2020 LSBC 11
Decision issued: February 28, 2020
Citation issued: February 7, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

JAMES LESLIE STRAITH

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing dates:	November 4, 18 and 19, 2019
Panel:	Jennifer Chow, QC, Chair Bruce LeRose, QC, Lawyer Lance Ollenberger, Public representative
Discipline Counsel:	Jaia Rai
Appearing on his own behalf:	James Leslie Straith

INTRODUCTION

[1] This matter arises from the Respondent's representation of "Lost Canadians", individuals who believe they have been unfairly excluded from Canadian citizenship. The Respondent faces a range of allegations, such as failing to identify the proper client, acting while in a conflict of interest, failing to follow proper billing and trust accounting rules and failing to keep proper records.

POSITION OF THE PARTIES ON FACTS AND DETERMINATION

[2] The Respondent admits being served with both the original citation issued February 7, 2018 and the amended citation issued October 22, 2019. The amended citation corrected minor drafting errors (the "Amended Citation").

[3] The hearing of this matter was originally set for ten days, namely, the weeks of November 4 to 8 and November 18 to 22, 2019. On November 4, 2019, the parties jointly requested an adjournment to allow them to discuss the possibility of an agreed statement of facts ("ASF"). Accordingly, the Panel granted a two-week adjournment to November 18, 2019, a date already set aside for this matter.

[4] The hearing resumed on November 18, 2019. The Panel was provided with an ASF that outlined the Respondent's dealings with: (a) DC, the primary contact and leader of the Lost Canadians group; and (b) JS, an individual Lost Canadian.

[5] At that hearing date, the Law Society advised the Panel that it was not proceeding with allegations 2 and 3 set out in the Amended Citation. The Law Society also advised that, while it would rely on the facts regarding allegations 4(a), (b) and (c), it was only seeking a finding of professional misconduct in regard to allegation 4(d).

[6] The Law Society also advised the Panel that it should not make an adverse determination regarding allegations 6(c) and 6(d), pursuant to the rule against multiple convictions for the same conduct: *R. v. Kienapple*, [1975] 1 SCR 729.

[7] The Hearing then proceeded on the following allegations summarized below from the Amended Citation:

(a) Allegation 1: Commencing in or around October 2011, the Respondent agreed to act and took steps on behalf of one or more individuals of the Lost Canadians group in matters in relation to Canadian citizenship law without making reasonable efforts to ascertain the identity of his client or person(s) authorized to instruct him on behalf of his client (the "Client Identification Allegation");

(b) Allegation 4(d): The Respondent acted in a conflict of interest by acting for JS in an application for judicial review filed in February 2012. At the July 2013 hearing, the Respondent sought a declaration of citizenship for JS while, at the same time, providing legal advice to and taking instructions from DC regarding the broader legal or policy issues raised by the judicial review application (the "Conflict of Interest Allegation"). In particular, after JS terminated the Respondent's retainer, the Respondent continued to offer advice to DC in relation to matters where DC's interests conflicted with those of JS, including a recommendation that DC adopt a position contrary to the interests of JS;

(c) Allegation 5: The Respondent failed to comply with Part 3, Division 7 of the Law Society Rules regarding his receipt and withdrawal of funds received from or on behalf of DC in relation to the Lost Canadians matter (the "Trust Accounting Rule Breaches Allegation");

(d) Allegation 6(a) and (b): The Respondent failed to maintain accounting and billing records in relation to the Lost Canadians matter as required by Part 3, Division 7 of the Law Society Rules (the "Records Requirement Allegation"). In particular, the Respondent did not retain signed copies of all bills nor retain copies of any receipts issued to persons who provided retainer funds on behalf of DC;

(e) Allegation 7: The Respondent failed to account to DC for all funds received in trust on his behalf (the "Failure to Account to Client Allegation"); and

(f) Allegation 8: The Respondent committed professional misconduct in relation to a civil action he commenced against DC on or about March 2015. The main allegation is that the Respondent commenced a civil action against DC to collect on a bill that was never finalized, signed and delivered to DC, contrary to section 69(5) of the *Legal Profession Act*. Further, or in the alternative, the Respondent's calculation of the amount he claimed to be due and owing from DC failed to account for or credit to DC amounts that the Respondent knew or ought to have known were received by him in trust on DC's behalf (the "Civil Action Allegation").

[8] After the Panel was presented with the ASF, the Respondent admitted to professional misconduct regarding the above allegations.

DECISION ON FACTS AND DETERMINATION

[9] On November 18, 2019, the Panel delivered its oral ruling on Facts and Determination and made a non-disclosure order as follows:

> The Panel has considered the Agreed Statement of Facts and the submissions made by both the Law Society and the Respondent. We accept the Respondent's admissions of professional misconduct made today.
>
> The Panel is satisfied that the Respondent has committed professional misconduct set out in the Amended Citation, specifically allegations 1, 4(d), 5, 6(a) and (b), 7 and 8.

> Written Reasons to follow.
>
> We also grant the Law Society's application made pursuant to Law Society Rule 5-8 and grant an order for non-disclosure of exhibit 5.

[10] After our oral ruling, the Panel adjourned to the following day to address the issue of disciplinary action.

[11] On November 19, 2019, the parties jointly submitted that the appropriate disciplinary action is a two-month suspension and payment of costs in the amount of $22,523.79 as described in the Law Society's bill of costs.

[12] The Panel reserved its decision on disciplinary action. Accordingly, these are the Panel's written Reasons on Facts and Determination and Disciplinary Action.

ONUS AND STANDARD OF PROOF

[13] It is well established that the Law Society bears the onus of proving the alleged facts on a balance of probabilities and that the alleged conduct amounts to, in this case, professional misconduct: *Law Society of BC v. Golden*, 2018 LSBC 38, at para. 23.

FINDINGS OF FACT

[14] In accordance with the Panel's oral ruling on November 18, 2019, the Panel accepts the facts set out in the ASF as proven on a balance of probabilities. The following is a summary of our findings of fact adopted from, or substantially based on, the ASF.

[15] The Respondent is a senior lawyer. At the time he was retained to act for Lost Canadians, the Respondent had practised law for approximately 26 years

[16] In 2010 or 2011, the Respondent was introduced to DC. For many years, DC had been involved in political action and lobbying efforts on behalf of Lost Canadians. DC was recognized as the leader of the Lost Canadians group, although the group was not a legal entity and had no formal structure.

[17] In October 2011, after several discussions and meetings, the Respondent accepted a retainer to provide legal services to the Lost Canadians group. The objective of the retainer was to file judicial review cases against the federal government to obtain favourable outcomes that would set precedents and benefit the Lost Canadians group. The judicial review cases would be filed by specific individuals.

[18] Ultimately, only one judicial review proceeding was filed during the Respondent's retainer, namely, a judicial review case filed on behalf of JS.

[19] Although no written retainer agreement was prepared, the Respondent opened a client file and maintained a client ledger in the name of the "Lost Canadians Association" (the "Client File"). The Respondent's work in connection with JS's judicial review case formed part of the Client File.

[20] In October 2013, JS terminated the Respondent's retainer before her judicial review case was resolved.

[21] Throughout his retainer, the Respondent acted as lead counsel and was assisted by a second counsel. Initially, the second counsel worked as an unpaid volunteer as he was subject to an undertaking given to the Law Society not to practise law until September 2012. As a condition of the second counsel resuming practice, the Respondent employed and supervised the second counsel's work once the undertaking expired. DC and JS were not aware of the specific arrangements between the Respondent and the second counsel.

[22] Although the Respondent also employed a researcher, the Respondent and his staff were assisted by a team of supporters of Lost Canadians established by DC. This team helped prepare and develop arguments and evidence for the judicial review cases, including JS's judicial review case.

[23] The Respondent received an initial retainer of $10,000 from DC on or about October 18, 2011. Throughout his retainer, the Respondent received additional funds from DC, JS and several other supporters of Lost Canadians as contributions towards the legal costs of the judicial review proceedings. In total, the Respondent received $32,454.56.

Allegation 1: Client identification allegation

[24] Allegation 1 is that the Respondent did not make reasonable efforts to ascertain the identity of his client or persons authorized to instruct him.

[25] The facts demonstrate that: (a) JS, DC and the Respondent had no agreement on the client's identity or person(s) authorized to instruct the Respondent; and (b) the Respondent had no discussions with either DC or JS about these issues. In particular, the Respondent had no discussions with DC or JS to ensure that all parties knew or understood who the client was, who was authorized to instruct counsel or what would happen in the event he received conflicting instructions

from them. In that context, the Respondent was required to specifically identify the instructing client.

[26] In this case, many individual Lost Canadians were impacted by the Respondent's retainer and the objective of establishing precedents in judicial review cases. Many individual Lost Canadians were providing funds to the Respondent to pay for the litigation. Although DC was the primary contact throughout the retainer and was providing instructions, JS was the applicant in the one and only judicial review proceeding filed.

[27] The lack of communication by the Respondent with DC and JS on who he was acting for demonstrates that the Respondent failed to adequately turn his mind to the potential confusion that could be created for DC and JS, which later became obvious when he was acting for JS. The Respondent's failure to communicate and identify who his client was and who would provide him with instructions created or contributed to a situation in which he found himself acting in an actual conflict of interest.

Allegation 4(d): Conflict of interest allegation

[28] Allegation 4(d) is that the Respondent acted in a conflict of interest. The facts demonstrate that the Respondent acted in a conflict of interest by failing to ensure that JS knew and understood that she was entitled to undivided loyalty from the Respondent. Further, while still under a duty of undivided loyalty to JS, the Respondent offered conflicting advice to DC after JS decided to change counsel and terminated his retainer.

[29] JS's judicial review application was one of several cases discussed by the Respondent and the Lost Canadians team. Based on those discussions, the Respondent proceeded with a judicial review application filed on behalf of JS. A briefing note was sent to the BC Civil Liberties Association to inquire whether the Association would intervene. Based on that note, it was clear that:

(a) JS's personal objective was to obtain citizenship. She had sought citizenship by way of relief under section 5(4) of the *Citizenship Act*, a provision that gave the Minister of Citizenship discretion to grant citizenship, without initiating legal proceedings and obtaining relief from the courts;

(b) the relief sought in JS's judicial review case was based on various grounds, including grounds that, if successful, could result in a favourable precedent for other Lost Canadians; and

(c) it was recognized that JS's judicial review may not achieve the desired result for all Lost Canadians. That was one of the reasons the briefing note was sent to the BC Civil Liberties Association to seek its intervention.

[30] JS's contact with the Respondent was minimal. JS was not advised by the Respondent of:

(a) the consequences or implications of the Respondent acting on her behalf while also taking instructions to benefit the Lost Canadians group at large;

(b) the concept of a joint retainer; or

(c) what would happen if the Respondent perceived a conflict between the interests or instructions of JS and the interests or instructions of the Lost Canadians group, as communicated by DC.

[31] The Respondent did not turn his mind to the potential for conflict or consequences that could flow from a potential or actual conflict.

[32] It is the Respondent's view that:

(a) he did not discuss with JS the implications of acting for her while taking instructions to benefit the Lost Canadians group at large because he did not anticipate any conflict, since JS's request for relief under section 5(4) of the *Citizenship Act* was rejected and no other legal proceedings were initiated;

(b) he did not view the situation as a joint retainer; and

(c) he did not turn his mind to the potential for conflict or resulting consequences because no conflict was obvious or apparent to him other than a potential for discretionary relief by the Minister under section 5(4) of the *Citizenship Act*.

[33] JS's judicial review application proceeded to a hearing before Martineau J. in the Federal Court on July 22, 2013. At that hearing, Martineau J. made observations to the effect that the Court was favourably inclined to grant judgment in favour of JS that day. However, given the wider issues raised by the Lost Canadians group, Martineau J. observed that JS might want to consider whether to adjourn the matter and convert the proceeding to an action.

[34] The Respondent met with JS to discuss the judge's comments and to obtain instructions. DC participated in this meeting with JS's consent. JS agreed to the adjournment knowing that she could obtain judgment in her favour that day because she wanted to do what was in the best interests of all Lost Canadians. An adjournment was sought. The judge made an order directing an "adjournment *sine die* in order to allow the [Respondent] to prepare the broader declaratory proceeding that [JS] and/or other interested parties intend to launch in the near future."

[35] Accordingly, while the adjournment of the hearing was sought based on JS's instructions, JS did not know that the Respondent was in a position of actual or potential conflict of interest. The Respondent was obliged to ensure from the outset that both DC and JS knew that JS was entitled to the Respondent's undivided loyalty, even if he received conflicting instructions from DC.

[36] After the July 22, 2013 hearing through to the termination of the Respondent's retainer on October 10, 2013, additional work on the judicial review proceeding continued, including the filing of an application and submissions to convert the judicial review into an action to benefit the larger Lost Canadians group.

[37] At the hearing, the Respondent suggested that, after July 22, 2013, the conflict of interest "had resolved itself." The Respondent explained that, at the hearing on July 22, 2013, he should have advised both DC and JS to obtain independent legal advice before continuing to represent both of them. However, that did not occur.

[38] Before the application to convert her judicial review into an action was resolved, JS decided to change counsel. By email dated October 10, 2013, DC notified the Respondent of JS's decision to terminate the retainer (the "Termination Email"). After his termination as her counsel, the Respondent had no further communication with JS. However, he continued to communicate with DC by email from October 10 to 16, 2013.

[39] A Notice of Change of Lawyer was not filed contemporaneously with the Termination Email. As a result, the Respondent remained counsel of record for a time and was asked by the Federal Court for his available dates for a case management conference. Rather than advise the Federal Court that he was no longer acting for JS, the Respondent and his second counsel sought instructions from DC in regard to JS's judicial review case.

[40] In his email exchanges with DC after being terminated as JS's counsel, the Respondent offered DC the following advice, which conflicted with the interests of JS:

(a) In an email dated October 10, 2013, the Respondent informed DC that he would be "preparing a proper account" and advised DC to "think about indemnification on that account as [the Respondent does not] think it is fair for [DC] to pay this account by [himself]. That advice was given because the Respondent believed that JS did not inform him of her decision to terminate his retainer until JS first tried unsuccessfully to obtain his work product;

(b) The Respondent then received a letter from JS's new lawyer, CG, enclosing an Authorization to send him the Respondent's file and a Notice of Change of Lawyer. The Respondent sent DC an email dated October 15, 2013 in which he stated:

> We have to tread very carefully here legally and to protect your legal interest in the materials assembled and research. That is intellectual property.
>
> JS likely has a "bootlegged copy" of the materials. The lawyer has ask [sic] for those materials in trust. He knows that they belong to the Lost Canadians.
>
> We need to sit down and discuss the proper approach here. The legal issue, as discussed in the letter, is the ability of the lawyer to use that "bootlegged copy" of the research materials.
>
> Also for the record I would ask you to send him an email saying that he is not your lawyer or the Lost Canadian lawyer and all those materials belong to the Lost Canadians. …

(c) DC responded by email dated October 16, 2013 in which he stated that he did not have a problem writing an email to JS's new lawyer to say that CG did not represent DC. However, DC did not agree that he had a claim to the research materials;

(d) Following DC's email, the Respondent sent three emails to DC dated October 16, 2013. In the first email, the Respondent wrote:

> It's unfortunate but I think it's important that you legally stake out a proper situation otherwise you were going to be stuck literally holding the bag/Bill on this one.
>
> From what I'm picking up there seems to be had a great deal of groupthink here and probably some emails flying around that I have

> not been privy to. Anyway we should have her build [sic] to you sometime today and frankly that's the end of it as far as I'm concerned. We will take a position that will at least legally protect you. If you choose not to have that protection that's your business.

(e) In the second email, the Respondent wrote:

> [Second counsel] is preparing an account which should be ready later today. I think we have four boxes of materials that need to be delivered to the council [sic] who is actually handling this case. The problem is going to be the issue of "solicitors lien" on this material.
>
> Basically we're going to send a copy of the cup [sic] to you. …
>
> I realize from your email that there is some posturing going on with the others about the intellectual property in this research. I don't agree with that position but you really don't want this thing to get old while we get into a bun fight about payment of the account.

(f) In the third email, the Respondent wrote:

> Okay now we have a development that puts the whole thing in a complete unadulterated car. We are going to have the local judge/pronothary [sic] dealing with this. We didn't call the Chief Justice as requested and now we are going down this separate path.
>
> DC you have to do something and in writing to both counsel … immediately.
>
> We are preparing a bill that will be forwarded to you. I strongly urge you to clean [sic] your rights to the intellectual property in regards the legal work and start research done [sic] in this matter. Ordinarily this would lead to a rapid resolution of the situation read [sic] the account. As I said before I really don't want to see you stuck all by yourself holding the bag for the account but if you don't give us instructions to take an aggressive position on this that is exactly what is going to happen. …

(g) On October 16, 2013, the Respondent sent a letter to JS's new lawyer, which he forwarded to DC, in which the Respondent wrote:

> DC has confirmed to me that you are not the lawyer for the Lost Canadians. Rather you are only the lawyer for JS. I have asked him to confirm this in writing and will forward to you upon receipt.

[41] In fact, DC was not candid with the Respondent about his involvement in JS's decision to terminate the Respondent's retainer, the reasons for JS's decision or whether he wanted the Respondent to continue representing the interests of the Lost Canadians generally.

[42] Regardless, the Respondent's advice to DC reflected in the email communications was clearly contrary to and conflicted with JS's interests in her judicial review case. The Respondent's advice was inconsistent with his representation of JS as his client. The advice reflected the fact that the Respondent did not, at any time, turn his mind to client identification and the potential for a conflict of interest.

Allegation 5: Trust accounting rule breaches allegation

[43] On October 17, 2013, after his termination as counsel for JS, the Respondent emailed to DC a "draft" bill dated October 16, 2013 (the "Draft Bill"). The Respondent and DC met in October 2013 to discuss the Draft Bill. They have different recollections of the conversation and disagree as to whether they reached any agreement to settle the amount of the Draft Bill. However, the Respondent admits that by December 31, 2013, he knew DC was disputing the Draft Bill and denying the existence of any agreement to settle the amount owing. The Respondent admits that the Draft Bill was never signed, issued nor recorded as a bill in his accounting records or PCLaw, his accounting program.

[44] Prior to the Draft Bill, the Respondent prepared four statements of account dated between March 1, 2012 and August 13, 2012 (the "2012 Accounts"). The 2012 Accounts were prepared when the Respondent was retained to work on JS's judicial review. However, the 2012 Accounts were never addressed to JS nor sent to her because all concerned understood that the Lost Canadians group would be paying the legal expenses. The 2012 Accounts were addressed to "Lost Canadians c/o DC," but DC never received them.

[45] In addition to the initial retainer of $10,000, the Respondent did not properly account for additional funds received from DC and "donations" received from various supporters of the Lost Canadians, including a payment from JS. The Respondent did not keep time records, daily time entries in the accounts rendered, signed copies of the 2012 Accounts, with one exception, nor hard copies of receipts related to the funds received from supporters of the Lost Canadians, although they remained available on the Respondent's PCLaw accounting program. The

Respondent admits he was solely responsible for his accounting records, trust and general deposits and trust withdrawals.

[46] Based on a Law Society review and analysis of the Respondent's accounting records, the following occurred:

(a) On October 26, 2011, the Respondent deposited into trust the initial retainer of $10,000 received from DC;

(b) Between March 1 and August 14, 2012, the Respondent made 13 additional deposits into trust reflecting funds received from various supporters of Lost Canadians, including JS;

(c) In the same period, March 1 to August 14, 2012, the Respondent posted the four 2012 Accounts and withdrew funds from trust in payment of each account almost immediately after it was posted;

(d) As of August 14, 2012, the Respondent held a residual trust balance of $2,412.46 to the credit of the Client File;

(e) Assuming the 2012 Accounts were properly issued and delivered to the client and all trust receipts accurately recorded, there is nothing remarkable about the accounting records up to August 14, 2012;

(f) On April 16, 2013, the Respondent withdrew $2,153.98 from trust when the client owed no monies pursuant to any outstanding account. The residual trust balance was down to $258.48. The Respondent says that those funds were withdrawn on payment of an account dated December 3, 2012, which is reflected on the client accounting ledger but which he acknowledges has never been issued or sent to the client. No physical copy of this account (in paper or electronic form) has ever been provided by the Respondent or located in his client files or accounting system. The Respondent also says that the April 16, 2013 trust entry was made to correct an earlier accounting error made in December 2012 when these funds were withdrawn inadvertently from his general account in payment of this account;

(g) On July 29, 2013, the Respondent received $3,000 by cheque from DC. He deposited that amount directly into his general account when no monies were owed by the client pursuant to any outstanding account. The amount paid by DC was based on the amount ($3,078.08) of his unbilled disbursements recorded in his ledger at the time;

(h) On September 3, 2013, the Respondent deposited into trust $5,112.50 received from a supporter of Lost Canadians. He transferred those funds immediately from trust into his general account when no monies were owed by the client pursuant to any outstanding account;

(i) On September 6, 2013, the Respondent deposited into trust $500 from JT, a supporter of the Lost Canadians (the "JT Payment"). This payment was not credited to the correct client ledger at the time of deposit. As a result, on September 6, 2013, a residual trust balance of $258.48 remained credited to the Client File, and there was an unallocated trust balance of $500;

(j) On October 20, 2013, the Respondent received $3,000 by cheque from DC. He deposited this amount directly into his general account when no monies were owed by the client pursuant to any outstanding account or properly issued bill. At the date of this deposit, the Draft Bill had been prepared and delivered to DC. However, the Draft Bill was never signed, properly issued or posted in the Respondent's accounting records at that time or after;

(k) The client ledger printed on August 26, 2017 and provided to the auditor by the Respondent contains entries dated January 26, 2014 and August 17, 2014. The January 26, 2014 entry does not appear on the client ledger printed June 13, 2014, and the Respondent advised the auditor that the January 26, 2014 entry was made at the same time as the August 17, 2014 entries;

(l) On August 17, 2014, the Respondent: (a) credited the JT Payment to the Client File, resulting in a residual trust balance of $758.58; (b) posted invoice number 288 in the amount of $5,983.17; and (c) transferred the $758.58 out of trust in partial payment of invoice number 288 (the "August 2014 Trust Withdrawal");

(m) Invoice number 288 was never physically created nor delivered to the client. The Respondent informed the auditor that it was instead a place holder for the Draft Bill, which the Respondent acknowledges and admits was never properly issued or posted;

(n) The effect of the August 2014 Trust Withdrawal was to zero out the trust balance held to the credit of the Client File;

(o) The total amount of funds received by the Respondent from DC, JS and other supporters of Lost Canadians was $32,454.56 ($26,454.56 of which was deposited into trust and $6,000 of which was deposited directly into general);

(p) The total amount of bills issued by the Respondent and posted in his accounting records was $24,412.77 ($18,429.60 pursuant to the 2012 Statements of Account, plus invoice number 288 in the amount of $5,983.17); and

(q) The difference between the total amount received by the Respondent and the total amount of bills issued and posted in his accounting records was $8,041.79 (the "Overpayment").

Allegation 5(a)

[47] Allegation 5(a) is that, on July 29, 2013 and October 20, 2013 respectively, the Respondent deposited directly into his general account rather that into his trust account two payments of $3,000 each received from DC. As no monies were owed at the time, the Respondent breached Rule 3-51 [now Rule 3-58].

[48] Rule 3-51 stated that, subject to exceptions not applicable on these facts, a lawyer who receives trust funds must deposit the funds into a pooled trust account as soon as practicable.

[49] The funds received from DC should have been treated as trust funds at the time of receipt and deposit because, at that time, no outstanding accounts existed. Unbilled fees or disbursements may have existed, but since no bill was properly issued and delivered to the client, the funds were not correctly recorded as trust funds.

Allegation 5(b)

[50] Allegation 5(b) is that the Respondent withdrew funds from trust and deposited them into his general account on eight occasions between March 1, 2012 and August 17, 2014 when he did not first deliver a bill to his client before withdrawing the funds from trust. By not first delivering a bill, the Respondent breached Rules 3-56 and 3-57 [now Rules 3-64 and 3-65] and section 69 of the *Act*.

[51] The combined effect of Rules 3-56(1) and 3-57(2) requires withdrawals out of a trust account to pay a lawyer's fees to be made only after a bill is prepared and delivered to the client. Rule 3-57(3) prescribes the manner of delivery of a bill.

[52] Rule 3-57(5) prohibits the withdrawal of funds from trust in payment of fees when the lawyer knows that the client disputes the right of the lawyer to receive payment.

[53] Section 69(1) and (3) of the *Act* requires a lawyer to deliver a bill to the person charged, and the bill must be signed or accompanied by a signed letter that refers to the bill.

[54] The Respondent made withdrawals from his trust account when no monies were owed by the client pursuant to any outstanding bill. The first five trust transfers particularized in allegation 5(b) were made purportedly in payment of the 2012 Accounts when no signed bills were delivered to the person charged as required.

[55] Additionally, the August 2014 Withdrawal was made approximately ten months after the Respondent's retainer ended. The accounting effect of that withdrawal was to zero out the trust balance at a time when no properly issued account was outstanding and the Respondent knew that DC was disputing the October 2013 Draft Bill.

Allegations 6(a) and (b): Records requirement allegation

[56] Allegations 6(a) and (b) are that the Respondent did not keep signed copies of the 2012 Accounts and did not keep copies of receipts issued to persons providing retainer funds on behalf of DC. By failing to keep copies, the Respondent breached Rule 3-62 [now Rule 3-71] and Rule 3-63 [now Rules 3-71 and 3-72].

[57] Rule 3-62(1) requires lawyers to keep copies of all bills delivered to clients or persons charged in their files. Section 69 of the *Act* requires bills delivered to be signed by the lawyer. Based on section 69, the Panel interprets the phrase "all bills delivered" in Rule 3-62(1) to mean that bills delivered must be signed by the lawyer.

[58] Rule 3-62(2) states that, for the purpose of subrule (1), bills include receipts issued under Rule 3-63(3). Rule 3-63(3) states that a lawyer who receives funds to which subrule (2) applies (funds recorded in general account as received on account of fees earned and billed or disbursements made) must immediately deliver a bill or issue to the client a receipt of the funds received, containing sufficient particulars to identify the services performed.

[59] While some receipts were available on the Respondent's PCLaw accounting program, they were not sent to DC or the donors as required.

Allegation 7: Failure to account to client allegation

[60] Allegation 7 is that the Respondent failed to account to DC for all funds he received in trust, contrary to one or more of Rule 3-48 [now Rule 3-54] and rules 3.5-3 and 3.5-6 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

[61] Rule 3-48(1) requires lawyers to account in writing to a client for all funds and valuables received on the client's behalf.

[62] Rules 3.5-3 and 3.5-6 of the *BC Code* set out lawyers' obligations to preserve a client's property, which includes money. Rule 3.5-3 states that a lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that it has come into the lawyer's custody. Rule 3.5-6 states that a lawyer must account promptly for a client's property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

Allegation 7(a)

[63] Allegation 7(a) is that the Respondent failed to notify DC promptly when he received 15 separate amounts totalling $16,454.56 between May 30, 2012 and September 6, 2013. The purpose of those funds was to contribute toward payment of the legal costs of the judicial review cases. Therefore, the payments were subject to Rule 3-48 and the *BC Code* provisions. The Respondent admits he did not promptly notify DC when he received and deposited those funds.

Allegation 7(b)

[64] Allegation 7(b) is that the accounting provided to DC on December 4, 2013 contained various errors or omissions. This allegation refers to the client ledger sent to DC by email on December 4, 2013. The Respondent admits that the client ledger sent to DC contained the errors and omissions alleged.

Allegations 7(c) and (d)

[65] Allegations 7(c) and (d) are that the Respondent failed to disclose to DC the errors he discovered, the steps he took and the adjustments he made to his trust accounting records, including the recording of an invoice and withdrawal of funds in purported payment of that invoice in August 2014. These allegations relate to the August 2014 Withdrawal described above.

Allegations 7(e) and (f)

[66] Allegations 7(e) and (f) are that the Respondent has never accounted to DC for the $8,041.79 difference between the total funds received and the total bills ostensibly issued. These allegations relate to the Overpayment described above.

[67] The following evidence establishes that the Respondent did not disclose to DC the steps taken in 2014 relating to the August 2014 Trust Withdrawal or the Overpayment:

(a) The Respondent's client file and accounting records contained no proof of delivery of invoice number 288 nor any communication to DC or JS regarding the August 2014 Trust Withdrawal;

(b) The Respondent's client file and accounting records contained no communication to DC or JS regarding the Overpayment; and

(c) The last communication to DC was in February 2014.

Allegation 8: Civil action allegation

[68] Allegation 8 is that, in or about March 2015, the Respondent commenced a civil action against DC to collect on a bill that was never finalized, signed and delivered, contrary to section 69(5) of the *Act*.

[69] Section 69(5) states that a lawyer must not sue to collect money owed on a bill until 30 days after the bill was delivered to the person charged. As discussed above, subsection (3) requires that the bill must be signed or accompanied by a signed letter referencing the bill.

[70] The civil action filed by the Respondent relates to the Draft Bill. As discussed above, the Draft Bill was never finalized, signed or delivered to DC.

[71] Allegation 8 alleges further, or in the alternative, that the calculation of the amount claimed by the Respondent to be due and owing did not credit DC with specified amounts that he knew or ought to have known were received by him in trust.

[72] The Respondent admits that:

(a) the claims made in the civil action did not reflect or account for the $3,000 payment from DC in July 2013 or the $758.48 residual trust balance taken during the August 2014 Trust Withdrawal, which consisted of the JT Payment of $500 and the $258 residual trust balance; and

(b) he ought to have known that his calculation did not include these amounts.

FACTS AND DETERMINATION

[73] On November 18, 2019, after accepting the Respondent's admissions and considering the ASF, the Panel gave its oral decision with written reasons to follow. The Panel determined that the Respondent had committed professional misconduct in regard to allegations 1, 4(d), 5, 6(a) and (b), 7 and 8 as set out in the Amended Citation. These are our written reasons.

[74] To a large extent, we have adopted portions of the written submissions on Facts and Determination, as well as Disciplinary Action, submitted by the Law Society.

Legal test for professional misconduct

[75] Although "professional misconduct" is not defined in the *Act* or the Law Society Rules, the test for professional misconduct is well established and set out in the leading case of *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171 ("*Martin hearing*").

[76] The *Martin* test requires the panel to be satisfied that the proven facts "disclose a marked departure from that conduct the Law Society expects of its members." Put another way, the panel must be satisfied that the respondent's behaviour "displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer," *Martin hearing*, at para. 154.

[77] The *Martin* test requires the panel to consider the applicable standard of conduct expected of lawyers and then determine whether the respondent's conduct falls markedly below that standard. The panel must also take into account the Law Society's overarching mandate to protect the public interest.

Allegations 1 and 4: Client identification and conflict of interest allegations

[78] A lawyer must accurately identify who the client is and who is authorized to provide the lawyer with instructions. A failure to do so will often lead to a lawyer being unable to discharge professional obligations, including the avoidance of actual or potential conflict of interest situations, and to ensure that the client receives, and knows that he or she is entitled to receive, the lawyer's undivided loyalty (the "Conflict Rules").

[79] The *Professional Conduct Handbook* (the "*Handbook*") and the *BC Code* impose a duty on lawyers to give their undivided loyalty to every client and prohibit lawyers from acting or continuing to act when a conflict of interest arises. The Conflict Rules that were in force at the time of the retainer in October 2011 were set out in Chapter 6, Rule 1 of the *Handbook*. On January 1, 2013, the *Handbook* was replaced by the *BC Code*. Accordingly, the Conflict Rules governing the Respondent's conduct from January 1, 2013 onwards are set out in Rule 3.4 of the *BC Code*.

[80] The duty of loyalty owed to a client is "one of the core values of the legal profession, perhaps the core value," *Law Society of BC v. Coglon,* 2002 LSBC 21, [2002] LSDD No. 103, at para. 45 ("*Coglon review*"); see also *Law Society of BC v. Golden,* 2019 LSBC 15, at paras. 13 to 14. *Coglon review* is often cited by hearing panels in conflict of interest cases.

[81] As explained in *Coglon review*, at para. 47, the respondent's motivation is a contextual rather than a determinative factor:

> … It is usual in conflict cases that the lawyer will lack some malign motivation and that he or she will have the strong hope that everything will work out for everyone. In a certain sense that is the problem: the Law Society cannot have, and the public interest cannot have, any real assurance that well-motivated actions taken in conflict of interest will cause less harm than those basely motivated.

[82] The hearing panel's decision on sanction in *Law Society of BC v. Coglon*, 2006 LSBC 14, at para. 9, (*"Coglon disciplinary action")* makes it clear that a finding of professional misconduct based on conflicts of interest is supported even if no loss occurs because the concern is the "possibility of injury."

[83] In this case, the Respondent failed to appreciate that both DC and JS were entitled to undivided loyalty from their lawyer. The Respondent admitted that he clearly understood for the first time that he was acting in a conflict of interest at JS's judicial review application. He admitted that he should have asked both DC and JS to seek independent legal advice at that time.

[84] The Respondent failed to identify who his client was and which person was authorized to give him instructions. He gave advice to two clients who had different and conflicting interests: JS in her individual quest for Canadian citizenship; and DC in his quest for a precedent that would benefit the larger Lost Canadians group. A conflict of interest situation arose because the interests of DC and JS were different; yet the Respondent failed to address that conflict. Rather

than taking the proper course and advising both DC and JS that he could no longer continue to act for either of them, the Respondent continued to act for both of them after JS's judicial review hearing until JS terminated the retainer. The Respondent then continued to act for DC when he knew or ought to have known that the conflict of interest remained.

[85] The Respondent did not appear to appreciate that he remained in a conflict of interest even after JS terminated his retainer in October 2013. The advice he gave to DC demonstrates that he disregarded any duty of loyalty to JS after she terminated his retainer. The advice the Respondent gave to DC in regard to Lost Canadians research materials and the payment of his bill showed a focus only on the duty of loyalty he owed to DC, despite the obvious conflict with his former client, JS.

[86] We have no hesitation in finding that the Respondent's conduct in this matter is a marked departure from the conduct expected of lawyers. By conducting himself this way, the Respondent displayed a gross culpable neglect of his duties as a lawyer, particularly in failing to turn his mind to the potential and actual conflicts of interest that could arise.

Allegations 5, 6, 7 and 8

[87] The Respondent admits that his misconduct, including the various breaches of the accounting and record-keeping requirements of the *Act* and Law Society Rules, rises to the level of professional misconduct. The Panel finds that the Respondent's conduct in regard to his accounting and record-keeping, as discussed above, is a marked departure from the conduct expected of lawyers.

[88] Specifically, the Panel finds that:

(a) All of the accounting and record-keeping breaches are very serious;

(b) The misconduct reveals a pattern of breaches throughout the Respondent's retainer from 2012 to 2015;

(c) The number of breaches is significant; and

(d) While harm is not a required element of professional misconduct, the Respondent's conduct did cause harm. DC was entitled to, but has never received, a full accounting of the funds received and disbursed by the Respondent, including the Overpayment. By never finalizing and issuing any proper final bill, the Respondent has effectively prevented DC from

> taxing his account and taking steps to compel a proper accounting and return of any Overpayment. The Respondent appears to have ignored his professional obligation to render a proper bill and facilitate the client's entitlement to dispute the bill in the appropriate forum.

[89] In summary, the Panel finds that the Respondent committed professional misconduct in regard to his representation of JS, DC and the Lost Canadians, including failing to identify the proper client, acting while in a conflict of interest, failing to follow proper billing and trust accounting rules and failing to keep proper records.

DISCIPLINARY ACTION

Position of the parties

[90] On November 19, 2019, the parties provided joint submissions on the appropriate disciplinary sanction. The parties agree that the appropriate sanction is a two-month suspension.

[91] On the issue of costs, the parties agree that the Respondent should pay to the Law Society costs in the amount of $24,260.04. That amount is based on a draft bill of costs prepared in accordance with Rule 5-11 and the Tariff of Costs in Schedule 4 of the Law Society Rules (the "Tariff").

Principles and factors relevant to assessment of sanction

[92] The primary purpose of disciplinary hearings is to uphold and protect the public interest in the administration of justice: *Act*, s. 3. The available sanctions range from reprimand to disbarment: *Act*, ss. 38(5) and (7).

[93] The principles and factors relevant to the assessment of the appropriate sanction are well established and reflected in the leading decisions: *Law Society of BC v. Ogilvie*, 1999 LSBC 17; *Law Society of BC v. Lessing*, 2013 LSBC 29; and *Law Society of BC v. Faminoff*, 2017 LSBC 04.

[94] *Ogilvie* was one of the first hearing panel decisions containing a comprehensive discussion and analysis of the factors to be considered in imposing discipline. Since protection of the public interest is the paramount objective in the sanctioning exercise, not every factor may come into play in each case and the weight attributed to each factor will vary from case to case.

[95] In *Lessing*, a Bencher review panel reaffirmed the *Ogilvie* factors and clarified that the starting point in determining which sanction to impose is the Law Society's mandate to protect the public interest. Accordingly, the *Ogilvie* factors must be applied through the lens of what is required to protect the public interest in the circumstances of a given case, including the circumstances of the underlying misconduct, as well as the circumstances of the respondent.

[96] The review panel in *Lessing* observed that, in most cases, two factors will play an important role: rehabilitation and protection of the public interest, which includes public confidence in the disciplinary process; and public confidence in the profession generally. However, in cases where rehabilitation and protection of the public interest come into conflict, the latter must prevail.

[97] *Lessing* cautions that achieving public confidence through the sanctioning process requires a common-sense approach. *Lessing* provides additional guidance regarding the application of progressive discipline and the weight that ought to be given to a respondent's professional conduct record, prior similar cases and the timing of admissions of misconduct.

[98] *Lessing* is also instructive in terms of how to approach sanction when multiple citations are proven. The review panel held that questions of whether a suspension or fine should be imposed, and the length of the suspension, should be determined on a global basis. This principle is equally applicable to multiple allegations contained in a single citation.

[99] In *Faminoff*, the review board expanded on the guidance contained in *Lessing*. The review board held at para. 80 that "[p]ublic confidence in the profession depends on the Law Society's discipline system being perceived as transparent, justifiable and legitimate." At paras. 81 to 83, the review board outlined the *Ogilvie* factors and endorsed analyzing these factors under four general headings, as not every factor will be relevant or carry the same weight in any given case (see also: *Law Society of BC v. Dent*, 2016 LSBC 05). The review board emphasized that imposition of sanction is an individualized process.

[100] The review panel's decision in *Law Society of BC v. Martin*, 2007 LSBC 20 ("*Martin review*") is instructive. In *Martin review*, at para. 41, the review panel held that the following considerations are relevant to the appropriateness of a suspension:

(a) elements of dishonesty;

(b) repetitive acts of deceit or negligence; and

(c) significant personal or professional conduct issues.

[101] In regard to whether a two-month suspension is an appropriate sanction, the Panel has considered the following factors:

(a) circumstances related to the proven misconduct, such as the nature and gravity of the conduct, the duration of the conduct and reasons for the conduct;

(b) the Respondent's circumstances, including his discipline history, late acknowledgement of the misconduct, lack of steps taken to redress the wrong and need for specific deterrence;

(c) other public interest considerations such as the need for general deterrence and maintaining public confidence in the disciplinary process and the profession generally; and

(d) sanctions imposed in prior similar cases, to the extent that they are consistent with present day values and views regarding appropriateness of the sanction to preserve public confidence in the profession and Law Society's ability to effectively regulate the profession.

Factors and considerations applicable in present case

Circumstances related to proven misconduct

[102] The conflict of interest manifested itself in several ways: in the Respondent acting for both JS and DC in regard to JS's judicial review case; in his continuing to act for both DC and JS after the court hearing in July 2013 when the Respondent became clearly aware of the conflict of interest; in his continuing to act as DC's lawyer after becoming clearly aware of the conflict of interest; and in his offering advice to DC that was contrary to the interests of JS.

[103] The nature and gravity of the misconduct is extremely serious and concerns multiple ethical and professional failings. The Respondent's conduct strikes at the most basic and fundamental qualities a lawyer must possess.

[104] The evidence does not establish that the Respondent's conduct was driven by an intention to deceive. However, the proven misconduct involves repeated acts of negligent behaviour and displays significant professional conduct concerns. When assessed globally, the application of the *Martin review* factors favours a suspension.

[105] To the extent that some of the misconduct was explained by the Respondent as an unprofessional and emotional reaction to JS's decision to terminate his retainer, that explanation does not assist the Respondent. Clients are entitled to change lawyers. Disputes between lawyers and clients happen. These situations do not give a lawyer the licence to ignore his or her professional obligations or expose clients to potential harm.

Respondent's circumstances

[106] The Respondent has a discipline history, as reflected in his Professional Conduct Record (the "PCR") tendered as an exhibit in this hearing. The Panel finds that most of the PCR does not assist the Panel. In this particular case, we have determined that the conduct matters or practice standards matters that occurred over 20 years ago are not timely enough to be relevant to our consideration of disciplinary sanction.

[107] We note that the PCR does not contain any record of the Respondent being in a previous conflict of interest situation. The PCR does, however, show past account and record-keeping issues, but those issues occurred after the date of the alleged misconduct set out in the Amended Citation before the Panel.

[108] To the Respondent's credit, he admitted professional misconduct to the majority of the allegations set out in the Amended Citation.

[109] To the Respondent's further credit, he agrees that a serious sanction such as a two-month suspension is appropriate to address his misconduct.

[110] The Respondent advised the Panel that he expects to retire shortly. The Respondent has been a member of the Law Society since 1985.

[111] The Law Society suggests that the principle of progressive discipline (see *Lessing*, para. 72) applies in this case. The principle means that a panel may apply a more serious sanction when a lawyer has a prior disciplinary record. However, the panel does not need to rely on the principle of progressive discipline to accept that a suspension is warranted on the facts of this case. Based on the multiple allegations and the seriousness of the conflict of interest situation, the Panel finds that a suspension is warranted.

Other public interest considerations

[112] The Panel agrees that a suspension is required for general deterrence purposes to remind the profession about the importance of lawyers abiding by the duty of

loyalty, avoiding conflict of interest situations, and complying with Law Society accounting rules and billing requirements.

[113] A two-month suspension is also an appropriate disciplinary response to maintain public confidence in the profession and the disciplinary process.

Prior similar cases

[114] No case is directly on point with the facts of this case. However, the following cases provide some guidance.

Conflict of interest cases

[115] *Law Society of BC v. Spears*, 2006 LSBC 09, is a decision that involves accounting rule breaches as well as conduct associated with acting in a conflict of interest. In that case, the respondent received a reprimand, was suspended for two months and was ordered to pay fines totalling $8,500 plus costs. The sanctions were ordered pursuant to the Rule 4-22 (now Rule 4-30) consent resolution process and based on admissions of conduct related to accounting rule breaches, conflict of interest and other misconduct.

[116] In *Law Society of BC v. Scholz*, 2008 LSBC 16, the respondent was suspended for one month and ordered to pay costs for misconduct related to conflicts of interest and breach of a court order.

[117] In *Coglon disciplinary action*, the respondent was suspended for one month for acting in a conflict of interest and ordered to pay costs.

Accounting rule breach cases

[118] In *Faminoff*, the review panel confirmed the hearing panel's decision to impose a two-month suspension for the respondent's professional misconduct associated with mishandling trust funds (not amounting to misappropriation), failure to maintain proper accounting records, intentional misrepresentation to the Law Society by backdating statements of account, and breaches of undertakings.

[119] In *Law Society of BC v. Derksen*, 2015 LSBC 24, the respondent was suspended for 45 days and ordered to pay costs for professional misconduct associated with several accounting and other rule breaches. The sanctions were ordered pursuant to a Rule 4-22 (now Rule 4-30) consent resolution process.

[120] In *Law Society of BC v. Cruickshank*, 2012 LSBC 27, the respondent was suspended for one month and ordered to pay costs for professional misconduct associated with accounting rule breaches and other discipline violations set out in two citations. The sanctions were ordered pursuant to a Rule 4-22 (now Rule 4-30) consent resolution process.

DECISION ON DISCIPLINARY ACTION

[121] This matter raised a serious conflict of interest issue for the Respondent in his dealings with DC and JS. Based on the above, the Panel accepts the joint submissions by the parties on Disciplinary Action.

[122] The Panel orders that the Respondent be suspended from the practice of law for two months commencing on May 1, 2020 or on a date otherwise agreed to between the parties.

REASONS ON COSTS

[123] The Panel's jurisdiction to order costs is section 46 of the *Act* and Rule 5-11. The amount of costs sought to be recovered is set out in a bill of costs governed by the Tariff.

[124] Rule 5-11 requires a panel to consider the Tariff, as well as the reasonableness of the tariff calculation. In assessing reasonableness, the Panel is guided by the following factors set out in *Law Society of BC v. Racette*, 2006 LSBC 29, at para. 13:

(a) the seriousness of the offence;

(b) the financial circumstances of the Respondent;

(c) the total effect of the Penalty, including possible fines and/or suspensions; and

(d) the extent to which the conduct of each of the parties has resulted in costs accumulating, or conversely, being saved.

[125] In this case, the Law Society tendered a bill of costs totalling $22,523.79 in fees and disbursements based on the Tariff. In joint submissions made on November 19, 2019, the Respondent agreed to pay the full amount of $22,523.79.

DECISION ON COSTS

[126] The Panel has considered Rule 5-11 and the parties' joint submissions on costs. We order that the Respondent pay to the Law Society costs of this hearing in the amount of $22,523.79 on or before September 1, 2020.