

2020 LSBC 09
Decision issued: February 18, 2020
Citation issued: July 18, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

DANIEL KAY LO

RESPONDENT

DECISION OF THE HEARING PANEL

Written materials:	October 21, 2019 November 27, 2019
Panel:	Jeffrey T. Campbell, QC, Chair Clarence Bolt, Public representative Gavin Hume, QC, Lawyer
Discipline Counsel:	Kathleen Bradley
Appearing on his own behalf:	Daniel Kay Lo

BACKGROUND

[1] Mr. Daniel Kay Lo (the “Respondent”) is before the Hearing Panel with respect to a citation alleging the following misconduct:

- (1) Between approximately January 1, 2015 and October 3, 2018, you failed to remit payroll source deductions and interest due to the Canada Revenue Agency (the “CRA”) in a timely way, contrary to rule 7.1-2 of the *Code of Professional Conduct for British Columbia* (the “Code”);
- (2) Between approximately December 16, 2013 and June 6, 2019, you collected Goods and Services Tax (“GST”) from clients but failed to remit funds and interest due to the CRA in a timely way, contrary to rule 7.1-2 of the *Code*;

- (3) Between approximately February 1, 2014 and July 21, 2018, you collected British Columbia Provincial Sales Tax (“PST”) from clients but failed to remit funds and interest due to the British Columbia Ministry of Finance in a timely way, contrary to rule 7.1-2 of the *Code*;
 - (4) In approximately November 2017, while acting for a client in a real estate matter, you failed to properly obtain the information required to verify the identity of the client, contrary to one or more of Rules 3-102, 3-104 and 3-105 of the Law Society Rules; and
 - (5) Between approximately 2015 and 2018, you made misrepresentations to the Law Society of British Columbia that your practice had paid its payroll remittances in full and on time, contrary to rule 7.1-1 of the *Code*.
- [2] It is alleged that the conduct underlying each of these five allegations constitutes professional misconduct, pursuant to s. 38(4) of the *Legal Profession Act*.
 - [3] The Law Society is not proceeding with one aspect of the citation, which alleges that, during the Law Society investigation, the Respondent wrongly attributed the failure to meet financial obligations to another lawyer. The Law Society is proceeding on the remaining allegations, which are summarized above.
 - [4] Pursuant to Rule 4-30(1) of the Rules, the Respondent has made a conditional admission of the discipline violations and consents to a proposed disciplinary action. It is proposed by counsel for the Law Society and the Respondent that the appropriate penalty is a global fine in the amount of \$15,000.
 - [5] Pursuant to Rule 4-30 of the Rules, the Discipline Committee considered and accepted the proposed resolution on September 26, 2019. The citation has been referred to this Panel for a hearing.
 - [6] This Panel must determine whether the joint proposed resolution is acceptable. If the Panel does not accept the proposed resolution, the matter is returned to the Discipline Committee and proceeds to a hearing before a new panel. If the proposed resolution is acceptable, this Panel is to impose the penalty and instruct the Executive Director to record the admission on the Respondent’s professional conduct record.
 - [7] The Respondent and counsel for the Law Society also request to conduct the hearing on written record rather an oral hearing. That order was granted on January 23, 2020.

STATEMENT OF FACTS

- [8] The Respondent has been a member of the Law Society of British Columbia since 2005. He has no prior professional conduct record. From 2006 to 2012, he practised as a sole practitioner, as in-house counsel and at a small firm in Vancouver. He did not practise for a period of time between 2012 and 2013. Since returning to practice in 2013, he has lived and worked in the Okanagan doing business as “Daniel K. Lo Mobile Legal and Notarial Services” and “TNG Legal Services MDP” (“TNG Legal”). His primary areas of practice are corporate law, family law, real estate and wills and estates.
- [9] The Respondent practises with notaries public at TNG Legal. He is the only lawyer at this firm.
- [10] In February 2018, the Law Society conducted a compliance audit of TNG Legal. The audit revealed a breach of the client verification rules and a longstanding failure to remit GST, PST and payroll source deductions, and led to the discovery of misleading statements in the Respondent’s annual trust reports.

Payroll source deductions and misleading statements to the Law Society

- [11] In October 2017, the CRA examined TNG Legal’s payroll records for the time period between January 1, 2015 and September 30, 2017 and found that TNG Legal had not remitted payroll source deductions during that time period.
- [12] In March 2018, the CRA conducted a further review of TNG Legal’s payroll records. The CRA determined that, as of March 2018, TNG Legal owed \$159,389.24 in payroll source deduction arrears. TNG Legal’s total arrears for 2015 to 2017, including interest and penalties, amounted to \$175,669.29.
- [13] The Respondent paid the debt to the CRA for missed payroll remittances by October 2018. Since the spring of 2018, TNG Legal has reportedly been making its payroll remittances as required.
- [14] Although TNG Legal did not remit any payroll source deductions between 2015 and 2017, the Respondent’s annual trust reports to the Law Society for those years reported that his firm had made payroll remittances in full and on time.

GST returns

- [15] TNG Legal was required annually to file GST returns, which were due on March 31 of each year for the preceding year. TNG Legal did not file any GST returns for 2013, 2014, 2015, 2016 or 2017.
- [16] The CRA sent notices to the Respondent in 2016 stating that, because TNG Legal had not filed returns as required, the CRA was estimating the amounts owed by the firm for the years 2013 to 2015. TNG Legal also failed to file returns for the years 2016 and 2017, and the CRA again sent the Respondent notices with an estimated assessment for unfiled GST returns. The Respondent began paying the arrears in 2018. He has paid the amounts owing to the CRA for the missed GST returns, which totalled approximately \$33,000.
- [17] TNG Legal is reportedly now filing its GST returns on time and remitting GST payments as required.

PST returns

- [18] As of March 2015, TNG Legal was required to file PST returns with the British Columbia Ministry of Finance on a quarterly basis. TNG Legal either did not file returns, or filed late returns, for a lengthy period of time between 2015 and 2018. In 2018, the Ministry of Finance conducted a number of audits of the firm's PST account. In 2018, TNG Legal paid its PST arrears, which amounted to approximately \$54,000. TNG Legal is now filing PST returns on time and making its remittances as required.

Failure to verify client's identity

- [19] In 2017, the Respondent represented a client identified as "PR" in the sale of her residential property. PR lived in another country during the time that the Respondent acted for her. The Respondent did not know her personally, and it does not appear that he had ever met her before. He did not have any in-person dealings with PR during the time that he represented her in the real estate transaction.
- [20] Documents related to the sale of PR's property were apparently signed by PR and forwarded to the Respondent by email. The documents included a certificate entitled "Verification of Client's Identity made by Notary's Agent" (the "Certificate"). The Certificate appears to have been completed by a notary public in the jurisdiction where PR was residing. The Certificate sets out that the notary public was acting as the agent of the Respondent in verifying PR's identity. The

Certificate asserts that the notary public had met with and confirmed the identity of PR by checking her identification.

- [21] The Respondent received the Certificate by email from PR's husband rather than directly from the notary public. The Certificate states that copies of the identification are attached to the Certificate, but the materials received by the Respondent did not include any copies of the identification. The Respondent did not follow up with the notary public to obtain copies of the identification.
- [22] In summary, the conduct in this matter involves a systemic failure to pay remittances to government agencies for taxes collected from clients and payroll source deductions. This conduct was sustained over several years. During this time, the Respondent reported to the Law Society in his annual trust reports that remittances for the payroll source deductions had been made as required. As a separate matter, the Respondent represented a client in a real estate matter without taking appropriate steps to verify her identity, despite having no face-to-face contact with her.

POSITIONS OF THE PARTIES

- [23] The Respondent admits the discipline violations and agrees with counsel for the Law Society that the conduct constitutes professional misconduct, pursuant to s. 38(4) of the *Act*.
- [24] The Respondent and counsel for the Law Society have presented a joint submission that the disciplinary action should be a \$15,000 fine.

APPLICATION FOR HEARING IN WRITING

- [25] Both the Respondent and counsel for the Law Society request that the hearing be conducted by written record rather than an oral hearing. A hearing based on written materials is authorized pursuant to a Law Society Tribunal Practice Direction issued April 6, 2018.
- [26] In determining whether a hearing panel should exercise its discretion to proceed with a hearing in writing rather than an oral hearing, the following factors set out in *Law Society of BC v. Johnson*, 2019 LSBC 04, at para. 24, are relevant:

- (a) The evidentiary record: A hearing based on written materials will generally require substantial agreement on the facts underlying the citation. If there is a conflict in the evidence or if the parties do not agree

on the key facts, then an oral hearing may be required to hear *viva voce* testimony, weigh the competing evidence and make findings of fact. There may be some cases where it is possible to conduct a hearing in writing notwithstanding that there is conflicting evidence, but in practice we consider that such cases will usually require an oral hearing.

- (b) Whether the parties have provided comprehensive submissions and a complete evidentiary record: If the hearing is to be conducted on written record, it is important that the hearing panel be provided with comprehensive materials with respect to all the relevant issues in the proceedings. If the hearing panel has questions that cannot be resolved on the basis of the written materials, it may be necessary to proceed with an oral hearing.
- (c) Whether the public interest requires an oral hearing: Some cases may raise public interest concerns that weigh in favour of holding an oral hearing. For example, some cases may involve significant media interest. In some cases there may be complainants or other parties who wish to attend a public hearing. Third party interests are not determinative, but they may be considered by the hearing panel when deciding whether an oral hearing is required. It is not necessary to exhaustively define the circumstances in which the public interest requires a public hearing, but there are some cases where an oral hearing open to the public is necessary.

[27] In this case, the parties have filed a joint book of exhibits, which includes relevant documents and an overview of the factual history set out in a Notice to Admit that has been approved by the Respondent.

[28] After reviewing the written materials, the Hearing Panel had a question with respect to the factual basis for one of the allegations. As noted above, allegation 5 of the citation is that the Respondent made misrepresentations to the Law Society by declaring in his annual trust reports that TNG Legal had paid its payroll remittances in full and on time when this was not true. The parties submitted that a fine is appropriate for this conduct, in part because the Respondent's misrepresentations were not intentional.

[29] The evidentiary record includes documentary exhibits related to the payroll remittances and the trust reports. However, the evidence that was initially provided to the Hearing Panel included little information with respect to the Respondent's explanation for wrongly reporting to the Law Society that TNG Legal had remitted the payroll deductions.

- [30] The Hearing Panel considered that further evidence on the discrete issue of the Respondent's explanation for the incorrect statements in the trust reports would assist the Panel in deciding whether the hearing can be solved based on written materials and whether the proposed penalty is appropriate.
- [31] By memorandum to the parties, the Hearing Panel invited counsel to provide further evidence on this issue. Counsel subsequently filed supplemental materials on November 27, 2019, including a letter from the Respondent and further written submissions from the Law Society. The supplemental record contains further information with respect to the Respondent's state of mind in representing to the Law Society that TNG Legal had paid the payroll remittances.
- [32] Following our review of the evidentiary record as supplemented by the further information provided in response to our request, we consider that the material that has been filed is sufficient to permit the Panel to properly assess the proposed resolution. We exercise our discretion to conduct the hearing in writing.

ANALYSIS

Test for professional misconduct

- [33] We must be satisfied that the evidence supports the Respondent's admission of a disciplinary violation and a finding of professional misconduct, pursuant to s. 38(4) of the *Act*. Notwithstanding the Respondent's admissions, the onus is on the Law Society to establish a breach of the Rules and that the threshold for a finding of professional misconduct is met: *Law Society of BC v. Lyons*, 2008 LSBC 09, at para. 29.
- [34] A breach of the Rules or the *Code* does not necessarily constitute professional misconduct: *Lyons* at para. 32. Professional misconduct is a designation reserved for acts or omissions that involve a degree of fault amounting to a "marked departure" from the conduct that is expected of lawyers: *Law Society of BC v. Martin*, 2005 LSBC 16. In determining whether the test for professional misconduct is met, relevant considerations include the gravity of the misconduct, its duration, the number of breaches, the presence or absence of *mala fides* and any harm caused by the misconduct: *Lyons* at para. 35.

Failure to meet financial obligations – allegations 1, 2 and 3

- [35] In this case, we accept the Respondent's admission that the conduct in allegation 1 (failure to remit payroll source deductions), allegation 2 (failure to remit GST) and allegation 3 (failure to remit PST), amounts to professional misconduct.
- [36] Section 7.1-2 of the *Code* requires lawyers to promptly meet financial obligations in relation to their practices. The Respondent failed to ensure that his firm was remitting the tax monies that it had collected from clients and payroll source deductions over a period of several years. During this time, the Respondent received notices from the CRA regarding missed filings, which should have alerted the Respondent that his firm's financial obligations were not being met. Even after the Respondent began to receive notices of missed filings, the pattern of missed or late remittances continued. The Respondent's firm accumulated a significant debt to various agencies. The Respondent demonstrated a pronounced failure to manage his firm's financial obligations with respect to taxes collected and payroll deductions over a lengthy period of time. We accept that this was professional misconduct.

Failure to properly verify the identity of a client – allegation 4

- [37] We also accept that the Respondent's failure to properly confirm the identity of his client PR was professional misconduct. The Respondent represented this client, whom he apparently did not know, with respect to a real estate transaction. The client was outside of Canada for the duration of the retainer and the Respondent did not meet her in person.
- [38] When dealing with a client who is in another jurisdiction, Rule 3-104 of the Rules requires a lawyer to verify the identity of the client through an agent. The lawyer is required to obtain the information relied upon by the agent in confirming the client's identity.
- [39] In this case, the client provided the Respondent with documents purporting to show that a notary public in the foreign jurisdiction had verified the client's identity. An agreement by the notary public to act as agent for the Respondent was provided to the Respondent directly by the client. The agreement was not properly completed. It does not appear that the Respondent had any direct contact with the notary public. The client provided the Certificate stating that the notary public had identified the client by two pieces of personal identification. The Certificate states that copies of the identification are attached to the Certificate. However, the client's identification was not included with the Certificate when it was forwarded to the Respondent and he did not follow up to obtain this information.

- [40] The real estate transaction proceeded without the Respondent having taken reasonable steps to identify the client.
- [41] In the course of its investigation, the Law Society confirmed that the transaction was legitimate and that the notary public had executed the documents and confirmed the client's identity. However, the failure to take proper steps to confirm the identity of a client can potentially result in significant harm and a loss of confidence in the profession.
- [42] The proper identification of clients is necessary for the profession to protect against fraud, money laundering and other unlawful activities. Lawyers are entrusted to facilitate significant transactions that can involve large sums of money. It is critical that lawyers take reasonable steps to properly identify clients in order to ensure the legitimacy of the transaction.
- [43] The rules regarding client identification and verification were discussed in *Law Society of BC v. Wilson*, 2019 LSBC 25, at paras. 21 to 25:

The Law Society rules about client identification and verification are complex and important. The goal is to ensure that the legal profession does not become an inadvertent participant in the improper processing of laundered money and that the fraud of identity theft is not aided and abetted by lawyers.

Except in circumstances where the lawyer is in face-to-face contact with the client, the mere production of identification documents will not suffice. The rigour on this issue stems from the ease with which identification documents can be forged, manipulated and otherwise abused. When confronted with a non-resident client, an additional identity verification exercise is mandated. There are different levels of identification verification required depending upon the nature of the lawyer's retainer. The following summary deals with those encountered in real estate transactions as this is the subject of the citation before us.

One process is to be followed if the client is within Canada. In that circumstance, the identification documents are required to be reviewed by another lawyer or other approved official. Examples of qualified identification verification individuals, in addition to lawyers, are doctors, dentists, professional engineers, professional accountants, notary publics, judges, school principals, etc.

The qualified individual is required to review the identification documents provided by the non-resident client and provide an “attestation” (in a form provided) that the client and the identification documents have been reviewed and approved. A copy of the identification examined is to be attached to the signed attestation.

In circumstances where the client is outside Canada, a further layer of verification is engaged. It is necessary for the lawyer representing the non-resident client to enter a written agency agreement with a foreign lawyer or other responsible party (as described above) by the terms of which that remote party takes responsibility for the verification of the validity of the identification documents proffered by the non-resident client. That foreign official is then required to provide a similar attestation to that required to be provided by a Canadian official but in this circumstance, the attestation is provided pursuant to a written agreement with the lawyer representing the remote client.

- [44] The Respondent admits that, in providing legal services to a client with respect to a financial transaction when he did not have any face-to-face contact with her, he should have taken reasonable steps to verify her identity using reliable information and, in particular, by obtaining copies of the client’s identification documents from an authorized agent as required by Rules 3-102 and 3-104 of the Rules. We accept that this was professional misconduct.

Misrepresentations to the Law Society – allegation 5

- [45] Allegation 5 of the citation involves the Respondent misreporting to the Law Society in his annual trust reports that payroll source deductions had been remitted. Counsel for the Law Society submits, and the Respondent agrees, that this was professional misconduct.
- [46] The Law Society submits that the misleading responses in the trust reports were contrary to the following duties in rule 7.1-1 of the *Code*:

A lawyer must

- (a) reply promptly and completely to any communication from the Society;
- ...
- (f) otherwise comply with the Law Society’s regulation of the lawyer’s practice.

- [47] The Respondent has explained the circumstances of how he came to wrongly declare in his trust reports that payroll deductions had been remitted. He explained that, during this time period, he relied on his business partner to manage the administrative duties involved in his practice, including making the payroll remittances. His business partner, who was not a lawyer, had advised him that the payroll remittances had been made. Accordingly, he reported to the Law Society that the payroll remittances were up to date.
- [48] It is noteworthy that, in the annual trust reports, the Respondent acknowledged that his firm's GST and PST remittances had not been made on time. However, he incorrectly declared that payroll remittances were up to date as he believed that the payments had been made. This evidence is not disputed by the Law Society, which concedes that the wrongful statements in the trust reports were not intentionally deceptive.
- [49] The gravamen of this conduct is that the Respondent provided inaccurate information to the Law Society. The Respondent's state of mind in making these declarations is important in assessing his degree of fault.
- [50] Counsel for the Law Society submits that the Respondent ought to have known the state of his firm's financial affairs and should have been more diligent about ensuring that the remittances had been paid before making the declarations to the Law Society. Counsel for the Law Society submits that, given the Respondent's duties to the Law Society, his actions were a marked departure from the conduct expected of lawyers and constitutes professional misconduct.
- [51] It is our view that, if a lawyer inadvertently provides mistaken information in the course of their reporting duties to the Law Society, but the lawyer honestly and reasonably believes the information to be true, it would generally weigh against a finding of professional misconduct. If the lawyer has reasonable grounds to believe that the information is truthful, the lawyer's conduct may not be such a marked departure from proper conduct that it would constitute professional misconduct. Depending on the particular circumstances, an innocent error for which the lawyer has a reasonable explanation may not constitute a discipline violation.
- [52] In the circumstances of this case, however, we accept that the Respondent should have exercised better supervision of his firm's financial affairs, particularly at a time when there were red flags that the firm was falling behind in its financial obligations. As noted above, the Respondent was sent notices by the CRA starting in 2016 that the firm had failed to make GST remittances. Once he was notified about missed GST remittances, he should have been alerted to the need for greater scrutiny of his firm's financial obligations.

- [53] Although the Respondent believed that the payroll remittances had been paid, we accept that he ought to have been more diligent when there were clear signs that the financial affairs were not in order. The Respondent provided incorrect information to the Law Society over a period of approximately three years. He ought to have ensured that the payroll remittances were up to date when he made the declarations in the trust reports, particularly given that he had received notices that his firm had missed important financial obligations.
- [54] We accept the Respondent's admission of a disciplinary violation for failing to properly comply with the Law Society's regulatory duties as required by rule 7.1-1 of the *Code*. We also accept his admission of professional misconduct.

THE PROPOSED PENALTY

- [55] The proposed resolution is a global fine in the amount of \$15,000. This is a joint submission pursuant to Rule 4-30 of the Law Society Rules, which should be accepted by the panel if it is within the range of fair and reasonable disciplinary action: *Law Society of BC v. Rai*, 2011 LSBC 02, at paras. 7 and 8.
- [56] In determining the appropriate range of disciplinary action, we have considered the relevant factors as discussed in *Law Society of BC v. Ogilvie*, 1999 LSBC 17.
- [57] The nature and gravity of the conduct are important considerations in determining the penalty. In this case, the citation involves a range of conduct, including a failure to meet financial obligations over a prolonged period of time. Significant sums of money were collected by the firm but not remitted to the appropriate government agencies as required by law.
- [58] Public confidence in the legal profession is harmed when lawyers do not meet their financial obligations. Lawyers are regularly entrusted with significant financial transactions. The integrity of the legal profession depends on the public having confidence that lawyers can be trusted to responsibly carry out financial duties.
- [59] The misconduct in this case also includes one incident of failing to take proper steps to verify a client's identity in a real estate transaction. As noted above, lawyers in real estate transactions are gatekeepers in ensuring that transactions are legitimate. In this case, there is no suggestion that the real estate transaction was not legitimate. However, there is a significant risk of harm when lawyers do not take proper steps to ensure the *bona fide* identity of clients. The client verification rules exist to ensure that lawyers do not inadvertently assist in illegitimate or unlawful fraudulent activity. The penalty in this case must make it clear that the

failure to follow the proper client verification procedures can be a serious disciplinary matter.

- [60] We consider as a mitigating factor that the Respondent has reportedly made changes to his practice in order to correct the administrative failings that underlie these matters. The Respondent has now paid all the debts that had accumulated to various government agencies, including penalties and interest. He has also made changes to his practice to ensure that the firm's financial obligations are met in the future.
- [61] We also take into account that the Respondent has admitted to the misconduct and agreed to the penalty, which has alleviated the need for a lengthy hearing. He has been co-operative with the Law Society investigation. He has no prior disciplinary record.

CONCLUSION ON DISCIPLINARY ACTION

- [62] After considering all the circumstances, we are satisfied that a fine in the amount of \$15,000 is an appropriate disciplinary action, and we accept the proposed resolution. We order that the Respondent pay a fine of \$15,000 on or before June 1, 2020.
- [63] Counsel have also agreed that there should be an order for costs in the amount of \$1,000. We order that the Respondent pay costs of \$1,000 on or before June 1, 2020.
- [64] The materials that have been filed in this proceeding include confidential client information. Pursuant to Rule 5-8(2) of the Law Society Rules, we order that any information with respect to the clients' identities and any information protected by solicitor-client privilege or confidentiality not be disclosed and that the information must be redacted from the exhibits prior to disclosure.