2019 LSBC 28
Decision issued: July 24, 2019
Citation issued: June 21, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act*, SBC 1998, c. 9

and a hearing concerning

WILLIAM LORNE MACDONALD

RESPONDENT

DECISION OF THE HEARING PANEL

Written submissions:	May 14, 2019
Panel:	Dean Lawton, QC, Chair Carol Hickman, QC, Lawyer Lance Ollenberger, Public representative
Discipline Counsel:	Angela Westmacott, QC
Counsel for the Respondent:	Carey Veinotte

PRELIMINARY MATTERS

[1] The parties made a joint application for an order by consent that the hearing of this matter be a hearing on the written record. The Panel granted the order.

[2] Pursuant to the written submission of the Law Society, and with the concurrence of the Respondent, the following background is provided.

[3] On June 8, 2017 the Discipline Committee authorized a citation (the "Citation") against the Respondent, William Lorne Macdonald (the "Respondent"). The Citation was issued on June 21, 2017 alleging that the Respondent breached the *Legal Profession Act* (the "*Act*") and the Law Society Rules (the "Rules") in relation to his handling of trust funds on nine occasions, all occurring on July 30, 2015.

[4] The Respondent has provided a conditional admission in relation to the allegations in the Citation and has consented to the disciplinary action proposed, pursuant to Rule 4-30.

[5] At its meeting on May 2, 2019, the Discipline Committee considered and accepted the proposed joint conditional admission of professional misconduct and disciplinary action. The proposed disciplinary action authorized by the Discipline Committee and consented to by the Respondent is a two-month suspension and costs in the amount of $1,000.

[6] We reviewed the materials submitted on behalf of the Law Society and the Respondent in order to make a determination under sections 38(4) and 38(5) of the *Act.*

ISSUES

[7] In accordance with the written materials submitted by the Law Society and the Respondent, there are two issues before us, namely:

(a) whether the conduct of the Respondent as set out in the Citation constitutes professional misconduct; and

(b) whether the proposed disciplinary action is appropriate in all of the circumstances.

FACTS AND DETERMINATION

[8] The Respondent was called and admitted as a member of the Law Society of British Columbia on February 19, 1999. From that time forward he has practised at the firm of Macdonald Tuskey, primarily in the area of securities law.

[9] The Respondent admitted that he was served with the Citation through his counsel on July 4, 2017 and has waived the requirements of Rule 4-19 of the Law Society Rules, 2015.

[10] On July 30, 2015 the Respondent directed his accountant to issue eight trust cheques from a Canadian dollar pooled trust account and one trust cheque from a US dollar pooled trust account and to deposit the nine trust cheques into his general account.

[11] On July 30, 2015 the Respondent signed nine trust cheques totaling $1,977.20 in relation to the following inactive client matters:

Client	Invoice #	Amount Withdrawn	Trust Cheque #
Client A	[number]	$406.35	1394
Client B	[number]	$296.77	1395
Client C	[number]	$ 89.29	1396
Client D	[number]	$ 97.50	1397
Client E	[number]	$ 20.00	1398
Client F	[number]	$ 21.25	1399
Client G	[number]	$202.95	1400
Client H	[number]	$472.32	1401
Client I	[number]	$300.45 US $390.19 CAD	1394 (USD)

[12] On July 30, 2015 the Respondent issued invoices for the nine inactive client matters, each of which charged fees annotated with the phrase, "full maintenance [*sic*] and storage." There was no correct correlation between the amount charged for file maintenance and storage and legal services provided on the client files. The only correlation was that the fees charged on each bill corresponded exactly to the residual amount left in trust in relation to each of the nine inactive client matters.

[13] By signing the invoices the Respondent certified that the fees charged on the invoices were accurate and verifiable.

[14] The Respondent did not send invoices to any of the nine clients. The Respondent also failed to obtain consent of the nine clients to the withdrawal of trust funds in relation to each of their matters prior or subsequent to withdrawing the trust funds and depositing them into his general account.

[15] On January 18, 2016 the Law Society Trust Audit Department conducted a compliance audit of the Respondent's practice for the audit period July 1, 2014 to January 18, 2016. During the compliance audit, the Respondent informed the audit team leader that his firm delivers all client invoices by email and a copy of the email is kept in the document management system of the Respondent's firm.

[16] The audit team leader requested copies of the emails confirming delivery of the nine invoices to the clients, but the Respondent was unable to provide them and had

no explanation for not delivering the invoices to the clients. The Respondent informed the audit team leader during the compliance audit that the fees charged for "full maintenance [*sic*] and storage" were for maintaining the client's corporate records office. The Respondent was unable to provide signed retainer agreements or retainer letters to document client consent to such fees to the audit team leader.

[17] Subsequent to the compliance audit, the Respondent found unbilled disbursements from 2013 for one of the nine clients. On January 31, 2016 the Respondent issued invoice number 11916 in the amount of $604.80 to the one client for unbilled disbursements and applied the sum of $202.95 remaining in trust toward payment of the invoice.

[18] Between June 10, 2016 and June 30, 2016 the Respondent reversed the eight remaining invoices, returned the funds to the Canadian trust account and the US trust account and sent the outstanding trust account balances by cheque to the clients.

[19] The trust cheque sent to Client H was returned to the Respondent's office because of an invalid address. On June 30, 2016 the Respondent submitted an Unclaimed Trust Money application to the Law Society for $472.32 remaining in the trust account relating to Client H.

The Rules breached and admissions of misconduct

[20] The Respondent admits that, on July 30, 2015, he misappropriated client trust funds totaling $1,977.20 for nine inactive client matters when he was not entitled to those funds because the withdrawals were not properly charged to the clients, contrary to Rule 3-64(1) of the Rules.

[21] The Respondent admits that his conduct constitutes professional misconduct pursuant to Section 38(4) of the *Act*, or a breach of the *Act* and the Rules.

[22] Although the Respondent has admitted he misappropriated client trust funds totaling $1,977.20 for the nine inactive client matters, we must nevertheless determine whether this conduct meets the test for "professional misconduct". Guidance on this question can be found in previous hearing panel determinations.

[23] In *Law Society of BC v. Martin*, 2005 LSBC 16, the panel defined "professional misconduct" as being a "marked departure from that conduct the Law Society expects of its members." In applying that definition, a panel must consider whether a respondent's conduct is culpable to the extent that it displays gross culpable

neglect of his duties as a lawyer. This test for professional misconduct has been accepted by other hearing panels.

[24] We observe that a breach of the Rules does not necessarily constitute professional misconduct. A breach of the *Act* or Rules may simply constitute a "Rules breach" rather than professional misconduct. It is accordingly important to examine the facts in each case.

[25] When considering if a breach of the *Act* or Rules constitutes professional misconduct, the hearing panel ought to consider the gravity of the conduct, its duration, the number of breaches, whether or not these were done in bad faith, and whether the conduct caused any harm. (See *Law Society of BC v. Gellert*, 2013 LSBC 22 and *Law Society of BC v. Tak*, 2014 LSBC 27.)

[26] In our opinion the Respondent's conduct in this case contravened Rule 3-64(1) effective July 1, 2015. The relevant portions of that Rule provide as follows:

> **Withdrawal from trust**
>
> **3-64** (1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are
>
> (a) properly required for payment to or on behalf of a client or to satisfy a court order,
>
> (b) the property of the lawyer,
>
> (c) in the account as the result of a mistake,
>
> (d) paid to the lawyer to pay a debt of that client to the lawyer,
>
> (e) transferred between trust accounts,
>
> (f) due to the Foundation under section 62 (2) (b) *[Interest on trust accounts]*, or
>
> (g) unclaimed trust funds remitted to the Society under Division 8 *[Unclaimed Trust Money]*.

[27] In our opinion the Respondent's conduct in this case amounts to a misappropriation of his clients' money held in trust. In *Gellert*, the hearing panel made the following remarks about the seriousness of misappropriation of trust funds:

> Misappropriation of a client's trust funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law.

[28] The hearing panel in the disciplinary action hearing on *Tak* stated that misappropriation, "is perhaps the most egregious misconduct a lawyer can commit." Moreover, the hearing panel in *Tak* stated that wrongly taking clients' money is the "plainest form of betrayal of a client's trust and is a complete erosion of the trust required for a functional solicitor-client relationship." (*Law Society of BC v. Tak*, 2014 LSBC 57 at para. 35)

[29] The Law Society submits in this case that we should find the Respondent committed professional misconduct in his handling of the nine outstanding client files.

[30] Although the Respondent was motivated by administrative expedience rather than personal gain, in our opinion his conduct in removing the trust funds belonging to his clients without their authorization was a marked departure from the conduct the Law Society expects of its members.

[31] For his part, in written submissions made on May 10, 2019 through his counsel, the Respondent states that he had an opportunity to read the written submissions of the Law Society to which we have referred in these reasons, and upon reading those written submissions, he, "accepts and concurs with the facts, determination, submission on costs, and orders sought by the Law Society therein."

[32] Given the written submissions of the Law Society and the adoption of, and concurrence in them by the Respondent, and upon our own review of the principles summarized above in the cases of *Gellert* and *Tak*, we find that the Respondent has committed professional misconduct when he billed clients for inactive accounts, took money from trust when he was not entitled to do so, and deposited that trust money into his general account, thus misappropriating that trust money.

The proposed disciplinary action and its appropriateness in this case

[33] We now turn to the question of whether the proposed discipline is appropriate in the circumstances of the Respondent's professional misconduct. Both the Respondent and the Law Society submit that a two-month suspension is the appropriate disciplinary action in this case, coupled with costs in the amount of $1,000. The Law Society submits, and the Respondent concurs, with the notion that a two-month suspension is a fair and reasonable disciplinary action in the circumstances of this case and serves the purposes of general and specific deterrence.

[34] In its written submissions as concurred in by the Respondent, the Law Society refers to what have become known as the "*Ogilvie* factors" stemming from the

decision of a panel in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. *Ogilvie* is cited often as a case providing guidance to hearing panels when determining an appropriate sanction following a finding of professional misconduct. The *Ogilvie* factors are several and are not designed to be exhaustive. In particular they include:

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

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

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

(d) the need to ensure public confidence in the integrity of the profession; and

(e) the range of sanctions imposed in similar cases.

[35] We recognize that although the *Ogilvie* factors are helpful, each hearing panel must make a determination of what is an appropriate sanction based on the facts and the evidence in each case.

[36] In determining the question of the nature and gravity of the conduct, we are alive to the decision of *Law Society of BC v. Sas*, 2016 LSBC 3 at para. 92, in which the panel stated, "misappropriation of monies held in trust for clients can never be tolerated, notwithstanding the motivation of the lawyer." In *Sas* the panel noted that disbarment is normally the appropriate disciplinary action because the misappropriation of client monies is a betrayal of trust and honesty underlying the legal profession. We note however that there is some variation regarding disciplinary action in cases of misappropriation of client funds for administrative expedience.

[37] The Law Society submits in this case that there are circumstances that favour a suspension rather than disbarment. In particular, the Law Society submits that the Respondent does not have a previous conduct history; was attempting solely to clean up small amounts of dormant trust account money and client files; in fact had unbilled disbursements in relation to one of the nine files; did not make the withdrawals to enrich himself as reflected by the relatively modest amounts involved; was acting under the genuine but mistaken belief that he could charge for file maintenance and storage; made all the withdrawals on the same day; accepted full responsibility for his actions and conduct; expressed remorse and cooperated

fully with the Law Society investigation; and promptly took steps to return all of the funds he took in relation to the nine client files.

[38] Again with a mind to the *Ogilvie* factors, we note that all of the misappropriations of funds from inactive client matters occurred on a single day and there is no evidence that the Respondent repeated the conduct at any other time.

[39] Importantly, we note that the Respondent immediately acknowledged his misconduct and expressed remorse for it. He was cooperative both in the compliance audit itself and in making admissions in the context of the citation against him and the proposal for disciplinary action. We are very aware that lawyers in British Columbia have a legal and moral obligation to protect the public interest in the administration of justice. This is a wide-ranging and all-encompassing obligation that includes the proper handling of trust funds. The public must at all times feel confident in entrusting money to lawyers, knowing that their funds will be protected and accounted for. The public interest requires a clear message to the profession that misappropriation, regardless of it being small amounts or for administrative convenience, is never acceptable.

[40] We have considered the range of sanctions in similar cases, and noted that *Sas* is the leading decision on misappropriation of residual trust funds where the misappropriation has been done for administrative purposes. In *Sas,* the respondent authorized the payment of 43 trust balances to her general account to pay fees or disbursements when no bills were delivered to clients until well after the transfers occurred. Although in Sas the total amount of funds taken relating to 22 clients amounted to $1,947.39, the panel in that case found that the respondent had misappropriated the funds based on willful blindness to the circumstances. In that case the panel imposed a four-month suspension, and costs in the amount of $32,038.49. The decision of the panel in *Sas* was affirmed by the British Columbia Court of Appeal, *Law Society of BC v. Sas*, 2016 LSBC 341.

[41] We note that a disciplinary action is acceptable if it is within the range of a fair and reasonable disciplinary action in all of the circumstances (see *Law Society of BC v. Rai*, 2011 LSBC 2). In that case, the panel observed that decisions about sanctions are, "an individualized process that requires the hearing panel to weigh the relevant factors in the context of the particular circumstances of the lawyer and the conduct that has led to disciplinary proceedings."

[42] Reflecting on the facts in this case, and again taking them into account in the context of the *Ogilvie* factors, we conclude that the joint submission of the Law Society and the Respondent – namely that the disciplinary action in this case should be a two-month suspension and costs in the amount of $1,000 – is reasonable in the

circumstances and is in the public interest. In coming to this conclusion, we confirm having considered the following materials:

(a) written submissions of the Law Society following an order permitting the hearing to be conducted on the written record;

(b) joint Book of Exhibits; and

(c) joint Book of Authorities.

[43] The Panel has marked the Joint Book of Exhibits as Exhibit 1 in this proceeding as of June 4, 2019. The Panel notes that the Joint Book of Exhibits, now marked Exhibit 1, includes an Agreed Statement of Facts with appendices that includes a letter from the Respondent admitting his misconduct as alleged in the Citation. Exhibit 1 also contains the submissions of the parties as to discipline.

[44] Both the Law Society and the Respondent submit that there is no further evidence or submissions necessary for the Hearing Panel to do justice between the parties.

DETERMINATION

[45] Accordingly, we make the following determination and disposition:

(a) pursuant to ss. 38-4 and 38-5 of the *Act*, the Respondent committed the professional misconduct alleged in the Citation;

(b) the Respondent be suspended for a period of two months commencing August 1, 2019, or at such other time as the parties may submit and the Panel orders;

(c) the Respondent pay costs in the amount of $1,000, payable immediately; and

(d) the Executive Director record the Respondent's admissions on his Professional Conduct Record.