Respondent's duty of candour to the Supreme Court required him to disclose "much more" about the creation and authenticity of the document than was in the affidavits.

[57] As to whether the Respondent's actions qualify as professional misconduct, the Law Society argues that, generally, but especially in proceedings where opposing interests are not represented, "a breach of the duty of candour, as it relates to sworn evidence, will, in the vast majority of cases, constitute a marked departure from the conduct that is expected of lawyers." The Law Society submits that, in the context of the information known to the Respondent in 2017, the Respondent's conduct is a marked departure from what is expected of a lawyer, and it is of no moment whether the Respondent's breach was intentional, in the sense of intending to mislead. The Law Society argues that, at a minimum, the Respondent was willfully blind or reckless as to the authenticity of the document he exhibited to the AC and YZ Affidavits; that he was grossly culpable in this regard; and that such gross culpable neglect will, or should, lead to a finding of professional misconduct.

[58] The Law Society also offers submissions on the role of "materiality" in the adjudication of the Respondent's conduct. The Law Society emphasizes that the Respondent's conduct should be measured against his duty to be candid in tendering evidence and submissions to the court, and not according to whether a misrepresentation in that evidence or submissions was material to the outcome of the application that was argued. The Law Society says,

> … Crafting "exceptions" to when counsel must be candid in the presentation of evidence undermines the importance of the duty and can only undermine the public's confidence in the integrity of the legal system.

[59] The Law Society also says that, in any event, materiality is only one of the factors to be considered in the assessment of whether a breach of the duty of candour amounts to professional misconduct and, in this case, it is of "low importance."

[60] The Law Society says that, on a proper assessment of the facts and the law, the Respondent should be found culpable of professional misconduct as alleged in paragraphs 1(c) and 2(c) of the Citation.

[61] During the hearing, the Panel asked the parties whether there are factors, not mentioned in the *BCCA Decision*, that the Panel ought to take into consideration in assessing whether the Respondent committed professional misconduct as alleged at paragraphs 1(c) and 2(c) of the Citation. The Law Society suggested that the context of the court proceedings and the without notice nature of the hearings may be relevant.

Respondent's submissions

[62] The Respondent's submissions focus on the application of the factors the Court of Appeal identified as potentially relevant to a consideration of an allegation of a breach of the duty of candour, identifies other potential factors for consideration and discusses jurisprudence.

[63] With respect to the factors identified by the Court of Appeal, the Respondent highlights that the Court of Appeal did not prescribe a legal "test" but offered an open set of factors that are potentially relevant to the adjudication of allegations of breach of the duty of candour. In addition to the factors identified by the Court of Appeal, the Respondent urges us to consider his intention at the time of the alleged breaches of the duty of candour (i.e., that he did not intend to mislead the Supreme Court) and that his conduct has not been characterized as dishonourable. The Respondent urges us to apply the factors we find relevant with an eye to the realities of practice in court and in the particular context of the case, including the Respondent's intentions in connection with the Amendment Application and the Remedies Application.

[64] The Respondent argues that consideration of the various factors should weigh against findings of professional misconduct.

[65] The Respondent highlights that his instructions changed over time. He argues that he endeavoured to accurately capture in the pleadings the relationship between the parties, as explained to him, and to bring the evidence into line with his instructions. He took these steps in the context of understanding his clients to have valid claims.

[66] The Respondent argues that his evolving instructions are relevant to the "circumstantial complexity", "degree of diligence" and "error of judgment" factors enumerated by the Court of Appeal. (In relation to the last factor, the Respondent submits the Court of Appeal presumably meant the "error of judgment" factor to capture a decision made honestly and without an intention to deceive.)

[67] The Respondent's submissions also address the role of materiality in the adjudication. He argues, *contra* the Law Society, that the duty of candour is conventionally understood to relate to material matters, and while materiality is not the sole factor to consider in determining whether a lawyer has breached the obligation to be candid with the court, it "will usually have a dominant place in [the] … assessment."

[68] The Respondent offers submissions on the meaning of the terms "willful blindness" and "recklessness." The Respondent refers us to *Sansregret v. The Queen*, [1985] 1 SCR 570, as adopted and applied in *Bronson v. Hewitt*, [2010] BCJ No. 211 (SC), a civil case:

> … The two concepts were defined and distinguished in *Sansregret* … at para. 22:
>
> > Wilful blindness is distinct from recklessness because, while recklessness involves a knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
>
> Recklessness and wilful blindness both have a subjective element. Recklessness is the conduct of one who sees the risk and who takes the chance [citation omitted]. The wilfully blind choose not to know the truth.

[69] The Respondent says that *Virk* approved a similar analysis of intentionality, recklessness and willful blindness.

[70] The Respondent argues that the concepts of "recklessness" and "willful blindness" are inapt, as they refer to states of mind not substantiated by the evidence. He says

that the use of the terms is "tantamount to alleging that Mr. May committed a fraud against the Court." The Respondent denies recklessness in his conduct during the Remedies Application.

[71] In relation to both paragraphs 1(c) and 2(c) of the Citation, the Respondent argues that the Citation "assumes" that the impugned parts of the affidavits were false or misleading in relation to the "purported contract document" but his evidence to the Panel was that he did not believe the document was made-up, even if it did not entirely make sense to him. He also argues that the synthesized document was exhibited on instructions, and on his understanding that it was the "correct" document.

[72] In respect of the allegations at paragraph 1(c) of the Citation, the Respondent says that he did not "rely" on the AC Affidavit, either in seeking leave to amend the pleadings or in seeking an order permitting service of the amended pleadings by alternative means. Rather, and as the Panel found at paragraph 185 of the *2021 F&D Decision*, the history of the renovation contract is not relevant to either issue. He points out that evidence is not required in support of an application to amend pleadings.

[73] In respect of the allegation at paragraph 2(c) of the Citation, the Respondent argues that it was not misleading and did not infringe the duty of candour for him to omit to mention to the judge presiding in the Remedies Application that the renovation work started under an oral contract that was later put into writing and signed, especially since he did not think that the renovation contract was a "made-up document." The Respondent says that, while he perhaps could have been more thorough, his omission was, at most, an error of judgment and should not be characterized as professional misconduct.

[74] Similarly, the Respondent says that the date of the document was not misdescribed in the evidence but, in any event, the dating of the document was immaterial to an application to quantify damages and for the declaration of a builder's lien.

[75] Finally, the Respondent argues that, in the Remedies Application, he tendered the renovation contract to YZ's affidavit on the understanding that it was the "correct document" and that he also correctly advised the court that it would be open to the defendants to set aside the order, as the application had proceeded without notice, following default judgment.

Step 1: Has the Law Society proved the delicts alleged?

[76] The delict alleged in paragraph 1(c) of the Citation, broken out into constituent elements, is that the Respondent:

(a) acted contrary to his obligations to the Supreme Court,

(b) by "filing or relying upon" AC's affidavit,

(c) when he knew or ought to have known that the affidavit was false or misleading as to a purported contractual document between Z & Co. and DT.

[77] The delict alleged in paragraph 2(c) of the Citation is that the Respondent:

(a) acted contrary to his obligations to the Supreme Court,

(b) by "offering, presenting or relying upon" YZ's affidavit,

(c) when he knew or ought to have known that the affidavit was false or misleading as to a purported contractual document between Z & Co. and DT.

[78] Our analysis proceeds on the basis that the "obligations to the court" at issue are those flowing from the Respondent's duty of candour to the Supreme Court. We will return to those later. We will first analyze the other elements of the alleged delicts.

[79] It is not disputed that the Respondent "filed" the AC Affidavit in connection with the Amendment Application. This fact was admitted by the Respondent.

[80] An affidavit filed in support of a court application is also typically "relied" on in the application, even if not specifically alluded to in oral submissions at the hearing, because the affidavit usually will be cited in the Notice of Application and included in the Chambers Record: Supreme Court Civil Rules, rule 8-1(4) and (15). In this case, neither the Notice of Application nor the index to the Chambers Record is in evidence, and the transcript of the hearing of the Amendment Application does not suggest that the Respondent specifically referred the Supreme Court to the affidavit in submissions. Nonetheless, the Respondent testified before the Tribunal that he "put in" the AC Affidavit on the Amendment Application. On the strength of this evidence, we are prepared to infer that the Respondent "relied" on the AC Affidavit, as alleged at paragraph 1(c) of the Citation.

[81] With respect to paragraph 2(c) of the Citation, the record supports a finding that the Respondent "offered, presented [and] relied on" the YZ Affidavit in the Remedies Application. The Respondent testified on cross-examination that he "tendered" the YZ Affidavit in the application. An affidavit which is "tendered" is "offered and presented." In addition, the transcript of the hearing of the Remedies Application shows that the Respondent specifically directed the judge's attention to the YZ Affidavit. The Respondent clearly "relied" on the affidavit at the hearing.

[82] The next question is whether the Respondent "knew or ought to have known that the affidavit[s were] … false or misleading as to a purported contractual document between Z & Co. and DT." In the *2021 F&D Decision*, we answered this question in the affirmative. At paragraphs 176 to 179, the Panel said,

> [176] With respect to the allegations at paragraphs 1(c) and 2(c) of the Citation, we are of the view that the Respondent ought to have known that the evidence in [AC]'s affidavit and in the affidavit of YZ concerning the contract document between Z & Co. and DT was misleading. Both affidavits present the amalgamated renovation contract document as the "true copy of the Renovation Contract" entered into by Z & Co. and the defendant DT, and "dated" / "bearing date" January 27, 2015. Neither affidavit commented on the history of the dealings between the parties. Most critically, neither affidavit explained that the contract in relation to which relief was claimed had started out as an oral agreement that was later be reduced to writing and "pre-dated" – actually, backdated – to January 27, 2015. The natural inference upon seeing a written contract "dated" or "bearing [the] date" January 27, 2015 would be that the written contract was entered into on January 27, 2015 by the parties named in the contract; the Respondent admitted as much under cross-examination. In response to the suggestion that there was no way for the court to know from [AC]'s affidavit – which was, in the relevant respect, identical to YZ's later affidavit – that the renovation contract document exhibited to the affidavit had not been created until at least June 22, 2015, the Respondent said, "That's true."
>
> [177] Understood in the most generous terms, the evidence suggests that in January, 2015, YZ and DT entered into an oral agreement, which YZ wanted to style as an agreement between Z & Co. and DT because he hoped to incorporate Z & Co. Then, some unknown number of months later (and certainly no earlier than June 22, 2015), some version of the agreement was reduced to writing. It was apparently first documented as an agreement between [the Company] and DT, then reformulated as an

> agreement between Z & Co. and DT - presumably when it became apparent to ZZ and YZ that [the Company] …, incorporated in June 2015, could not be party to an agreement entered into in January 2015.
>
> [178] None of this evidence was put before the court. …
>
> [179] By declining to canvass the admittedly convoluted evidence of the dealings between the parties but instead simply exhibiting the amalgamated renovation contract to [AC]'s and YZ's affidavits, the Respondent gave the court a partial and inaccurate impression of the plaintiffs' contentions as to the history of the dealings between the parties. …

[83] The Panel adopts and relies on these findings anew. We add the following.

[84] By the time the AC and YZ Affidavits were made in December 2016 and February 2017, respectively, the Respondent had received evolving information from his clients about the contractual arrangements for the renovation of the condominium. Based on what he was told, the Respondent was aware that the exhibit could not be "the" contract between his clients and DT, even if he believed it to represent the substance of the agreement between the parties. The Respondent ought to have known that it was misleading for the affidavits to suggest that the exhibit was "the" contract.

[85] Additionally, the document exhibited to the AC and YZ Affidavits was not an authentic document. The exhibit was created when the Respondent permitted two different documents – all but the first page of the written renovation agreement handed to the Respondent on November 18, 2016 and the "corrected" first page of the renovation contract that YZ delivered to AC on November 24, 2016 – to be combined into one.

[86] Given what the Respondent knew about the history of the dealings between the parties and about the synthetic nature of the exhibit to the AC and YZ Affidavits, the Respondent ought to have known that the affidavits were misleading in relation to the purported renovation contract between Z & Co. and DT.

[87] Before leaving this part of the analysis, we wish to address an argument made by the Respondent in his written submissions. The Respondent argued that, previously, the Panel accepted the Respondent's testimony that he understood the exhibit to the AC Affidavit to be the "correct" document. We did not do so. Rather, as stated at paragraph 158 of the *2021 F&D Decision*, we agreed that "the evidence suggests that *the Respondent allowed himself to be convinced* that the synthesized

renovation contract represented the 'true' agreement governing the renovation of the [c]ondominium" [emphasis added]. We also commented at the same paragraph that because the Respondent viewed ZZ and YZ as "very unsophisticated builders" in an industry where poor record-keeping practices are common, "receiving a '*corrected*' first page of the renovation contract from ZZ did not throw up a red flag" [emphasis added].

[88] The remaining question in analyzing the delicts is whether the Respondent failed to uphold his duty of candour to the Supreme Court.

[89] The *BCCA Decision*, at paras. 8 and 9, stresses that the duty of candour is afforded a "high place" among a lawyer's professional obligations, and that rule 2.1-2 of the *Code* provides that a lawyer's conduct should "at all times" be characterized by candour. As the Court of Appeal also recognized, at para. 10, the commentary to rule 5.1-1 confirms that the requirement for candour is heightened in a hearing without notice. The lawyer "must take *particular care* to be *accurate, candid and comprehensive* in presenting the client's case so as to ensure that the tribunal is not misled" [emphasis added].

[90] The *BCCA Decision* confirms that the duty of candour entails both negative and positive obligations. The lawyer must not:

(a) mislead the court in submissions or with respect to the evidence (at paras. 5 to 6);

(b) intentionally make an inaccurate statement (at para. 7);

(c) make a statement in willful blindness to its truth (at para. 7); or

(d) make a statement recklessly, i.e., with indifference as to the statement's accuracy (at para. 7).

[91] In addition, the lawyer must:

(a) consider the accuracy of the statements the lawyer intends to make (para. 7); and

(b) acknowledge when the truth of a statement is unknown to the lawyer (para. 7).

[92] For certainty, we confirm that we do not understand the Court of Appeal to have articulated new law with respect to the duty of candour. Rather, we understand the

Court to have clarified and confirmed the law applicable to the adjudication of the Respondent's conduct in 2016 and 2017.

[93] The guidance in the *BCCA Decision* and the *Code* together emphasize that the duty of candour is stringent and that a correspondingly stringent standard of review should apply to the conduct of a lawyer alleged to have failed to meet the duty of candour. Recent disciplinary decisions support this approach. As the panel noted in *Law Society of BC v. Lee*, 2021 LSBC 31 at para. 66,

> Lawyers are held to a high standard when they present evidence and submissions in court. Lawyers should not cause documents containing errors or lies to be placed before the court. …

[94] In our view, a proven non-trivial inaccuracy in the presentation of evidence, whether by design, by willful blindness or due to recklessness, may lead to a finding that the Respondent failed to uphold a duty of candour.

[95] The evidence in this case shows that the Respondent twice placed affidavit evidence before the Supreme Court contending that an exhibit was "a true copy" of "the" renovation contract between the Respondent's clients and DT. The Respondent's conduct was intentional in the sense that the Respondent chose to lead this evidence but not in the pejorative sense that he set out to deceive the Supreme Court. The Respondent's conduct was also reckless, in the sense that he could only have placed the evidence before the Supreme Court: (a) in careless disregard of the fact that the two different documents were combined in the Respondent's office to create the exhibit, and (b) through inattention to the shifting information his clients presented to him in August 2015 and November 2016.

[96] We reject the Law Society's submission that the Respondent was willfully blind in his conduct. As described in the analysis in *R v. Sansregret* – the applicability of which the Law Society did not dispute – "willful blindness" occurs when a person is on notice of the need to inquire but declines to do so because the person "does not wish to know the truth." The evidence does not show that the Respondent sought to avoid the truth.

[97] We also reject the Respondent's submissions that the standard of recklessness is inapplicable, and that the Respondent was not, in any event, reckless. To begin, we disagree with the Respondent's argument that recklessness is tantamount to fraud. The proposition is not supportable at law: a person may be reckless as to the accuracy of a statement without the recklessness amounting to an intention to deceive; recklessness may occur in degrees or, put another way, on a continuum. This was acknowledged in *Virk* at paragraphs 22 and 23, as follows:

> …While mere inaccuracy or negligence might not be enough, the Hearing Committee implied that a lack of candour could arise somewhere below actual intention or willful blindness. In other words, in the context of the solemnity of the occasion, including the context of the reasonable expectations of lawyers as officers of the court, cavalier, irresponsible or reckless statements might be deserving of sanction.
>
> … the record demonstrated that the appellant's statement was clearly inaccurate*. The Hearing Committee was entitled to draw an inference from his preparation and tendering of the documents that he must have known his statement was inaccurate, or that he was indifferent to its accuracy, through the inference that people intend the natural consequences of their acts*. …
> [emphasis added.]

[98] We also disagree that the record fails to support recklessness in the Respondent's conduct. To the contrary, in our view, the adjective "reckless" aptly describes the Respondent's conduct.

[99] As elucidated in *R v.Sansregret*, a person is "reckless" if he knows of a danger yet persists in a course of conduct that creates a risk that a prohibited result will occur. In this case, the Respondent's clients told him facts that were inconsistent with the exhibit to the AC and YZ Affidavits being "the" renovation contract between the parties. The Respondent also knew that the exhibit was not a "true copy" of an original document, even though he came to believe that the content of the document represented the substance of the agreement between the parties. The Respondent therefore must have known that the AC and YZ Affidavits might cause the Supreme Court to be misled. The Respondent nonetheless forged ahead and laid the affidavits before the Supreme Court. The prohibited result occurred: the Respondent presented the Supreme Court with evidence that was incomplete and inaccurate.

[100] In making this finding, we acknowledge the Respondent's submission that he took steps to diligently present his client's case. We agree that he attempted to bring the evidence into line with the instructions he received in late 2016. The record suggests that he attempted to reconcile the inconsistencies in his clients' story to produce a comprehensible narrative of what had occurred between ZZ, YZ and DT. The difficulty for the Respondent is that his actions toward his clients do not answer an allegation that he failed to fulfil a duty to the Supreme Court; a lawyer's duties to client and court are not coextensive. In any event, as the Court of Appeal has noted, "[t]here is no duty to the client to provide a misleading account to the

court or to fail to acknowledge that … [the lawyer] does not know whether a statement he or she is making is true": *BCCA Decision* at para. 66.

[101] We turn next to the materiality and relevance of the evidence to the Amendment and Remedies Applications.

[102] In relation to the allegation at paragraph 1(c) of the Citation, we acknowledge that the evidence about the renovation contract exhibited to the AC Affidavit was not material to the Amendment Application. The Plaintiffs were not required to prove facts about the purported agreement between ZZ, YZ and DT to obtain leave to amend the notice of civil claim. That same affidavit evidence was also of marginal relevance to the Amendment Application; it is not apparent how the evidence would make any fact which the Plaintiffs were required to prove more or less likely to be true. To the extent that the evidence in the AC Affidavit was relevant, it was by way of background.

[103] Nonetheless, materiality and relevance are not controlling factors in the analysis. As the Court of Appeal has confirmed, materiality and relevance are among the factors to be weighed and considered. In our view, other factors weigh more heavily in the analysis of whether the delict alleged at paragraph 1(c) of the Citation is made out. Specifically, and in light of the guidance of the Court of Appeal, we weigh heavily the unqualified nature of the duty of candour – it applies "at all times" in interactions with the courts – and the requirement that lawyers be scrupulously candid in proceedings where the opposing party is not represented. In this case, the Respondent relied on inaccurate and misleading evidence in a without notice proceeding. Such conduct does not accord with the nature of the lawyer's duty of candour to the court.

[104] We turn to the allegation at paragraph 2(c) of the Citation. In the Remedies Application, the Respondent again relied on inaccurate and misleading evidence in a without notice application. On this occasion, however, the evidence was material and highly relevant to the issues before the Supreme Court: the damages and lien the Plaintiffs aimed to prove were tied directly to the terms of the renovation agreement exhibited to the YZ Affidavit. In our view, the Respondent failed in his duty of candour to the court by offering, presenting and relying on YZ's evidence that the exhibit was a "true copy" of the renovation contract between the parties.

[105] We therefore conclude that the Law Society has proved the delicts alleged at paragraphs 1(c) and 2(c) of the Citation.

Step 2: Do the delicts amount to professional misconduct?

[106] We are persuaded, in respect of both allegations, that the Respondent's proven conduct amounts to professional misconduct.

[107] With respect to paragraph 1(c) of the Citation, what leads us to characterize the Respondent's delict as a "marked" departure from the standard expected of lawyers is the size of the gap between the expected standard of conduct and what the Respondent actually did.

[108] The Court of Appeal confirmed that a lawyer's duty of candour occupies a high place and imposes both negative and positive obligations on counsel, as outlined in these reasons at paragraphs 90 and 91, above: *BCCA Decision* at paras. 7 and 8. The Respondent did not attend to his obligations in filing or relying on the AC Affidavit in the Amendment Application. In particular, the Respondent did not carefully turn his mind to the accuracy of the assertions in the affidavit. Instead, he led evidence which contended that an exhibit was a "true copy" of "the" renovation contract between the parties, although the document had been created in the Respondent's office in December 2016 by combining two separate documents, and notwithstanding that the Respondent was in possession of facts indicating that the exhibit could not, in fact, be "the" renovation contract between the parties. Moreover, in the face of the misleading documentary evidence, the Respondent did not in his submissions to the Supreme Court disclose the contextual facts necessary for a fair understanding of the history of the document. The Respondent's silence, combined with the terms of the document exhibited to the AC Affidavit, left the misleading impression that the parties had entered into a written renovation contract in January 2015, and that the exhibit was that document.

[109] In reaching our conclusion on the proper legal characterization of the Respondent's conduct, we have not lost sight of the fact that the purported renovation agreement was not material to the Amendment Application and was of scant, if any, relevance to the matters to be proved to secure the relief sought. We have weighed the immateriality and negligible relevance of the misleading evidence in the balance but conclude that these factors should carry limited weight, especially in contrast to the "high place" and the stringency of the duty of candour.

[110] We also take into account that the conduct occurred in the context of without notice proceedings. The Respondent's conduct in laying the misleading evidence before the Supreme Court strayed far from the exigencies of the duty of candour in such proceedings. In such proceedings, the lawyer must be scrupulously accurate and candid and comprehensive in presenting the client's case. The Respondent was not.

His lack of care during the hearing represents a marked departure from the standard the Law Society expected of him.

[111] Much of the foregoing analysis applies in equal measure to the legal characterization of the conduct proven in respect of paragraph 2(c) of the Citation. Where the analysis of paragraph 2(c) of the Citation must depart from the analysis of paragraph 1(c), is with respect to the materiality and relevance of the misleading documentary evidence and the false impression created by the Respondent's silence concerning the context of that evidence. Counsel must disclose all material facts in a without notice application: *Law Society of BC v. Nejat*, 2014 LSBC 51; *Law Society of BC .v Albas*, 2016 LSBC 18. Accordingly, as the *BCCA Decision* confirms, "a deficiency in disclosure on a material aspect will be serious and carry weight in the analysis": para. 74.

[112] In comparison with the Amendment Application, the Respondent's deficient disclosure was material and highly relevant to the relief sought in the Remedies Application. In the Remedies Application, the Respondent sought contractual damages and the declaration of a lien based on the renovation contract exhibited to the YZ Affidavit. We adopt anew the following statement from paragraph 186 of the *2021 F&D Decision*:

> … the court was entitled to have full and candid information from the Respondent as to the evidence of the history of the renovation contract between the plaintiffs and DT. In our view, it was a marked departure from the standards expected of the Respondent to present the renovation contract in YZ's affidavit as the "true" contract, without also presenting the plaintiffs' other evidence as to the history of the plaintiffs' contractual dealings with DT.

[113] The materiality and relevance of the misleading evidence in the YZ Affidavit weigh in favour of a finding of professional misconduct in relation to paragraph 2(c). We rely on these factors, together with those we have analyzed in respect of paragraph 1(c), to find that the Law Society has proved professional misconduct as alleged at paragraph 2(c) of the Citation.

[114] Before concluding these reasons, we would add the following comment. These reasons pertain to the case before the Panel. These reasons should not be taken to endorse the Law Society's submission that a breach of the duty of candour will almost always constitute a marked departure from the conduct that is expected of lawyers.

[115] We acknowledge that some other panels of this Tribunal have, in other cases, tended towards a "strict liability" position on the professional discipline consequences of a breach of the duty of candour. For example, in *Lee*, a case the Law Society emphasized in its submissions, the panel stated categorically, at para. 83:

> Misleading the court amounts to professional misconduct. The jurisprudence confirms this conclusion. Our court systems functions, in part, because lawyers are officers of the court and the court is able to rely on the representations made and court documents prepared by lawyers.

[116] In our view, while the last sentence in the extract above from *Lee* is indisputably accurate, the first is not invariably correct, because each case must be considered on its own facts and circumstances, and with the guidance of jurisprudence, including the *BCCA Decision*.

[117] The bright line by which lawyers must govern their conduct is set by the *Code* and by judicial direction: lawyers must be candid in their interactions with courts. The standard is clear. Nonetheless, a lawyer's failure to meet the standard may not in every case lead to a finding that the lawyer's conduct constitutes a "marked" departure from the conduct expected of lawyers. As the Court of Appeal recognized, "[n]ot all failures to discharge professional duties will amount to professional misconduct": *BCCA Decision* at para. 13. Context will always be important and each case must be judged on its own merits. Depending on the circumstances, a departure may be something less than marked.

[118] Moreover, the Law Society's position must be considered in light of the two-step analysis endorsed in the *BCCA Decision*. A panel is instructed to first ask, "was the delict established on the record" and, second, "if so, did it rise to the level of 'a marked departure' from expected conduct? *Each question* requires the thoughtful application of professional judgment by the Hearing Panel …" [emphasis added]: *BCCA Decision* at para. 73. This two-step approach would be unnecessary if the breach of the obligation of candour invariably amounted to professional misconduct, regardless of context.

DETERMINATION

[119] In summary, we find that the Respondent engaged in professional misconduct as alleged at paragraphs 1(c) and 2(c) of the Citation.