2024 LSBC 42
Hearing File No.: HE20230019
Decision Issued: October 28, 2024
Citation Issued: November 4, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

REVIEW BOARD

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

NEAL BURTON WANG

RESPONDENT

DECISION OF THE REVIEW BOARD

Hearing date:	June 24 and 25, 2024
Review Board:	Herman Van Ommen, KC, Chair Nicole M. Byres, KC, Lawyer Timothy J. Delaney, Bencher Monique Pongracic-Speier, KC, Lawyer Ruth Wittenberg, Public representative
Discipline Counsel:	William B. Smart, KC Susan J. Humphrey, Maryanna Dinh
Counsel for the Respondent:	J. Kenneth McEwan, KC Brendan Coffey Saheli Sodhi

INTRODUCTION

[1] By a citation issued November 4, 2020 and amended January 5, 2023 (the "Citation") the Law Society made the following allegations against the Respondent:

> (a) In allegations 1, 3, and 5 of the Citation relating to three different clients or client groups for which he received funds in trust he failed to
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> (i) provide substantial or any legal services,
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> (ii) make reasonable inquiries about the circumstances of the trust funds,
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> (iii) make a record of the results of those inquiries.
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> (b) In allegations 2, 4, and 6 of the Citation relating to the same clients or client groups he failed to obtain, record, and verify client identification information.
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> (c) In allegation 7 of the Citation that he failed to maintain accounting records in compliance with Law Society Rules (the "Rules").

[2] Professional misconduct was alleged in all seven allegations and a breach of the rules was also alleged in allegations 2, 4, 6, and 7.

[3] The facts and determination hearing took place on November 21 to 23, 2022, January 5 to 6, 2023, and April, 19 to 20, 2023. In reasons issued September 7, 2023 (*Law Society of BC v. Wang*, 2023 LSBC 38 ("F&D Decision"), the hearing panel found professional misconduct in allegations 1 and 5 and dismissed allegation 3. The hearing panel found a breach of the Rules in allegations 2, 4, and 6. The Respondent admitted to breach of the Rules in sub-allegations 7 (a), (c), (e) to (i), and the hearing panel found professional misconduct in sub-allegations 7 (b), (d), and (j).

[4] The Law Society seeks a review of the dismissal of allegation 3 and the failure to find professional misconduct in allegations 2, 4, and 6 of the Citation.

[5] By cross-review, the Respondent says that the hearing panel erred by concluding that he had engaged in professional misconduct as alleged at paragraphs 1, 5 and 7(b), (d) and (j) of the Citation, and erred by concluding that he committed a breach of the Rules

as alleged at paragraphs 2, 4 and 6 of the Citation. The Respondent's Notice of Review seeks orders setting aside the hearing panel's findings on these matters.

[6] At the commencement of the hearing before the hearing panel on November 21, 2022 the Respondent applied to adjourn the hearing and sought extensive disclosure from the Law Society relating to AK, a witness he had indicated he intended to call. After one and one-half days of submissions the panel dismissed the Respondent's applications for an adjournment and further disclosure, and the hearing commenced. After the conclusion of the evidentiary portion of the hearing, the matter was adjourned until a later date for the parties to make oral closing submissions. The Respondent then brought a motion to reopen the evidentiary portion of the hearing and sought an order that the panel issue a summons to AK so that he could be cross-examined by both parties. The Panel dismissed the application.

[7] The Respondent's cross-review seeks orders setting aside the decisions of the panel to dismiss his applications for disclosure and declining to reopen the hearing and summon AK to give evidence. The Notice of Review seeks an order that the Citation be reheard, on the grounds that the original hearing was tainted by procedural unfairness. However, in oral and written argument, the Respondent conceded that the hearing panel's findings on allegations 2, 3, 4, 6 and 7 were "likely unaffected by the procedural fairness issue, as it is unlikely that [AK]'s evidence would have altered the findings made in respect of those allegations".

[8] Despite the errors alleged in his Notice of Review, the Respondent did not, in written or oral argument, address the hearing panel's determinations of Rules breaches in allegations 2, 4, and 6 or findings of professional misconduct in allegations 7 (b), (d), and (j). As the Respondent did not argue these matters, the Board has not considered them.

STANDARD OF REVIEW

[9] This review is governed by s. 47 of the *Legal Profession Act* (the "*Act*") which permits a review board to confirm the decision of a hearing panel or substitute it with a decision the hearing panel could have made. There was no substantial disagreement on the standard of review we are to employ.

[10] In *Harding v. Law Society of British Columbia*, 2017 BCCA 171, at paragraphs 7 and 8, the Court said the following:

> [7] In *Law Society of BC v. Hordal*, 2004 LSBC 36, the review board described the standard of review as follows:

[9] In *Hops*, [1999] LSBC 29, while considering the appropriate scope of review for "findings of proper standards of professional and ethical conduct", the Benchers adopted the language of the Honourable Mr. Justice Branca when he wrote in *Re: Prescott* (1971) 10 D.L.R. (3d) 446, at 452:

> "The Benchers are the guardians of the proper standards of professional and ethical conduct. The definition in my judgment shows that it is quite immaterial whether the conduct complained of is of a professional character, or otherwise, as long as the Benchers conclude that the conduct in question is "contrary to the best interests of the public or of the legal profession". The Benchers are elected by their fellow professionals because of their impeccable standing in the profession and are men [and women] who enjoy the full confidence and trust of the members of the legal professional of this Province."

[10] It follows from that observation that the Benchers must determine whether the decision of the Hearing Panel was "correct", and if it finds that it was not, then the Benchers must substitute their own judgment for that of the Hearing Panel as is provided in Section 47 (5) of the *Legal Profession Act*.

[11] There is a clear caveat articulated in the authorities to the general application of the correctness test in cases where the Hearing Panel has had the benefit of the *viva voce* testimony of witnesses and have had the opportunity to assess the credibility of those witnesses by observing their demeanor in the proceedings. In those cases the Benchers ought to accord some deference to the Hearing Panel on matters of fact where determinations have been made by a Hearing Panel on factual matters in dispute.

[8] In *Law Society of BC v. Berge*, 2007 LSBC 7, the review board described the standard of review in this way:

> [19] The standard of review to be applied by the Benchers on this Review is one of correctness. See *Law Society of BC v. Dobbin*, [2000] L.S.D.D. No. 12.
>
> [20] This standard permits the Benchers to substitute their own view for the view of the Hearing Panel as to:

> i) whether the Applicant's conduct constitutes conduct unbecoming a lawyer; and/or
>
> ii) whether the penalty imposed was appropriate.
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> [21] The standard of review described above is subject to one qualification, namely, that where issues of credibility are concerned, the Benchers should only interfere if the Hearing Panel made a clear and palpable error. See *Law Society of BC v. Hops*, [1999] LSBC 29 and *Law Society of BC v. Dobbin (supra)*.

[11] The *Hordal/Berge* standard of correctness is the standard of review to be applied by this Review Board. However, as stated in *Harding*, deference will be accorded to the hearing panel for determinations of matters of fact based on the assessment of witness credibility absent any clear and palpable errors.

PROFESSIONAL MISCONDUCT ALLEGATIONS 2, 4, AND 6

[12] In allegations 2, 4, and 6 of the Citation relating to the clients AK, R Inc., L Investments and A Corp., it is alleged that the Respondent failed to obtain, record, and verify client identification information.

[13] The Law Society submits that although the hearing panel correctly found the Respondent breached the relevant Rules, the Panel incorrectly found that those breaches did not constitute professional misconduct. The Law Society says the Panel erred by failing to properly analyze the factors referred to in *Law Society of BC v. Huculak* 2022 LSBC 26.

[14] In response to the Law Society's submissions, the Respondent submits that the hearing panel did identify the relevant factors in *Huculak* and although not expressly linking their reasons to those factors when considering allegations 2, 4, and 6, they did meaningfully engage with those factors when analyzing whether the Rule breaches were professional misconduct.

[15] The hearing panel referred to the factors first set out in *Law Society of BC v. Lyons*, 2008 LSBC 9. These are the same factors referred to in *Huculak*. Paragraph 12 of the F&D Decision quotes from paragraphs 32 and 35 from *Lyons,* as follows:

> [32] A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant

> breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> [35] In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.

[16] The *Lyons* factors assist in determining whether a breach of the Rules is a marked departure from the conduct expected of lawyers and thus professional misconduct, a more serious finding. The factors in *Lyons* are not a complete list nor are all the factors listed necessarily applicable in each case. The important exercise is not to check off the list of *Lyons* factors but to identify the circumstances of the Rules breach in question that make the conduct in question a marked departure or not.

[17] We will proceed on the basis of the Rules breaches found by the hearing panel and will consider only whether the Panel properly decided that those Rules breaches did not constitute professional misconduct.

Allegation 2

[18] The hearing panel found that the Respondent failed to properly identify his client AK by failing to record his home address or telephone number and he failed to verify AK's identity before performing a financial transaction.

[19] The Panel noted that the Respondent knew AK well, he was a longtime friend, a former colleague and a lawyer in good standing. The Panel also noted that the Respondent had attempted to comply with the Rules by taking a photocopy of AK's driver's license. The Panel found that while good faith efforts had been made and that the Respondent complied with the spirit of the Rules, the Respondent failed to meet the strict requirements of them.

[20] In the circumstances, we agree that the conduct is not a marked departure. The breach of the Rules was minor and the Respondent had made good faith efforts to comply.

Allegation 4

[21] The Law Society alleged in the Citation that the Respondent failed to obtain, record and verify the identification information of R Inc. In argument before the hearing panel, the Law Society agreed that the Respondent had adequately identified R Inc. but had not

verified its identity before performing a financial transaction, namely receiving $43,265.26 in insurance funds and disbursing those funds as referred to in allegation 3.

[22] The panel's finding of a Rules breach is found in para. 99 of the F&D Decision where the Panel wrote:

> [99] The Respondent admits he did not make the inquiries into the corporate structure of the companies for which he was taking and distributing money into his trust account. Though he claims that he had personal knowledge of certain parties, the Respondent could not confidently identify where the money was coming from or who was the ultimate beneficiary.

[23] The primary consideration by the hearing panel of what could be considered the *Lyons* factors was noting the Respondent's claim that "he had personal knowledge of certain parties." Another finding that shows a consideration of the *Lyons* factors is the hearing panel's comment, "[t]he Panel finds that the Respondent was not taking adequate steps or efforts to document or demonstrate compliance with the Rules." This finding, though, would tend to show the breach was more than simply a rules breach.

[24] We do not consider the hearing panel's analysis sufficient to support a finding that this was only a Rules breach.

[25] The breach of the Rules found by the hearing panel was that the Respondent did not even attempt to comply with the obligation to verify the identity of his client, he made no inquiries. The panel noted his claim that he knew certain of the parties but in fact R Inc. was a new client. It was a company incorporated in Nevis and he made no attempt to obtain independent documents concerning its existence, directors, or ownership structure from a government registry.

[26] The lack of any attempt to comply with the Rules makes his conduct a marked departure and thus professional misconduct.

Allegation 6

[27] The Citation alleges that the Respondent failed to obtain, record, and verify the client identification information of L Investments and A Corp.

[28] The Panel found at para. 137 of the F&D Decision as follows:

> [137] Contrary to Rule 3-100(1) the Respondent did not obtain and record the following client identification information from WW and A Corp.: home address, home telephone number, occupation, position with A Corp., general nature of the

> type of business engaged in by A Corp. or A Corp.'s incorporation or business identification number and its place of issue.

[29] The hearing panel made no explicit finding concerning the Respondent's failure to verify the identity of A Corp although it would be impossible to verify the identity of a client that had not been properly identified. The hearing panel made no explicit findings regarding L Investments in relation to allegation 6 that the Respondent failed to obtain, record, and verify client identification information.

[30] The hearing panel's only consideration of what might be *Lyons* factors is at paras. 140 and 148 of the F&D Decision where the Panel wrote:

> [140] The Panel empathizes with the Respondent as these Rules can be onerous. The Rules, however, are a necessary anti-money laundering tool and must be strictly complied with. In this case, the Respondent was not engaged by any of those previous firms to provide legal work for these clients nor did another lawyer refer this client matter to him so he cannot rely on their records. Nor did the Respondent obtain and record this information when he commenced practice on his own. The Panel finds that the Law Society has proven to the requisite standard that the Respondent did not meet the standard set by the Rules in force at the time and that this failure amounts to a breach of the *Act* or Rules, pursuant to section 38(4) of the *Act*.
>
> [148] While the Respondent's conduct with relation to allegation six, though problematic, does not reach the standard required for professional misconduct, the identification and verification rules have been put in place for a reason and their requirements have not been met in this situation, as such the Panel finds that the Respondent has breached the *Act* or Rules pursuant to section 38(4) of the *Act*.

[31] The circumstances that led the panel to find that the Respondent's proven conduct was not a marked departure are unclear; there is only the hearing panel's conclusion.

[32] The surrounding circumstances of this breach as set out in the F&D Decision, at paras. 135 and 136, are:

> [135] The Law Society submits that the Respondent back dated retainer agreements related to A Corp., and L Investments. The Respondent received $1.525 million from P Inc. on August 28, 2017, and another $1.4 million from P Inc. on September 1, 2018. The Law Society submits that it was not known whether these funds had been sent on behalf of L Investments or A Corp.

> [136] A retainer agreement was not signed between the Respondent and WW in relation to L Investments and A Corp. until December 11, 2017. Correspondence between the Respondent and WW, namely, an email, which included retainer agreements for L Investments and A Corp. dated effective August 1, 2017, so the Respondent could comply with his annual law society file review.

[33] When considering allegation 5 concerning the same clients the panel found, at para. 127 and 129 of the F&D Decision:

> [127] As discussed above, the Panel finds that the Respondent has provided the Panel with contradictory testimony, falsified documents and has not been candid throughout this proceeding. The Panel does not believe it necessary to outline the previously mentioned tests regarding credibility or reliability but will reiterate that the Respondent has given the Panel no reason to believe the testimony or evidence that he has provided against what the documents and the circumstances of these transactions reveal.
>
> [129] As previously stated without the Respondent's file notes or other documents, the Panel has no evidence as to whether the Respondent was providing substantial legal services, his failure to document all or any of the claimed work leaves the Panel to make a determination based solely on testimony that is unreliable at best and lacks credibility at worst.

[34] The circumstances as found in relation to allegation 5 provide the context of his failure to identify and verify A Corp.

[35] The failure to properly identify A Corp when performing a financial transaction is serious. The Respondent held substantial funds in his trust account without having a retainer agreement and did not know on whose behalf the funds were forwarded to him. He made no attempt to comply with the identification and verification rules at the time and only later sought to backdate retainer agreements. This is another reason why the breach of the Rule is very serious.

[36] For those reasons we find that this conduct is a marked departure and thus professional misconduct.

BACKGROUND - ALLEGATION 3

[37] In September 2017 the Respondent was retained by R Inc., a company incorporated in Nevis, to continue it into British Columbia. R Inc. owned a condominium in Toronto which was being sold and one of the reasons to continue R Inc. into British Columbia was to obtain a tax advantage on that sale.

[38] R Inc. had received or was about to receive a cheque from an insurance company in payment of a claim for damage to the condominium resulting from a flood in 2016. R Inc. did not have a bank account in Canada (or elsewhere) and the insurance company would only issue the cheque in the name of the insured.

[39] The Respondent was asked if he could assist by depositing that cheque in his trust account, to which he agreed.

[40] After receiving the cheque from the insurance company in November 2017 the Respondent advised his client of that fact and was instructed as follows "deposit the cheques in your trust account. Render your account… wire the balance to B Inc." The Respondent did so.

[41] Allegation 3 of the Citation is that between August 2017 and August 2018 the Respondent used his trust account to receive and disburse the sum of $43,265.26 in circumstances where he failed to do one or more of the following:

(a) provide substantial or any legal services in connection with the R Inc. Trust Matter;

(b) make reasonable inquiries about the circumstances of the R Inc. Trust Matter; and,

(c) make a record of the results of any inquiries made about the circumstances of the R Inc. Trust Matter.

[42] The Law Society argued that the Respondent did not provide substantial legal services directly related to those funds.

[43] The Respondent argued that he was entitled to accept and disburse the funds because he was already acting for R Inc, on the continuation and his work on the continuation was connected to the funds in trust because the condo was being sold and the insurance funds had to be dealt with prior to the sale and therefore prior to the continuation.

[44] The hearing panel found the Respondent was able to assist by cashing and disbursing the insurance cheque because providing legal services includes facilitating commerce.

[45] The Law Society submits that the hearing panel failed to consider whether the legal services provided were directly connected to the trust funds. In addition, by defining legal services so broadly, the hearing panel considered irrelevant factors in determining whether the Respondent committed professional misconduct. Lastly, the Law Society

submits that the hearing panel failed to consider and determine whether the Respondent had made reasonable inquiries and made a record of them.

[46] The Respondent argued that legal services were correctly defined and that the Law Society, in arguing that "legal services must be directly related to the trust funds" (the wording of Rule 3-58.1 which was not in place at the time of the conduct), assumed that Rule 3-58.1 codified an existing standard. The Respondent submitted that the aspect of the Rule prohibiting the use of a trust account without providing directly related legal services was in fact new. To put it another way a lawyer could, before the passage of Rule 3-58.1, hold funds in trust without providing legal services, if no suspicious circumstances existed or if they did exist, they had been satisfactorily answered.

ISSUES - ALLEGATION 3

[47] The issues we need to consider are:

(a) What are "legal services"?

(b) Did Rule 3-58.1 create a new prohibition on the use of trust accounts?

(c) Did the Respondent breach the standard that governed between August 2017 and August 2018 by allowing funds to be transacted through his trust account?

(d) Did the Respondent make reasonable inquiries and make a record of them?

Legal Services

[48] The hearing panel noted that the term "legal services" or "substantial legal services" is not defined in the *Act* or Rules. The *Act* however does define "the practice of law". The hearing panel employed a contextual and purposive analysis of the *Act* to create a definition of legal services. At paras. 84 to 89 of the F&D Decision the Panel wrote:

> [84] One of the main roles of lawyers is to guide their clients through the legal system which the Respondent argues he did in this circumstance. The Respondent provided a client with legal help regarding the aforementioned insurance cheque which the client would otherwise be unable to process. Both real estate and insurance law are complex topics that often require the help of legal counsel and the Panel is persuaded that this is likely one of those times. Furthermore, the

prevention of loss is a legitimate consideration for commerce, something quite appropriate for a lawyer to assist in facilitating.

[85] The Respondent was previously providing corporate services to the client in question and in his mind this additional action was neither onerous nor burdensome. The Respondent was hired to continue the company into the province of British Columbia with the Condo being directly owned by the same company. The Panel accepts that it is more likely than not, the Respondent was providing sufficient legal services to meet the burden required to satisfy substantial legal services when considering both the legislative intent and context of the Rules set in place.

[86] Additionally, one of the purposes of legal services is to facilitate efficient commerce, something that the Rules should only constrain in common sense situations or where clearly articulated rules prevent lawyers from assisting. The Panel finds that facilitating commerce may also be a function of assisting clients in efforts to avoid loss, harm, or delay for any pecuniary or legitimate opportunity costs.

[87] Lawyers should be free to facilitate, as creatively as ethics and rules permit, the ability for clients and society to advance. If the Respondent refused to assist in this matter, as argued by them, the client would have been severely affected and left with no alternative way to receive the funds from the insurance cheque. Refusing to provide the requested services would prevent efficient commerce and hinder a lawyer's ability to make common sense decisions surrounding what is and what is not legal services.

[88] Without a clearly articulated definition of what "substantial legal services" is not, lawyers ought to be free to exercise judgment that assists legitimate commerce. There is no allegation that this transaction was improper. The standard proposed by the Law Society may lead lawyers to refuse to participate in legitimate deals over fear of sanctions. Such an untenable standard would leave clients in a precarious position having no way to receive their funds without a lawyer's help and with lawyers unwilling to help.

[89] Over-regulation of the legal profession will prevent the goal of the facilitation of efficient commerce, and though there are scenarios that may require constraints, they should be left for the most obvious situations. Expanding beyond that will only harm the clients the Law Society seeks to protect.

[49] We do not agree that "the facilitation of efficient commerce" is the appropriate standard by which to determine whether certain conduct constitutes legal services. It is

far too broad and vague. While facilitating commerce may be the result of providing legal services it does not aid in defining legal services. Commerce can be facilitated in many ways that do not include legal services. Accountants, bankers, consultants and many others also facilitate commerce. Legal services must be defined in a manner that distinguishes them from services provided by people who are not lawyers.

[50] The Federation of Law Societies in its February 19, 2019 Guidance to the Legal Profession (proposing what became Rule 3-58.1 in British Columbia) noted that the term "legal services" was not defined but said it generally means "the application of legal principle and legal judgement to the circumstances or objectives of a person or entity." We adopt this definition.

[51] We find that the Respondent did not provide any legal services related to the trust funds. He merely deposited the cheque and paid out the funds (minus his account for the continuation) as instructed. This did not involve the application of legal principle or legal judgement to the problem R Inc. had in cashing the cheque.

Rule 3-58.1 – New or Codification

[52] The Law Society Rules regarding trust matters have changed over time. When considering allegation 3, both the context of changes to the Law Society Rules and the context of the transaction under scrutiny must be reviewed.

[53] The Law Society submits that Rule 3-58.1 codifies obligations or standards that pre-existed the passage of that Rule. It merely made explicit existing standards.

[54] The Respondent agrees that to the extent Rule 3-58.1 refers to a lawyer's duty to act as a gatekeeper over their trust account and make reasonable inquiries when suspicious circumstances exist, it is a codification of pre-existing obligations or standards. He submits, though, that the prohibition on depositing or removing funds from trust unless "the funds are directly related to legal services provided by the lawyer or law firm" is new.

[55] The present Rule dealing with both receipt and withdrawal of funds in a trust account is Rule 3-58.1 (1). It was enacted in July 2019, after the transaction in question. It reads:

> 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 deposited to or withdrawn from a trust account unless the funds are directly related to legal services provided by the lawyer or law firm.

[56] Prior to the enactment of this Rule, rule 3.2-7 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*") provided (with the relevant commentary):

> 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.
>
> **Commentary**
>
> [1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
>
> [2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services ...
>
> …
>
> [3.1] The lawyer should also make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter ...
>
> [3.2] The lawyer should make a record of the results of these inquiries.

Notably the commentary in 2017 to 2018 did not say a lawyer must provide legal services directly related to the trust transaction (as the rule now reads).

[57] The question, then, is whether rule 3.2-7 of the *BC Code* contained an implicit requirement that a lawyer must provide legal services directly related to the trust transaction. The interpretation of rule 3.2-7 by the Law Society and by panels of the LSBC Tribunal, must be considered.

[58] The thrust of the Law Society's publications in the 10 to 15 years leading up to the Rule change, was focused on ensuring that lawyers understood their duty to be vigilant and to make inquiries of their clients if suspicions were raised. For example, we had our attention drawn to a number of publications issued by the Law Society. Some of them are as follows:

> If you receive a request from a client for services that seem to mean that you are being retained to be the client's banker, or if you cannot precisely identify the legal services you are being retained to carry out, be vigilant to ensure that no

> person uses your trust account to deal with the proceeds of crime. Remember that a client who wants to bring you cash because the client has no bank account can instead purchase and then bring you a money order or bank draft. Please call the Law Society if you would like advice on how to deal with ambiguous requests for your services.
>
> *Benchers' Bulletin,* "Practice Watch", November to December 2002
>
> A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
>
> …The lawyer should also make inquires of a client who:
>
> > (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter…
>
> *Benchers' Bulletin,* "Practice Watch", Summer 2011

[59] These practice directions do not clearly prohibit a lawyer from transacting funds through the lawyer's trust account for a client without providing the client with legal services that are directly related to the trust transaction. Instead, the bulletins note the lawyer should make appropriate inquiries to ensure the trust account is not being misused.

[60] Next, there was a decision of some significance rendered by a panel of the Law Society Tribunal. That was the decision in *Law Society of BC v. Gurney,* 2017 LSBC 15. This decision was issued on May 18, 2017, approximately three to four months before the start of the transaction which is the subject of allegation 3. The panel in *Gurney* noted that a lawyer may only use their trust account where it is objectively clear the transaction is legitimate. The panel said:

> [79] We find lawyers' duties with regard to the use of their trust accounts are contained in the *Code* provisions that were set out above as part of the Law Society submission, and more particularly encompass the case law cited by the Law Society in its submissions. They are:

…

(b) The Court of Appeal in *Elias v. Law Society of BC,* (1996), 26 BCLR (3d) 359, 1996 CanLII 1359 (CA), quoted the Bencher review decision at para. 9: "where the circumstances of a proposed transaction are such that a member should reasonably be suspicious that there are illegal activities involved under Canadian law or laws of other jurisdictions, it is professional misconduct to become involved *until such time as inquiries have been made to satisfy the member on an objective test that the transaction is legitimate." It is clear that the duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction, and the lawyer must be satisfied on an objective basis that the transaction is legitimate.*

(c) *The lawyer's duty to investigate arises when, on an objective basis, he becomes suspicious that the transaction is illegitimate*. Professional misconduct can be found even if the underlying transaction cannot be proved to be illegitimate. A lawyer cannot delegate the duty to inquire to a third party such as a client and rely upon the client's assurance as to the legitimacy of the transaction: *Law Society of BC v. McCandless*, 2010 LSBC 3, at paras. 43; *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD 44, at paras. 25 to 27; *Holy v. Law Society,* [2006] EWHC 1034, at paras. 23, 35.

[80] …The gatekeeper function requires a lawyer to use trust accounts for legitimate commercial purposes for which the lawyer is a legal advisor and facilitator. Prior to the lawyer becoming involved in a transaction, if there is a reasonable suspicion that the transaction may involve illegal activities in Canada or abroad *the lawyer has a duty to make reasonable inquires*. An objective test is applied to the lawyer's conduct. In order for professional misconduct to be found, illegal activities do not have to be proved.

[emphasis added]

[61] On April 10, 2018, the Law Society issued a *Discipline Advisory*, "Lawyers are gatekeepers", wherein the *Gurney* decision was summarized. In doing so, the Law Society noted, amongst other things that: "The gatekeeper function requires a lawyer to use trust accounts for legitimate commercial purposes that are connected to the lawyer's professional functions. Lawyers have a positive duty to make reasonable inquiries prior to becoming involved in a transaction". The Discipline Advisory also noted that the *Gurney* decision "highlights the repercussions for lawyers if they allow their trust accounts to be used without making reasonable inquiries in suspicious circumstances."

[62] This Discipline Advisory does not state that a lawyer could never use their trust account unless they provided legal services directly related to the transaction. Instead, it suggests that when there are "red flags" the lawyer's obligation was to make inquiries to ensure the transaction is a legitimate commercial transaction.

[63] About one year later, a watershed moment in British Columbia came when the Cullen Commission released its Interim report on Money Laundering in British Columbia in March 2019.

[64] Of course, issues like money laundering to cover up criminal activities or terrorist financing were not new issues in 2019. However, at this time, significantly more attention was being paid to these issues, because increased government restrictions placed on financial institutions were causing sophisticated criminals to increasingly turn to lawyers to try to use them as a source to launder their funds.

[65] Around the same time, the Law Society issued another Discipline Advisory which stated:

> While most private loans are legitimate, there is an increased risk of illegal activity with them. Private lending transactions are one means by which proceeds of crime can be laundered. Lawyers who are retained to draft loan or security documents, to register the same, or to assist with the advance or recovery of funds should take additional steps to protect themselves and maintain public trust in the profession. *These steps include asking some additional questions that must* (*sic*) *answered satisfactorily, ensuring that they know their clients, and knowing the subject matter of their retainers*.
>
> [emphasis added]
>
> *Discipline Advisory, "*Private lending", April 2, 2019

[66] Again, this publication does not specifically state that a lawyer was prohibited from using their trust account for a client, in the absence of rendering substantial legal services in relation to the trust matter. Instead, the focus was on how the lack of legal services is a red flag which should cause the lawyer to make appropriate inquiries. Implicitly, the lawyer could handle trust funds without providing substantial legal services if, following these inquiries, the lawyer could be reasonably satisfied that it was an objectively legitimate transaction.

[67] Another relevant decision of the Law Society Tribunal is *Law Society of BC v. Daignault,* 2020 LSBC 18. While this decision was rendered after the 2019 Rule change, it concerned trust account activities by the lawyer in 2011 and 2012. In this case, the

lawyer had received and disbursed funds for the purposes of purchasing securities for a client. He did not know the client (and made no inquiries) and he performed no legal services in connection with transactions. There were a few parties involved in the transactions and he did not caution the unrepresented parties that he was not acting for them. The lawyer admitted his conduct amounted to professional misconduct. The panel made the following relevant comments:

> [60] Was the failure to provide substantial legal services in connection with trust transactions misconduct? The parties' written submissions diverge on this point. The Law Society acknowledges that, in 2011 to 2012, neither the Law Society Rules nor the *Handbook* included an express requirement that lawyers use their trust accounts to receive and disburse funds only if providing related legal services. The Law Society argues, however, that the obligation was implicit. In support of this argument, the Law Society points to publications and bulletins issued between 1999 and 2005 commenting on lawyers' obligations to guard against becoming unwitting facilitators of crime or fraud, and to the reasoning in *Law Society of BC v. Hops*, [1999] LSBC 29, *Law Society of BC v. Skogstad*, 2008 LSBC 19 ("*Skogstad F&D*") and *Law Society of BC v. Skogstad*, 2009 LSBC 16 ("*Skogstad* DA"). The Law Society also submits that, in any event, the Hearing Panel is not asked to decide whether in 2011 to 2012 a lawyer was subject to a "stand-alone" professional obligation to forebear from allowing his trust account to be used for transactions except where the lawyer provides substantial legal services in connection with the transaction.
>
> …
>
> [63] We also agree with the Law Society that we need not determine whether lawyers in 2011 to 2012 were subject to a "stand-alone" obligation not to permit funds to be transacted through their trust accounts, except when related legal services were provided. The citation against the Respondent alleges that *one or more* of the Respondent's failures to caution unrepresented parties, and to provide substantial legal services in connection with the trust transactions, constitutes professional misconduct. In the agreed statement of facts, the Respondent admits that his conduct in respect of *both* omissions constitutes misconduct. Counsel for the Respondent explained at the Hearing that it is the "two things together" that constitute the misconduct in this case.

[68] As noted above, commentary 3.1 under rule 3.2-7 states: "The lawyer should also make inquiries of a client who: (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter".

[69] The corollary of this must be that a request to use a trust account, without seeking legal services was, at the time, a red flag that ought to have caused the lawyer to question whether they were being unwittingly used as a dupe in a criminal or fraudulent transaction. But there was not an absolute prohibition against use of a lawyer's trust account without directly related legal services. And it follows that if the lawyer made reasonable inquiries and was reasonably satisfied the transaction was legitimate (objectively speaking) the lawyer could complete the transaction.

[70] This then brings us to the new model trust accounting rule that was adopted by the Federation of Law Societies of Canada on October 19, 2018. This rule contains the language that was later adopted by the Law Society of British Columbia, with Law Society Rule 3-58.1 (1), in July, 2019.

[71] Notably, the Benchers Bulletin announcing the new Rule 3-58.1 (1) stated:

> The foundation for the outcome in *Re Gurney* is *BC Code* rule 3.2-7. Commentary [3.1] of this provision states that a lawyer should make inquiries of a client who seeks the use of a lawyer's trust account without requiring substantial legal services from the lawyer. If a person seeks to use your trust account without requiring substantial legal services in connection with the funds in trust, do not accept the money (Discipline Advisory, *Lawyers are gatekeepers*, April 10, 2018). A lawyer's trust account must not be used as a client's bank (and not even for you to hold money for your child's soccer team's cookie sale).
>
> Building upon this foundation, and giving effect to the Federation's model trust accounting rule, the Law Society will likely soon amend the definition of "trust funds" in Rule 1 and incorporate a new Rule 3-58.1, which explicitly provides that "funds paid into or out of a trust account must be directly related to legal services provided by the lawyer or law firm." In addition, on completion of the legal services to which the funds relate, a lawyer or law firm must take reasonable steps to obtain appropriate instructions to pay out the funds as soon as practicable. The draft wording for the new Rule 3-58.1 and the draft amendment to the definition of "trust funds" are set out below.
>
> . . .
>
> The proposed amendment narrows the definition of "trust funds" so that funds received that are not "directly related to legal services" would not be considered trust funds. *This change is meant to aid in prohibiting the use of a trust account for purposes that are not directly related to legal services*.[Emphasis added]

Benchers' Bulletin, "Anti-money laundering cash transaction rule essentials", Summer 2019

[72] It is clear that the new Rule did create a bright line. If a lawyer deposits funds into their trust account and no legal services are directly related to the transaction, then the Rule is breached. Prior to the addition of Rule 3-58.1, and the amendment to the definition of "trust funds" in Rule 1, in July 2019; however, such a bright line did not exist. Importantly, this bright line did not exist when the Respondent engaged in the activity that is the subject of allegation 3.

[73] It follows that the Respondent did not breach the standard expected of lawyers between August 2017 and August 2018 by transacting funds through his trust account for his client, without providing directly related legal services.

Did the Respondent make Reasonable Inquiries regarding the Trust Funds?

[74] With this background and context to the Law Society's Rules, we turn now to the context of the transaction itself, and whether or not the Respondent made reasonable inquiries.

[75] *Gurney*, at paras. 79 to 80 referred to in para. [60] of our reasons above, made it clear that where suspicions were raised the lawyer's duty was to make reasonable inquiries. That does not mean a lawyer could not act whenever suspicions had been raised. If reasonable inquiries were made, and they reasonably satisfied the lawyer that the transaction was legitimate, then the lawyer could deposit the funds into trust. The *Gurney* test was, however, an objective test.

[76] The material facts are set out in paragraphs [37] to [40] of our reasons above.

[77] As stated in *Gurney*, a lawyer may only use their trust account where it is objectively clear the transaction is legitimate, and "…it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an *objective* test that the transaction is legitimate [emphasis in original]" and a lawyer's "duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction..."

[78] Despite there being no concerns over the source of the insurance funds, because the requested use of the Respondent's trust account was unrelated to the legal services he was providing, the Respondent was required to make inquires to satisfy himself that that the transaction proposed by the client was objectively legitimate.

Did Respondent make Reasonable Inquiries and Make a Record

[79] The Respondent says:

(a) there were no suspicious circumstances or, alternatively, he did make the appropriate inquiries;

(b) the funds came from a Canadian insurance company, which is not suspicious; and

(c) although he was not being asked to perform substantial legal services, he was satisfied that he was not assisting an improper transaction.

[80] The Law Society submits that there were objectively suspicious circumstances that required the Respondent to make inquiries. The Law Society says the primary suspicious circumstances were the following:

(a) R Inc. did not have a bank account anywhere;

(b) the Respondent did not know who the beneficial owners were of R Inc.;

(c) he did not know why R Inc. owned the condo and why it was being sold; and

(d) he did not know who the beneficial owners of B Inc. were and why B Inc. was paying the expenses of R Inc.

[81] When considering whether the Respondent fulfilled his duty to inquire, the Board considered the Respondent's evidence which was before the hearing panel and formed part of the Revised Review Record. That evidence included the following:

(a) The Respondent understood that R Inc. was a special purpose vehicle, registered in Nevis, to hold a residential condominium in Toronto, Ontario. However, the Respondent did not know why the condominium in Toronto was held by a Nevis company, nor who the beneficial owner of R Inc. was.

(b) The Respondent did not ask his client why R Inc. did not have a bank account in Canada nor why it could not open a bank account in Canada in order to deposit the insurance cheque.

(c) The Respondent did not know nor ask if R Inc. and B Inc. had the same beneficial owner.

(d) The Respondent relied on information from the instructing person for R Inc. (Mr. C) that B Inc. pays expenses for the condominium.

(e) The Respondent did not make any inquiries as to the nature of the business of B Inc.

[82] The Board also considered the Respondent evidence at the F&D Hearing as follows. The Respondent:

(a) thought the Nevis co (R Inc.) held the Toronto condo for tax reasons;

(b) thought R Inc. did not have a bank account in Canada because the company was just being migrated to Canada;

(c) thought it was not unusual for some companies to not have a bank account because they are "holdco"s not "opco"s;

(d) said R Inc. had no income so why open a bank account and incur fees;

(e) stated he believed both R Inc. and B Inc. were sister companies but "didn't know" and did not make inquiries;

(f) did not know who were the beneficial owners of R Inc. and B Inc., and did not inquire about the nature B Inc.'s business; and

(g) did not ask why R Inc.'s conveyancing lawyer in Ontario did not take the insurance money.

[83] As noted in para. [35] of the reasons above, the Respondent also did not verify the identity of his client R Inc., and made no attempt to obtain from a government registry, independent documents concerning its existence, directors, or ownership structure.

[84] Based on the evidence outlined in paras. [81], [82] and the Board's findings referred to in para. [35], we find that the Respondent did not make reasonable inquiries regarding the insurance funds he deposited into his trust account on behalf of R Inc. (which were then paid out to B Inc.). The Respondent was obligated to make these inquiries because these trust transactions were unrelated to the legal services he was providing to continue R Inc. into BC.

Professional Misconduct

[85] We have found that the request to use the Respondent's trust account for purposes unrelated to the legal services he was providing created a suspicious circumstance. The

Respondent was required to inquire about the circumstances of the transaction but did not do so. There is no record of inquiries. We must next determine whether the Respondent's conduct is a marked departure from that normally expected of lawyers.

[86] In *Elias*, which was quoted by the panel in *Gurney,* the Court of Appeal held:

> "… it is professional misconduct to become involved until such time as inquiries have been made to satisfy the member on an objective test that the transaction is legitimate." It is clear that the duty to make inquiries is triggered prior to the lawyer becoming involved in the transaction, and the lawyer must be satisfied on an objective basis that the transaction is legitimate.

[87] The insurance funds were unrelated to the legal services the Respondent was providing to his client. In the absence of related legal services, the Respondent had a professional obligation to make reasonable inquiries to satisfy himself on an objective test that the transaction was legitimate, which he failed to do.

[88] We find that the Respondent's failure to make reasonable inquiries given the red flags referred to in paras. [80], [81] and [82] was a marked departure which constitutes professional misconduct.

ALLEGATIONS 1 AND 5

[89] In his cross-appeal, the Respondent seeks to have the hearing panel's finding of professional misconduct in relation to allegations 1 and 5 set aside. The Respondent did not make fulsome submissions on these allegations, but relied on his response submissions regarding allegation 3, namely that prior to July 2019 lawyers were not limited to the use of their trust account for transactions directly related to the legal services being provided.

[90] The Respondent argued it was the standard of practice at the relevant time for lawyers to sometimes accept funds into trust for clients even when "those funds were not 'directly related to' the subject of their retainer". The Respondent submitted that his actions were not "so egregious that it is obvious that his … conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard". The Respondent further submitted that "[w]hen considered alongside the irreparable prejudice caused by the late disclosure which denied the Respondent and the panel the benefit of the evidence of [AK], allegations 1 and 5 must be set aside".

[91] Similarly to allegation 3, the Board finds that at the time of the transactions that form the basis for allegations 1 and 5, there was not a clear prohibition against lawyers

accepting funds into their trust account without providing directly-related legal services, but in such circumstances a lawyer had a duty to make inquiries.

[92] The hearing panel's findings regarding allegation 1 are found in paras. 25 and 56 of its decision:

> [25] … The funds going in and out of the trust account over the period of a day was because a purported investment deal had fallen through. The Respondent then received $88,705.94 from a Mexican source in October 2016 and disbursed $50,000 of those funds to AK the next day. The balance of the funds were disbursed to AK in November. The funds were supposedly from the sale of assets in Mexico. The Respondent was not involved in the sale, nor did he have information about the nature of the assets or the source of the funds.
>
> [56] As such, the Panel finds that the Respondent's conduct in relation to all counts found in allegation one is a marked departure from the conduct expected of a lawyer. The Law Society has proven professional misconduct in relation to allegation one.

[93] The hearing panel's findings regarding allegation 5 are set out as follows:

> [115] The Panel finds that the nature of the transactions should have created a sense of independent diligence separate and apart from AK.
>
> [116] The Panel finds that insufficient steps were taken by the Respondent to ensure that he was not assisting in dishonesty, crime, or fraud, which the Law Society submits is a marked departure from the standard required of lawyers.
>
> [117] Further issues arise from an April 26, 2018, email to the Respondent from WW asking for a $165,000 wire transfer from A Corp. to G Corp., with no previous information regarding money transfer to G Corp.
>
> [118] The Respondent made no inquiries and had no information regarding the transfer. Questions should have been asked as the funds held in trust by the Respondent were believed to be L Investments funds, not A Corp. funds. The Respondent assumed that WW had made a mistake when he referred to A Corp. and not to L Investments and the Respondent made no further inquiries. At a minimum, clarity should have been sought.
>
> [119] The Respondent received a wire transfer of $63,830 from DS on May 28, 2018. He was told this was someone who owed WW and NW

money and was paying them back and the Respondent agreed to run it through his trust account. No inquiries were made regarding DS or the funds. …

[120] On May 18, 2018, the Respondent was instructed by NW to wire the $2,600,000 he held in trust to L Investments in Dubai. … Due to an error with the wire transfer coordinates, the transfer was not completed and $2,599,955 was returned to the Respondent's trust account on June 4, 2018 ($2,600,000 less a $45 processing fee).

[121] On June 7, 2018, the Respondent was instructed by NW to wire all but $105,000 of the funds he held in trust to A Advocates in Dubai. Later that same day, the Respondent wired $2,613,016.81 to A Advocates from his trust account. On June 13, 2018, the Respondent was instructed by NW to wire the balance of the funds he held in his trust to A Advocates. The following day, on June 14, 2018, the Respondent wired $104,885 to A Advocates from his trust account.

…

[123] Instead of making inquiries regarding these transactions, the Respondent submits he was relieved to finally get instructions and divest the funds that were making him uncomfortable. The Panel finds that his discomfort should have prompted earlier action as the Respondent seemed utterly unconcerned that he may be helping commit dishonesty, fraud, or crime.

…

[131] Furthermore, additional deficiencies by the Respondent to make relevant inquiries into the large sums of money being moved through his trust account defy the prudent and conscientious consideration of a transaction of this nature. While the Respondent was "in between" firms and working on his own, there should have been further diligence about requirements that would have ordinarily been done by others in larger organizations where he had previously worked. The Respondent relied on AK for assistance, something that was not reasonable in the circumstances, given the full context of this particular transaction.

…

> [133] … The Panel also finds that the Respondent failed to make reasonable inquiries to obtain information about the parties and the subject matter and purpose of the financial transactions he was requested to facilitate.
>
> …
>
> [147] The Panel cannot accept the arguments provided in relation to allegation five by the Respondent. The conduct of the Respondent is far outside the realm of what a reasonable lawyer would do within similar circumstances, as such the Panel finds that in relation to allegation five the Respondent's actions amount to professional misconduct.

[94] We accept the findings of the hearing panel that the Respondent failed to make appropriate inquiries and that his conduct was a marked departure and amounted to professional misconduct. The Respondent has not identified an error of fact or law in this part of the hearing panel's reasoning that leads us to conclude that the hearing panel's determination on allegations 1 and 5 are incorrect.

THE PROCEDURAL FAIRNESS ISSUES IN THE CROSS-REVIEW

[95] In his Cross-Review, the Respondent seeks a new hearing because the hearing panel's refusal to order further disclosure and adjourn the hearing caused procedural unfairness. He also says in his Notice of Review that the hearing panel erred in dismissing an application for the panel to summon AK to give evidence, and that AK should be called by the hearing panel at a rehearing. This argument was not pursued in written or oral argument and we will not consider it.

[96] Relying on *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, the Respondent at the start of the hearing before the hearing panel on November 21, 2022, applied for extensive further disclosure from the Law Society, and to adjourn. He did so because on November 16, 2022, the Law Society disclosed nine documents not previously disclosed. Four documents were publicly available and five documents were from Law Society investigation files of two other lawyers. The production of the five documents from Law Society investigation files, in particular, underpinned the applications for further disclosure and for an adjournment.

[97] The Law Society asserted that the five documents related only to the credibility of one of the Respondent's intended witnesses, AK. The Respondent advised the Law Society of his intention to call AK as a witness on November 14, 2022, seven days before the start of the hearing.

[98] In the face of the Respondent's application for disclosure and to adjourn the hearing, the Law Society advised that it would not rely on any of the five documents and would not put them to AK during his cross-examination.

[99] The Respondent said the disclosure of the five documents from Law Society investigation files contributed to "an erosion of trust" concerning whether the Law Society had made full disclosure to the Respondent and whether interview transcripts from the investigation files that were previously disclosed had been appropriately redacted.

[100] The Respondent also advised that because of the disclosure of the five documents, AK had sought counsel and might not cooperate. He was careful to note that AK had not refused to testify.

[101] After hearing submissions for one and a half days, the hearing panel dismissed the applications for further disclosure and an adjournment. The reasons given were as follows:

(a) the Respondent's submission regarding the existence of further information that may or may not assist the Respondent's case was speculative;

(b) having considered the standard from *Stinchcombe* (discussed below), the Hearing Panel did not accept that there may be other, undisclosed documents relevant to the Citation; and

(c) the Hearing Panel took comfort in the submissions of Law Society counsel who indicated that an exhaustive review of the investigation files had been carried out and that relevant content had been produced.

Standard of Review

[102] Both parties agree that the correctness standard of review applies to the procedural fairness issues.

Background

[103] The background to the demand for further disclosure is important. The allegations in the Citation determine the scope of relevance.

[104] In allegation 1 of the Citation, as described by the Respondent in submissions:

> 2. The Respondent was alleged to have received and disbursed $163,705.45 from [AK] without providing substantial legal services and without making reasonable inquiries about the circumstances of the trust matter or recording the results of those inquiries.
>
> 3. Allegation 1 centred on two sets of transactions that had come through the Respondent's trust account:
>
> (a) $75,000 sent to the Respondent's trust account before being sent back to the client the following day; and
>
> (b) $88,705.49 wired to the Respondent's trust account from the sale of some of [AK]'s assets in Mexico, which were wired back to [AK] in two installments.

[105] In allegation 5, also as described by the Respondent:

> 9. … The Respondent was alleged to have received money in trust in connection with work for [L Investments], a company beneficially owned by [WW]….
>
> 10. On August 28, 2017 and September 1, 2017, the Respondent received wire transfers from [P. Inc] in the amounts of $1.525 and $1.4 million respectively. On September 6, 2017, [WW] confirmed that the Respondent ought to have received the two wires with a view to assisting [WW] … with transactions.
>
> 11. From January 24, 2018 to approximately June 14, 2018, the Respondent assisted [L Investments] in processing [seven transactions] …..

[106] "AK" referred to in allegation 1 is the same person the Respondent intended to call as a witness. "WW" referred to in allegation 5 was the subject of an SEC investigation in which very serious allegation were made against him. AK introduced WW to the Respondent. The Respondent described the importance of AK's evidence as follows:

> 22. …[AK]'s prospective evidence was intended to provide the hearing panel with context about the nature of the transactions at issue in the Citation. A central feature of the Respondent's defence was his reliance on [AK], another member of the bar, in relation to the transactions at issue. [AK]'s evidence as to the circumstances, and his advice to the Respondent as to the circumstances, on which the Respondent relied, was central to the context of the events.

[107] AK had been the subject of an investigation by the Law Society. No citation was issued against AK. Another lawyer, RP, who had dealings with both AK and WW was

also the subject of a Law Society investigation. The investigation into RP resulted in a citation.

[108] More than a year prior to the hearing, after receiving a redacted transcript of a Law Society interview of AK, Respondent's counsel wrote to Law Society counsel on August 23, 2021 as follows:

> Now, six months after the previous production, and 10 months after the interviews of [AK], we are provided with a heavily redacted, and obviously relevant, interview of this material witness. We also note that this new disclosure also references another lawyer, [RP], for whom a citation has already been issued with references to the same initials as were used with [AK].
>
> Presently, there is insufficient information for us to assess the basis of the redactions to the interview, nor to assess whether other information, captured within the ambit of the LSBC's duty to disclose, is being withheld in the investigative files of [AK] and [RP], and potentially other investigations. As the LSBC has an obligation to apprise the Respondent of the existence and nature of information which it refuses to disclose, in the circumstances of this case, in light of the late-breaking production of dated and obviously relevant material, we believe the LSBC has an obligation to produce the following:
>
> > (1) Copies of communications, if any, addressed to AK, advising him that information harvested through his interview and investigation would be disclosed in the Wang citation proceedings and all communications between investigators, [AK] and his counsel;
> >
> > (2) A written itemized inventory of all information in the LSBC's possession that relates to the investigation of [AK], accompanied by a statement of the basis upon which production is being withheld;
> >
> > (3) A written itemized inventory of all information in the LSBC's possession that relates to the investigation of [RP], accompanied by a statement of the basis upon which production of the listed items is being withheld;
> >
> > (4) With respect to redactions that have been applied to disclosure that has been produced, details of the nature of the underlying information with sufficient detail to allow us to make a meaningful decision on whether to challenge the non-disclosure;
> >
> > (5) Audio/video recording of the [AK] interview, and

> (6) Production of details of any other lawyers under investigation for their involvement with entities and clients referred to in the [AK] interview and citations for Mr. Wang and [RP].

[109] Subsequently, the Law Society produced a redacted transcript of an interview of RP and related documents. Further documents relating to RP were produced on December 7, 2021 and January 12, 2022.

[110] After receiving additional disclosure from the investigation files of AK and RP, the Respondent made no further demands for disclosure until the application made at the outset of the hearing.

[111] Respondent's counsel submitted that disclosure of the five documents just prior to the commencement of the hearing "eroded … trust" that full disclosure had been made, and caused him to apply for further disclosure.

[112] The Law Society submits that the five documents were not relevant to the allegations in the Citation, only went to AK's credibility and were disclosed when the Law Society was notified that the Respondent intended to call AK as a witness.

[113] At this Review, the Respondent argued that the five documents were relevant to two issues, first to the credibility of AK and second to the conduct of the Respondent's defence, including whether to call AK as a witness or to call other evidence.

[114] At the most basic level, relevant evidence is evidence that is logically relevant, *i.e.*, evidence that tends to prove or disprove a fact in issue: *R v. Grant*, 2015 SCC 9 at para. 18. We find that the five documents are not logically relevant to the allegations in the Citation. The five documents are:

(a) an email between RP and his accountant about a pending Law Society Trust Audit that refers to AK;

(b) a long series of text messages between AK and RP;

(c) a copy of the Rule 4-55 Order directing an investigation of the books and records of RP;

(d) a client trust ledger from RP that shows transactions with AK; and

(e) an Irrevocable Direction (signed but blank as to the payee) from AK to RP authorizing RP to disburse funds from a specified account.

[115] None of these documents refers to the Respondent nor to any matter at issue in the allegations in the Citation. None has any apparent bearing on a fact in issue.

Standard of Disclosure

[116] Rule 5-4.6 states the following disclosure obligation on the part of the Law Society:

> 5-4.6 (1) At any time after a citation has been issued and before the hearing begins, a respondent may demand in writing that Law Society counsel disclose the evidence that the Society intends to introduce at the hearing.
>
> (2) On receipt of a demand for disclosure under subrule (1), Law Society counsel must provide the following to the respondent by a reasonable time before the beginning of the hearing:
>
> > (a) a copy of every document that the Society intends to tender in evidence;
> >
> > (b) a copy of any statement made by a person whom the Society intends to call as a witness;
> >
> > (c) if documents provided under paragraphs (a) and (b) do not provide enough information, a summary of the evidence that the Society intends to introduce;
> >
> > (d) a summary of any other relevant evidence in Law Society counsel's possession or in a Society file available to counsel, whether or not counsel intends to introduce that evidence at the hearing.

[117] As both parties acknowledge, the Law Society has a common law duty of fairness to ensure the Respondent has a fair hearing. The parties disagree on what is required to meet this duty.

[118] The Respondent argues that *Stinchcombe*-level disclosure, or something very close to it, is required in LSBC Tribunal proceedings. The Respondent says that a member of the Law Society has an obligation to cooperate fully with a Law Society investigation and may not "play defence" in respect of that investigation. In response, the Law Society owes the member a high level of candour in making disclosure in a citation proceeding. The Respondent invites us to adopt the *Stinchcombe* disclosure standard, which is the standard applied by the Law Society of Ontario in disciplinary proceedings; see, *e.g*, *Law Society of Upper Canada v Savone,* 2016 ONSC 3378.

[119] The Law Society denies that *Stinchcombe* reflects the standard of disclosure required of it. It says that *Stinchcombe* responds to the specificities of criminal proceedings, including the accused's right to silence and the burden on the Crown to prove the allegations against an accused beyond a reasonable doubt.

[120] The Law Society says that Rule 5-4.6, and not *Stinchcombe*, governs the Law Society's disclosure obligations in disciplinary proceedings. The Law Society stresses that Law Society investigations are confidential as is the information that is gathered. The information disclosed to the Law Society in the course of an investigation can include highly personal and sensitive information. If an investigation eventuates in a citation, the fruits of the investigation are disclosed to the respondent. Otherwise, information disclosed in an investigation of a lawyer remains confidential. The Law Society says that the Respondent received the information from investigations of other lawyers that was relevant to the proceeding against him. This level of disclosure meets the requirements of procedural fairness. Procedural fairness does not demand that the Respondent receive disclosure of information gathered in other investigations that is not relevant to the allegations against him.

Does *Stinchcombe* apply?

[121] Whether a lawyer subject to a disciplinary citation should receive *Stinchcombe*-level disclosure has not previously been decided in British Columbia. The issue was considered in *Law Society of BC v Seifert*, 2006 LSBC 51 but not decided.

[122] Pre-hearing disclosure bears on the procedural fairness of the hearing process and to whether a respondent has adequate knowledge of the case to be met. The precise content of the Law Society's duty of procedural fairness in a citation hearing must be determined in accordance with all circumstances relevant to the particular case: *Vavilov v. Minister of Citizenship and Immigration,* 2019 SCC 65 at para. 77; *Green v. Law Society of Manitoba*, 2017 SCC 20 at para. 56. At a minimum, the factors articulated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 should be considered. Those factors are as follows: the nature of the decision being made and the process followed in making it; the nature of the statutory scheme; the importance of the decision to the individual(s) affected; the legitimate expectations of the affected person(s); and the decision-maker's own choice of procedure: *Baker* at paras. 22 to 27; *Vavilov* at para. 77.

[123] It has long been recognized that administrative decision-making that has the potential for significant personal impact or harm will tend to attract a more demanding level of procedural fairness than decision-making which does not: *Baker* at para. 25. In connection with professional regulation, the Supreme Court in *Kane v. Board of*

Governors of the University of British Columbia, [1980] 1 SCR 1105 at 1113 had this to say:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake [citations omitted]. A disciplinary suspension can have grave and permanent consequences upon a professional career.

[124] The *Stinchcombe* disclosure standard was developed in the criminal context and protects the constitutionally protected right of the accused to make full answer and defence to a criminal charge: *R v. Taillefer; R v. Duguay,* [2003] SCC 70 at para. 61. It requires disclosure of "all material evidence whether favourable to accused or not," that is not privileged and no matter whether the Crown intends to introduce the evidence before election or plea: *Duguay*, at para. 59. "Relevance" is determined at a low threshold. Material is relevant if it could reasonably be used by the accused to meet the Crown's case: *Duguay*, at paras. 60 to 61. The dividing line between what ought to be disclosed and what is not required to be disclosed is sometimes characterized as "clearly irrelevant": *Duguay*, at para. 60. Statements from persons who have provided relevant information should be produced, no matter whether the Crown intends to call them as witnesses: *Duguay,* at para. 59. Evidence that may be used to impeach the credibility of a witness for the Crown is also producible: *Duguay*, at para. 62.

[125] There is reason to be cautious about assuming that the Crown's disclosure obligations may be transplanted directly onto the Law Society in a LSBC Tribunal proceeding. As the Supreme Court of Canada has noted, there are "fundamental differences" between criminal and disciplinary proceedings. The former "are of a public nature, intended to promote order and welfare within a public sphere of activity", while the latter "maintain discipline within a limited sphere of private activity": *Law Society of Saskatchewan v. Abrametz,* 2022 SCC 29, at para. 54.

[126] The Supreme Court of Canada has, moreover, denied that the *Stinchcombe* standard of disclosure applies in "the administrative context". In *May v. Ferndale Institution*, 2005 SCC 82, a case concerning security reclassifications for prison inmates serving life sentences, resulting in their involuntary transfers from minimum to medium security facilities, the Court considered the applicability of the *Stinchcombe* principles and, at paras. 89 to 92, held:

> The appellants contend that the disclosure requirements set out in *Stinchcombe* apply to the present case because the transfer decisions involved the loss of liberty. On the other hand, the respondents argue that the proper context in which to deal with the involuntary transfers is administrative law and not criminal law.

> The *Stinchcombe* disclosure standard is fair and justified when innocence is at stake but not in situations like this one.
>
> We share the respondents' view. The requirements of procedural fairness must be assessed contextually in every circumstance: [citations omitted].
>
> It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context.
>
> In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As Arbour J. held in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, at para. 40:
>
> > As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position . . . .

[127] *May* is distinguishable from the case on review in at least two respects. First, the security reclassification decisions at issue in *May* were not products of adjudicative hearings but were arrived at by case workers who applied a computerized decision-making tool to analyze security risks. The decision-making context here is entirely different, as it involved an adversarial hearing in which the Law Society bore both factual and legal burdens of proof. Second, as noted by the Court, questions of fault were not at issue in *May*. The residual liberty interests of the inmates were implicated by the reclassification decisions but the decision-making was not concerned with whether the inmates had contravened conduct standards. Issues of reputation and livelihood were not at stake. In contrast, culpability for conduct proscribed by a professional regulator is the dominant issue in citation proceedings. In the case on review, the proceedings against the Respondent were aimed at determining whether he committed delicts that amount to professional misconduct or a breach of the *Act* or Rules.

[128] Nonetheless, the differences between the nature of the administrative decision-making in *May* and the case on review do not negate the Court's central holding: *Stinchcombe* does not automatically apply to administrative decision-making.

[129] Various professional regulators apply the *Stinchcombe* standard to disclosure in disciplinary hearings. Some of the reported cases that discuss disclosure standards focus on the question of whether the professional who is subject to disciplinary allegations ought to have the regulator's "full file" on them: see, *e.g.*, *Hammami v. College of Physicians and Surgeons of British Columbia*, 1997 CanLII 651 (BCSC). Others focus on the importance of the individual having access to any exculpatory material in the regulator's possession: see, *e.g.*, *Milner v. Registered Nurses Assn. of British Columbia,* 1999 CanLII 3148 (BCSC) and the cases cited therein. As noted above, the Law Society of Ontario applies *Stinchcombe* to disclosure obligations in disciplinary hearings. Apparently, the Law Society of New Brunswick and the Nova Scotia Barristers' Society do as well; see *Law Society of New Brunswick v. Weir*, 2012 NBLSB 2 at paras. 42 to 43 and *Nova Scotia Barristers' Society v. Harris*, 2004 NSCA 143 at para. 81.

[130] The parties did not refer us to any authorities addressing circumstances like those at play in the case on review, where the issue is not disclosure of the Law Society's file for the Respondent but disclosure of investigation files pertaining to other lawyers. We have been unable to identify any LSBC Tribunal decisions on this issue.

[131] An analysis of the first three *Baker* factors suggests that the Law Society should meet a very high level of disclosure in proceedings on a citation, consistent with *Stinchcombe*:

(a) Very important interests are at stake. The resulting decision can influence the lawyer's professional reputation and affect their practice. In *Sheriff v. Canada (Attorney General)*, 2006 FCA 139 at paras. 29 to 30 and 33 to 34, the Federal Court of Appeal held that the potential for a license review to affect the reputation and livelihood of a trustee in bankruptcy warranted a departure from *May* and demanded *Stinchcombe*-level disclosure.

(b) The decision-making process is formal: an adversarial hearing before a panel typically composed of a bencher, a non-bencher lawyer and a public representative who is not a lawyer, resulting in a written decision.

(c) The adjudication sets out to determine whether the respondent has not met professional standards intended to protect members of the public, who are vulnerable to the effects deficient lawyering, professional misconduct or otherwise inappropriate behaviour on the part of lawyers.

[132] The remaining two *Baker* factors tend to suggest a somewhat less exacting standard of disclosure from the Law Society. Rule 5-4.6 provides for disclosure of the documentary evidence that the Law Society intends to tender at the hearing (Rule 5-4.6(2)(a)), notice of the anticipated evidence of witnesses the Law Society intends to call (Rule 5-4.6(2)(b) and (c)), and a summary of any other "relevant evidence" in counsel's possession or in the possession of the Law Society, whether or not counsel intends to lead it in the hearing (Rule 5-4.6(2)(d)), *but only on written demand by the respondent* (Rule 5-4.6(1)). The decision-maker's own choice of procedure, and the legitimate expectations of a respondent based thereon, do not mirror the *Stinchcombe* standard.

[133] We are not persuaded that Rule 5-4.6 alone is sufficient to ensure the level of procedural fairness appropriate to the hearing of a citation. We find that the Law Society's disclosure obligations are as set out in Rule 5-4.6, with the following additional obligations. Subject to claims of privilege, the Law Society should proactively disclose the evidence it has relied upon in preparing its case, all exculpatory evidence that is logically relevant to the allegations against the respondent, and, to the extent that it is not captured in the preceding categories, any other evidence that may reasonably assist the respondent in advancing a defence that is plausibly open to them.

[134] Disclosure produced pursuant to this standard often will be indistinguishable from the disclosure that would be produced were *Stinchcombe* applied directly to LSBC Tribunal proceedings. In other cases, the extent of the disclosure may be slightly different. We do not see this as a cause for concern. The object of disclosure is not to achieve maximum document production, but to achieve a high level of procedural fairness in a citation proceeding. Disclosure calibrated to the standard of relevance described above should be sufficient to ensure a high level of procedural fairness.

[135] We find that documents that go only to a witness's credibility need not be disclosed, unless the Law Society intends to rely on them at the hearing of the citation. In that case, such documents should be disclosed upon confirmation of the witnesses to be called to give evidence at the hearing.

Did the disclosure in this case make the hearing unfair?

[136] In argument, counsel for the Respondent argued that they had shown that AK's file likely contained evidence confirming that AK was considering an investment in the cannabis field. The Respondent referred to a letter dated July 26, 2021 from the Law Society to AK enclosing the Law Society's investigation file. This letter referred to cannabis investments. This letter was not put before the hearing panel. Although apparently the letter was in the Review Record by consent, we were not asked to admit it as new evidence. In any event, it does not assist.

[137] There is reference to AK and a potential investment in the cannabis field in the unredacted portion of AK's transcript. In making disclosure, Law Society counsel had clearly turned their mind to the potential relevance of AK's potential investment in the cannabis field to allegation 1 and disclosed that portion of the interview. Having clearly identified that as a potentially relevant matter and in view of counsel's assurance that all relevant documents had been disclosed, we can infer that there were no other documents on that point.

[138] The Respondent argues that the hearing panel erred by putting the onus on the Respondent to prove the existence of relevant documents. In our view, when a respondent challenges the adequacy of disclosure by the Law Society, they must show some basis for that challenge. *R. v. Chaplin*, [1995] 1 S.C.R. 727 provides helpful guidance. In that case, at paras. 23 and 25, the Court held:

> 23 When the Crown alleges that it has discharged its obligation to disclose, an issue may arise as to whether disclosure is complete in two situations:
>
> > (1) the defence contends that material that has been identified and is in existence ought to have been produced; or
> >
> > (2) the defence contends that that material whose existence is in dispute ought to have been produced.
>
> . . .
>
> 25 In situations in which the existence of certain information has been identified, then the Crown must justify non-disclosure by demonstrating either that the information sought is beyond its control, or that it is clearly irrelevant or privileged….

[139] In the application before the hearing panel, the existence of the materials sought, *i.e*., the entire investigation files regarding AK and RP, was not in dispute. It is clear, though, that the entire files would not be relevant. The issue was whether counsel had properly produced the portions of the file that were relevant and whether relevant documents that had not been disclosed existed in those files.

[140] In that situation, the Respondent needs to show some basis for that allegation. In *Chaplin,* when discussing an application for material the existence of which is in dispute, the Court stated, in paras. 30 to 32:

> 30 In contrast to the above, in some cases, this being one, the existence of material which is alleged to be relevant is disputed by the Crown. Once the Crown alleges that it has fulfilled its obligation to produce it cannot be required to

> justify the non-disclosure of material the existence of which it is unaware or denies. Before anything further is required of the Crown, therefore, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified not only to reveal its nature but also to enable the presiding judge to determine that it may meet the test with respect to material which the Crown is obliged to produce as set out above in the passages which I have quoted from *R. v. Stinchcombe* and *R. v. Egger*, [1993] 2 S.C.R. 451.
>
> 31 Although the obligation cast upon the defence which I have characterized as "a basis" is in the nature of an evidentiary burden, I prefer not to call it that because it can, and in many cases will, be discharged not by leading or pointing to evidence but by oral submissions of counsel without the necessity of a voir dire. Accordingly, I avoid the terms "air of reality" or "live issue" and other terms used in some of the cases that are more appropriate when used to describe a true evidentiary burden. Viva voce evidence and a voir dire may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel.
>
> 32 Apart from its practical necessity in advancing the debate to which I refer above, the requirement that the defence provide a basis for its demand for further production serves to preclude speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming disclosure requests. …

[141] In the application before the hearing panel, the Respondent could only point to the disclosure of the five non-public documents from the investigation files of AK and/or RP to show that disclosure had not been adequate. We have reviewed those documents and find that they are not relevant and that the Law Society was not required to disclose them. The Respondent has not shown any basis to suggest that Law Society counsel's identification of relevant documents from the AK and RP investigation files, or the redactions of the transcripts made by counsel on the basis of relevance, were inadequate.

[142] The Respondent also contends that the disclosure of the five documents impaired his ability to decide whether to call AK as a witness.

[143] It is clear from the record that AK had not refused to testify. He had decided to retain his own counsel. Even if he had refused to give evidence voluntarily, counsel for the Respondent could have issued a summons under Rule 5-5(4) to compel his attendance.

[144] The Respondent's counsel decided not to call AK as a witness. That decision was driven by his concern that adequate disclosure had not been made. We have not found that the Law Society's disclosure was inadequate. It is, moreover, important to note that the Law Society had agreed not to rely on the five documents from the investigation file or to put them to AK in cross-examination. The Respondent was in the same position as he was before the disclosure of those five documents.

Did the Panel's refusal of an adjournment make the hearing unfair?

[145] With respect to the refusal to adjourn, we agree it was appropriate in the circumstances. If further disclosure had been ordered an adjournment would likely have been necessary. After finding that further disclosure was not required the only remaining issue was the impact of the disclosure of the four public documents. Those documents would not in our view justify an adjournment and the hearing panel correctly refused to adjourn the hearing.

CONCLUSION

[146] The Board concludes that the hearing panel's finding that the Law Society had not met the burden of proof in relation to allegation 3 should be set aside and substituted with the finding that the Respondent committed professional misconduct in relation to allegation 3.

[147] The Board concludes that the hearing panel's finding that the Respondent committed a breach of the *Act* or Rules in relation to allegation 2 was correct.

[148] The Board concludes that the hearing panel's finding that the Respondent committed a breach of the *Act* or Rules in relation to allegation 4 and 6 should be set aside and substituted with a finding that the Respondent committed professional misconduct in relation to allegations 4 and 6.

[149] The Board concludes that the hearing panel was correct in dismissing the Respondent's application for disclosure and the Respondent's application to adjourn the hearing.

[150] The Board concludes that the hearing panel was correct in finding professional misconduct in relation to allegations 1 and 5.

COSTS

[151] Both the Law Society and the Respondent seek costs of this Review. The Board will consider costs by way of written submissions. The Law Society shall have until November 8, 2024 to either file a consent order as to the costs of the review or to file a draft Bill of Costs and its submissions on costs. The Respondent in turn shall have until November 22, 2024 to file any responding materials and the Law Society shall have until November 29, 2024 to file a reply.