expense, contrary to Law Society Rule 3-56(1). His explanation was that the chequebooks for his general account and trust account were very similar and it was a simple mistake. He discovered the resulting trust shortage when preparing his monthly reconciliation. The lawyer took several months before reporting the shortage to the Executive Director and eliminating the trust shortage, instead of doing so immediately as required by Rules 3-66(1) and (2). The lawyer readily conceded that he should have notified the Executive Director immediately, and that he did not review the relevant rules until he was able to repay the trust account. He has put in place some simple safeguards to easily identify the chequebooks. A conduct review subcommittee told the lawyer that any future similar issues with his trust account would be handled with greater severity. (CR 2015-17)

DUTY TO THE COURT

During a trial management conference in a family matter, a lawyer did not candidly respond to the judge's questions about an affidavit and a missing exhibit involving her client's financial disclosure. The lawyer acknowledged that, in failing to be forthright with the court, her conduct was contrary to rule 2.1-2 of the *Code of Professional Conduct for British Columbia*. A conduct review subcommittee advised the lawyer that her conduct was inappropriate, as her duty of candour to the court is part of her overriding obligation to act with honesty and integrity in all aspects of both her professional and personal life. The lawyer stated that, if faced with a similar situation, she would be aware of her professional obligation and in all likelihood would ask the court for some time to gather her thoughts to ensure that she was not being less than forthright. The lawyer expressed remorse for her actions and acknowledged her misconduct. (CR 2015-18)

LAND TITLE ACT ELECTRONIC FILINGS

A lawyer failed to comply strictly with the *Land Title Act*, Law Society Rule 3-56(3.2)(b) and rule 6.1-5 of the *Code of Professional Conduct for British Columbia* regarding the use of his personal digital signature in electronic filings. During a compliance audit of the lawyer's practice, it was discovered that he had permitted his assistant to routinely affix his digital signature to documents that were submitted to the Land Title and Survey Authority. The lawyer promptly admitted his misconduct to Law Society staff during the compliance audit and has taken steps to amend his practice. A conduct review subcommittee accepted the lawyer's explanation that he was issued the password some years prior to actually using it. When electronic filing subsequently became compulsory, he did not recall the terms and conditions upon which the password was issued, until it was brought to his attention by Law Society staff. The subcommittee reminded the lawyer of his obligations to understand fully and abide by any terms and conditions that are imposed upon or accepted by him in any area of his practice. (CR 2015-19)

BREACH OF UNDERTAKING/TRUST CONDITION

A lawyer breached a trust condition imposed by an unrepresented opposing party, by accepting funds in payment of a certificate of costs registered as a judgment against the unrepresented party's company's mortgages, but failing to advise his client's trustee in bankruptcy that payment had been made and failing to discharge the judgment, contrary to rule 7.2-11 of the *Code of Professional Conduct for British Columbia*. A conduct review subcommittee advised the lawyer that trust conditions are equivalent to undertakings and should be clear, unambiguous, explicit and communicated in writing. A lawyer should not impose or accept trust conditions that are unreasonable, and when a lawyer does accept property subject to a trust condition, the lawyer must fully comply with such conditions even if they subsequently appear unreasonable. The lawyer acknowledged his errors and admitted that his conduct fell short of the standard required of him. He will give greater care and attention to his correspondence and to trust conditions and undertakings in particular. He will only offer and accept trust conditions that are clear and unambiguous and will subsequently comply with the agreed conditions under all circumstances. The lawyer will also make every effort to properly remove himself from litigation files that become irrevocably antagonistic and will regularly refresh his knowledge and understanding of the rules governing his conduct as a lawyer. (CR 2015-20)

INCIVILITY

Following an examination for discovery, a lawyer made several uncivil comments toward an unrepresented opposing party, including using profanities in an elevated and condescending tone, contrary to rules 2.2-1, 7.2-1 and 7.2-4 of the *Code of Professional Conduct for British Columbia*. A conduct review subcommittee felt that the lawyer's conduct was inexcusable. The lawyer acknowledged his misconduct and said that the behaviour was out of character and he has learned his lesson. His manner before the subcommittee was sincere, especially when describing how humiliating it was to read the transcript and the demeaning way he spoke to the opposing party. The subcommittee found it troubling, however, that he had not taken any steps to gain more insight into the cause for his behaviour in order to prevent its recurrence. With regard to public confidence and the harm done to the opposing party, the subcommittee hoped that the opportunity the opposing party had to attend the conduct review to explain his experience and the subcommittee's report demonstrated to him that the Law Society views this conduct seriously. The subcommittee further hoped that, in some measure, this process betters the woeful lack of a sincere and timely apology from the lawyer. (CR 2015-21) ❖

Discipline digest

BELOW ARE SUMMARIES with respect to:

- Leonides Tungohan
- Thomas Paul Harding
- Stanley Chang Woon Foo
- David Massao Saito
- Richard Craig Nielsen
- Ronald Wayne Perrick
- Krista Margret Jessacher
- David Jacob Siebenga

For the full text of discipline decisions, visit the Hearing decisions section of the Law Society website.

LEONIDES TUNGOHAN

Vancouver, BC

Called to the bar: May 1, 2008

Discipline hearing: April 15 and 16 and September 15 to 17, 2014, and April 17, 2015

Panel: Miriam Kresivo, QC, Chair, Bruce LeRose, QC and Lois Serwa

Decisions issued: January 14 (2015 LSBC 02) and June 5, 2015 (2015 LSBC 26)

Preliminary question: April 15, 2014 (2014 LSBC 41)

Bencher: Tony Wilson

Review on jurisdiction (written submissions): March 10, 2015

Review board: Lynal Doerksen, Chair, James Dorsey, QC, Martin Finch, QC, Sharon Matthews, QC, Laura Nashman, Karen Nordlinger, QC and Lance Ollenberger

Review board decision issued: July 9, 2015 (2015 LSBC 33)

Counsel: Alison Kirby for the Law Society; Leonides Tungohan on his own behalf

FACTS

Between October 2009 and March 2010, Leonides Tungohan received trust funds from a client in a real estate litigation matter, but failed to handle the funds in accordance with Part 3, Division 7 of the Law Society Rules.

Tungohan failed to notify the Law Society of the circumstances of a monetary judgment granted against him in April 2011 and his proposal for satisfying the judgment, contrary to Rule 3-44.

Between December 2009 and May 2011, Tungohan withdrew funds from his pooled trust account purportedly in payment of his fees without first preparing and delivering a bill to his clients, contrary to Rules 3-56 and 3-57(2).

Between December 2009 and December 2010, he failed to maintain books, accounts and records in accordance with Part 3, Division 7 of the Rules.

Also, between December 1 and December 31, 2009, Tungohan made payments from his trust funds when his trust accounting records were not current, contrary to Rule 3-56(1.2).

DETERMINATION

The panel found that Tungohan's failure to report an unsatisfied monetary judgment, his numerous breaches relating to the withdrawal of trust funds and his failure to maintain appropriate books, accounts and records of client funds are marked departures from the conduct expected of lawyers and constitute professional misconduct.

DISCIPLINARY ACTION

The panel was concerned that Tungohan's misconduct related to the handling of trust funds and failure to maintain books, accounts and records appropriately. Throughout the hearing, he did not appear to understand his obligations under the trust accounting rules, which are key to the protection of the public.

The panel ordered that Tungohan:

1. pay a fine of $3,000;
2. provide quarterly reports from an accountant to the Law Society; and
3. pay costs of $29,200.

PRELIMINARY QUESTION

Prior to the commencement of the hearing, Tungohan made an application for a determination of a preliminary question. The application was heard by a Chambers Bencher at a pre-hearing conference on April 15, 2014.

Tungohan argued that certain allegations in the citation had already been ruled upon and that for a formal hearing panel to rule on them again would amount to an abuse of process and a violation of procedural fairness. He submitted that a judgment had already been made by the Practice Standards Committee. The Chambers Bencher disagreed, noting that the committee is not an adjudicative body and does not have the ability to make a finding of professional misconduct.

That application was denied and the hearing proceeded.

DECISION OF REVIEW BOARD ON JURISDICTION

Tungohan sought a review of the decision of the Chambers Bencher in the pre-hearing conference. The issue at hand was whether a review by a review board at that stage of the proceeding was permissible under the Act and Rules governing the Law Society.

Under the administrative scheme established in the Act and the subordinate procedure for panel proceedings established by the Rules, a decision by a single Bencher in a pre-hearing conference on a preliminary question is not an "adverse determination" from which flows panel imposition of mandatory and discretionary consequences for the lawyer named in a citation.

Consequently, the decision is not one Tungohan can apply to review, and his Notice of Review was quashed.

Sharon Matthews, QC gave a separate decision concurring with the majority of the review board but disagreeing with the analysis. Matthews believed that, on disciplinary matters, only decisions of panels hearing a citation are reviewable under s. 47 of the *Legal Profession Act*. Other panel decisions, determinations or orders are covered by the appeal rights found in s. 48, which provides for appeals to the Court of Appeal.

THOMAS PAUL HARDING

Surrey, BC

Called to the bar: August 31, 1990

Discipline hearing: July 16 and 17, 2014 and February 20, 2015

Panel: Sharon Matthews, QC, Chair, Ralston S. Alexander, QC and John Lane

Decisions issued: November 3, 2014 (2014 LSBC 52) and June 5, 2015 (2015 LSBC 25)

Counsel: Robin McFee, QC for the Law Society; Gerald Cuttler for Thomas Paul Harding

FACTS

In late 2006 or early 2007, Thomas Paul Harding was retained by a client in a matter related to a motor vehicle accident. At that time, the case was scheduled to proceed to trial within a month or two but was adjourned due to the client's change of counsel shortly before that trial setting. With the exception of one update meeting with the client, Harding took no further steps on the matter for over four years. The single meeting with the client yielded notes of one-half of a page, but no plan and no action to move the case forward.

When Harding took the step of filing a notice of intention to proceed after 49 months, the defendant brought an application to strike the claim for want of prosecution. Harding filed evidence on the application that the delay was his fault, and not as a result of the instructions of his client, who had always instructed him to press forward with the matter.

Harding also did not recommend to the client that she obtain independent legal advice with regard to the application.

Harding did not report the want of prosecution application to the Lawyers Insurance Fund. He explained that he did not do so as he did not think there was a reasonable chance that the application would succeed. The application was, in fact, dismissed by the judge.

Harding was also counsel for two plaintiff clients in two separate motor vehicle accidents that occurred in June 1999 and January 2003. In October 2006, the defendants in both actions (the "joint defendants") brought applications for orders that various non-parties produce documents and information about the plaintiff clients. In March 2007, Harding filed Notices of Motion seeking dismissal of the joint defendants' applications, as well as findings of contempt of court for breaching the "implied undertaking" of confidentiality for releasing documents obtained through discovery.

In late October 2006, counsel for the joint defendants sent letters to Harding advising that, if the contempt application was dismissed, they would be seeking special costs from his clients and/or from him. The contempt application was dismissed in March 2007, with the court ordering written submissions to address the issue of costs. In May 2007 Harding arranged for a lawyer to provide independent legal advice and representation to his clients. He did not report the potential claim against him for special costs to the Lawyers Insurance Fund.

While the special costs issue was still outstanding, one of the clients entered into a settlement agreement. Harding did not advise the client that one of the terms of the agreement was that the joint defendants not seek costs against him as her solicitor in the contempt application, and he did not advise her to seek independent legal advice.

In March 2010, the court awarded special costs against the other client, but declined to order special costs against Harding.

DETERMINATION

The panel concluded that Harding failed to serve his client in the first motor vehicle matter in a conscientious, diligent and efficient manner in circumstances that amount to professional misconduct.

Further, failing to recommend that his client obtain independent legal advice was not consistent with his obligation to put his client's interests first and amounts to professional misconduct.

In the second matter, the panel found that, while the claim for special costs did create circumstances where Harding had a financial interest in the outcome, there was no conflict of interest and his conduct did not amount to professional misconduct.

Finally, Harding's failure to make reports to the Lawyers Insurance Fund in all three matters was not found by the panel to be professional misconduct.

DISCIPLINARY ACTION

In the panel's view, the gravity of the two allegations against Harding on which professional misconduct was determined is an important factor in setting disciplinary action. Failure to represent a client conscientiously, diligently and efficiently is a serious breach of a lawyer's professional duties and responsibility. So, too, is failure to refer a client for independent legal advice when required to do so.

The panel also considered Harding's past record, which consists of two previous findings of professional misconduct and two conduct reviews.

The need for deterrence and the need to ensure that the public understands that the Law Society takes such conduct seriously mandate a significant fine for this case. The panel ordered that Harding pay:

1. a fine of $6,000; and
2. court reporting costs of $441.

STANLEY CHANG WOON FOO

Vancouver, BC

Called to the bar: November 10, 1995 (BC); June 24, 1994 (Ontario); June 2010 (New York State)

Review: December 8, 2014

Benchers: Nancy Merrill, Chair, Satwinder Bains, Lynal Doerksen, Martin Finch, QC, Dean Lawton, A. Cameron Ward and Tony Wilson

Decision issued: July 9, 2015 (2015 LSBC 34)

Counsel: Carolyn Gulabsingh for the Law Society; Richard Gibbs, QC for Stanley Chang Woon Foo

BACKGROUND

In September 2011, while at a courthouse attending to client matters, Stanley Chang Woon Foo made discourteous or threatening remarks to a social worker from the Ministry of Children and Family Development. Specifically, his words were that he "should shoot" her because she "takes away too many kids."

A hearing panel found that Foo's conduct was more than just a mere failure to exercise ordinary care and that he had committed professional misconduct. The panel ordered that Foo be suspended for two weeks and pay costs (facts and determination 2013 LSBC 26; disciplinary action 2014 LSBC 21; Discipline digest, Summer 2014 *Benchers' Bulletin*).

Foo made an application for a review of that decision. Since Foo had admitted to the conduct, the issues in dispute were whether the facts constituted professional misconduct and whether the hearing panel was correct in the disciplinary action it imposed.

DECISION

Foo's counsel submitted that the comments in the courthouse were nothing more than "playful banter" and, although awkward, were an attempt to be "funny." The Law Society argued that the comments were a "marked departure" from the conduct expected of its members and, as such, were professional misconduct.

The Benchers on the review agreed with the Law Society's position and upheld the decision of the hearing panel. While lawyers certainly have the freedom to express themselves as protected by *Charter* rights, and should also be permitted a sense of humour, their actions, words and conduct must follow that required and expected of a lawyer. Such conduct in a courthouse before the start of a sensitive trial is not befitting the professional expectations placed on lawyers and the finding that it was professional misconduct on Foo's part was upheld.

The Benchers dismissed Foo's application and affirmed his two-week suspension plus costs as ordered by the hearing panel. The Benchers also ordered Foo to pay the costs of the review.

DAVID MASSAO SAITO

North Vancouver, BC

Called to the bar: June 12, 1987

Non-practising membership: August 27, 2013

Ceased membership: January 1, 2015

Agreed statement of facts: August 17, 2015

Counsel: Carolyn Gulabsingh for the Law Society; Henry Wood, QC for David Massao Saito

FACTS

Between 2007 and 2012, while he was an officer and employee