

2020 LSBC 14  
Decision issued: March 3, 2020  
Citation issued: March 18, 2019

**THE LAW SOCIETY OF BRITISH COLUMBIA**

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

**and a hearing concerning**

**SANDRA HELEN MARY SMAILL, QC**

**RESPONDENT**

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**DECISION OF THE HEARING PANEL  
ON FACTS AND DETERMINATION**

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Hearing date: December 11, 2019

Panel: Michael F. Welsh, QC, Chair  
Thelma Siglos, Public representative  
Sandra E. Weafer, Lawyer

Discipline Counsel: Michael D. Shirreff  
No one appearing for the Respondent:

**INTRODUCTION**

- [1] The citation in this matter was authorized by the Discipline Committee on February 28, 2019 and issued on March 18, 2019. The citation was later amended on October 17, 2019, but not in a substantive way.
- [2] The citation arose out of issues that were identified following a compliance audit of the Respondent’s practice in January 2018. As a result of the compliance audit, the matter was referred to the Professional Conduct department, and a more in-depth investigation was ordered of the Respondent’s trust and accounting compliance (the “Rule 4-55 investigation”).
- [3] The citation has eight allegations:

1. Between approximately January 2016 and April 2018, the Respondent failed to maintain accounting records in compliance with the Law Society Rules;
2. Between approximately May 17, 2017 and August 31, 2017, the Respondent misappropriated, or improperly took, some or all of \$1,104.18 in client trust funds by withdrawing funds held on behalf of clients when she knew or ought to have known that she was not entitled to the funds;
3. Between approximately March 22, 2017 and March 15, 2018, the Respondent misappropriated, or improperly withdrew, some or all of \$5,386.06 in trust funds by withdrawing funds from her pooled trust account when she knew or ought to have known that she was not entitled to the funds;
4. Between January 6, 2016 and September 29, 2017, the Respondent received some or all of \$1,168 in client trust funds and failed to deposit the funds into her pooled trust account and deposited the funds into her general account without first preparing and delivering a bill to her clients;
5. Between approximately January 2016 and March 2018, the Respondent misappropriated, or improperly took, some or all of \$3,341 in client trust funds by withdrawing funds when there were insufficient funds on deposit to the credit of her clients;
6. The Respondent collected Goods and Services Tax (“GST”) from her clients, but between October 2015 and January 2018, she failed to remit the GST funds due to the federal government in a timely way;
7. Between approximately January 2016 and March 2018, the Respondent failed to remit employee payroll source deductions to the federal government; and
8. The Respondent failed to provide full and substantive responses, promptly or at all, to various Law Society communications.

[4] Although the citation and the amended citation were served on the Respondent, the Respondent did not appear at the hearing. In fact, from the time that the Rule 4-55 investigation was commenced, the Respondent did not cooperate at all with either the Law Society investigation or this disciplinary process.

- [5] In March, 2018, the Respondent was suspended from practice for failing to provide responses and records to the Law Society during the course of the compliance audit. Prior to this hearing, the Law Society prepared a Notice to Admit that was delivered to the Respondent, but she did not provide any response to that Notice.
- [6] Although notified of the hearing date, the Respondent did not attend the hearing. She did provide a confirmation from her former legal assistant that she would not attend the hearing. She also provided through another member of the Law Society who was not representing her, an unsigned letter dated December 9, 2019 indicating, again, that she would not be participating in the hearing.
- [7] As the evidence clearly established that the citation and the Notice of Hearing had been provided to the Respondent, and as she confirmed that she would not be participating in the hearing, the Panel had no concerns about granting the Law Society's application to proceed in the absence of the Respondent. As such, pursuant to s. 42(2) of the *Legal Profession Act*, we granted the application to proceed in the absence of the Respondent.

## **FACTS**

- [8] As noted earlier, the Respondent did not respond to the Notice to Admit. As such, the facts in the Notice to Admit, which support all of the allegations in the citation, are deemed to be admitted. Notwithstanding that counsel for the Law Society put forward a great deal of documentary evidence in addition to the Notice to Admit. All the evidence adduced clearly meets the burden on the Law Society to establish the allegations in the citation through clear, convincing and cogent evidence.

### **Failure to maintain accounting records**

- [9] The Respondent was a sole practitioner in a non-computerized office. During the course of the compliance audit and subsequent Rule 4-55 investigation, it was established that:
- (a) the Respondent had no central filing system in the firm to store or retain client accounts. Accounting records, banking records, client files and billing records were not properly maintained or filed;
  - (b) the Respondent did not keep current trust ledgers and listings;
  - (c) the Respondent did not always record the funds received and disbursed in connection with her law practice;

- (d) the Respondent did not maintain a book of entry or data source showing all trust transactions received and disbursed by the firm, as well as the unexpended trust balance;
- (e) the Respondent's monthly reconciliations were not signed, and the preparation dates were not recorded, contained multiple errors, and were not completed in a format consistent with Law Society accounting rules;
- (f) the Respondent did not maintain proper general account records, and
- (g) the Respondent did not maintain billing records of all bills for fees and disbursements that she rendered or a master billing file of all bills delivered or file copies of bills.

[10] The books and records were in such a state of disarray that it took months of effort for forensic accountants to try and recreate the trust ledgers and postings as part of the Rule 4-55 investigation.

#### **Misappropriation or improper withdrawals from trust**

[11] Between May 17 and August 31, 2017, the Respondent, on 22 occasions, misappropriated or improperly withdrew trust monies by withdrawing residual balances in long inactive or concluded client files. These monies were not properly required for payment on behalf of clients and the unclaimed trust monies were not paid to the Law Society, contrary to Rule 3-89(1).

[12] Some, but not all, of these 22 withdrawals were supported by Statements of Account which referred to the work done as "file closing" or "file closure". The Respondent's explanation to the investigators was that, as these files had been closed for a long time with minimal balances, and she was unable to contact the clients or executors, she simply prepared accounts for internal records only and did not deliver the accounts to the clients. The Rule 4-55 investigation reports noted that the Respondent was aware of Rule 3-89(1) with regard to unclaimed trust money, but that she considered that she had earned the money through trying to locate the clients.

#### **[13] Improper handling of retainer funds**

[14] The Rule 4-55 investigation report also noted two clients, RM and TT, for whom the Respondent did not deposit retainers into her pooled trust account.

- [15] According to the receipt book for the practice, the Respondent received three amounts totalling \$4,000 from RM: \$1,700 on January 6, 2016; \$1,200 on or around January or February 2016; and \$1,100 on July 7, 2017. Of those amounts, only the second deposit of \$1,200 was deposited into the trust account (and transferred to the general account the same day).
- [16] For client TT, the receipt book showed a retainer of \$700 received on July 24, 2017. That amount was deposited into the general bank account on July 25, 2017. At the time the monies were deposited into the general account, rather than the trust account, the general account was overdrawn by \$9,999.28 of its maximum line of credit of \$10,000. Once the \$700 was deposited, the Respondent was able to, and did, pay two overdue invoices totalling \$630 that were owed to the Law Society.

#### **Withdrawing trust funds without sufficient funds on deposit**

- [17] The evidence shows that between March 22, 2017 and March 15, 2018, the Respondent improperly withdrew some or all of \$5,386.06 from her pooled trust account when she knew that the withdrawals were not properly required for payment to or on behalf of a client.
- [18] The citation itemizes seven such withdrawals – in amounts between \$500 and \$1,525. These withdrawals were done without statements of account or other client documents to support the withdrawals. It appears from the forensic work done on the Respondent's books and records that many or all of these withdrawals were made at times when the Respondent's general account was overdrawn and used to pay expenses such as rent and her assistant's salary.

#### **Failure to remit taxes**

- [19] At the time of the compliance audit, the Respondent was unable to confirm when she last filed or made GST remittances. The statements of account rendered by the Respondent showed that she billed and collected GST from her clients, yet on March 21, 2017, Canada Revenue Agency (the "CRA") issued a statement of account showing that \$46,977.16 was owed to the federal government for GST remittances.

#### **Failure to remit employee payroll source deductions**

- [20] The Notice to Admit and the documents show that between January 2016 and March, 2018, the Respondent failed to remit employee payroll source deductions. Documents issued by the CRA show that as at February 28, 2017, the Respondent

owed a total of \$43,509.54 in arrears, penalties and interest for payroll deductions, for which the CRA had initiated garnishment proceedings.

### **Failure to respond to the Law Society**

- [21] After the Rule 4-55 investigation report was completed on July 24, 2018, the Law Society appointed an investigator to further investigate the Respondent. That investigator left messages on July 24, July 25 and August 3, 2018, none of which were responded to. On August 9, 2018, the Law Society investigator wrote a letter to the Respondent outlining the concerns of the Rule 4-55 investigation, providing a copy of the interim report and requesting an interview with the Respondent. The Law Society did not receive a response to that letter, or to a voicemail left for the Respondent on August 9, 2018.
- [22] The Respondent finally called the Law Society on September 11, 2018. She indicated that she had not received any of the voicemails. The Law Society confirmed the contact information for the Respondent and on September 18, 2018, the Law Society re-sent a number of documents to the Respondent by process server, including the Rule 4-55 report and the August 9, 2018 letter. No response was received from the Respondent. A further letter was sent to the Respondent by courier on December 6, 2018. No response was received from the Respondent.

## **FINDINGS OF THE PANEL**

### **Accounting records**

- [23] This Panel has no trouble concluding that each and every allegation in the citation is proven and that each and every allegation, considered both individually and cumulatively, constitutes professional misconduct.
- [24] Although the term “professional misconduct” is not defined in the *Act*, the test for determining whether conduct constitutes professional misconduct is well established. The question is “whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members.” *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171.
- [25] Not every breach of accounting rules will warrant a finding of professional misconduct. It is clear, however, that the conduct described in the Notice to Admit, in the Rule 4-55 report and in the citation goes far beyond mere breaches of accounting rules. As counsel for the Law Society stated in his submissions “the breaches of the Rules in the within matter were serious, ongoing and resulted from

the Respondent paying little or no attention to the administrative side of her practice”.

- [26] The state of the record keeping in the Respondent’s practice, coupled with her lack of cooperation with the Law Society, meant that forensic accountants had to do a painstaking re-creation of the Respondent’s books and records. When books and records are in such a state of disarray, there can be no doubt that this constitutes a “marked departure” from what is expected, and therefore constitutes professional misconduct. Where there is overwhelming evidence of trust account abuse and mismanagement, the case for professional misconduct is compelling: *Law Society of BC v. Sahota*, 2016 LSBC 29, at para. 55.

### **Misappropriation**

- [27] Three allegations contained in the citation describe the wrongful taking, or the misappropriation, of monies in trust. Previous Law Society decisions have held that the term misappropriation is a broad term that encompasses more than what is commonly referred to as “stealing”. As the panel stated in *Sahota*, at para. 63: “all that is required is for the lawyer to take the money entrusted to him or her knowing that it is the client’s money and that the taking is not authorized.”
- [28] There are many decisions that talk about the sacrosanct nature of trust accounts. When clients place funds with lawyers, those clients, the public and the regulator are entitled to expect that those funds will remain to the clients’ credit unless and until work is done on the clients’ behalf in accordance with the retainer, and a bill is rendered and delivered. The regulator is further entitled to expect that the entire sequence is documented and that the documentation is maintained and retained in an appropriate manner.
- [29] As the hearing panel found in *Law Society of BC v. Ali*, 2007 LSBC 18, at paras. 104 and 105:

A fundamental principle that governs the conduct of lawyers is that trust funds are sacrosanct. The Respondent has breached that principle repeatedly and over a significant period of time. The fact that the amounts involved were relatively small is irrelevant.

The Respondent’s conduct, whether deliberate or a matter of incompetence or negligence, is so gross as to prove a sufficient mental element of wrongdoing. The Respondent has shown a remarkable disregard and lack of attention to her obligations.

- [30] This Panel finds that the misappropriation of client trust funds as set out in the citation is proven and constitutes professional misconduct.

### **Improper handling of retainer funds**

- [31] Similarly, both failing to deposit retainer funds into a pooled trust account and using those funds without first preparing and delivering a bill, constitute professional misconduct. The Rules are clear that retainer funds are to be deposited into trust. A lawyer cannot escape the obligations towards those funds by depositing them into a general account as opposed to a trust account. For the same reasons as set out above, the Respondent's use of trust funds for personal purposes without issuing a bill for services rendered constitutes professional misconduct.

### **Failure to remit GST and employee payroll source deductions**

- [32] Pursuant to s. 7.1-2 of the *Code of Professional Conduct for British Columbia* lawyers have an obligation to promptly meet financial obligations with respect to their practice. While this is true of all obligations, there is a heightened obligation to remit monies collected for payment to the government by or on behalf of others, such as GST, PST or payroll source deductions. Failure to make these remittances, particularly in such large amounts and for such prolonged periods, constitutes professional misconduct: see, for example, *Law Society of BC v. Medd*, 2004 LSBC 15 and *Law Society of BC v. Gordon*, 2018 LSBC 37.

### **Failure to respond to the Law Society**

- [33] In this case, the evidence is that the Respondent has persistently and repeatedly failed to respond to the Law Society and to cooperate both in the investigation and in this discipline process. It is clear that failure to respond is *prima facie* evidence of professional misconduct: *Law Society of BC v. Dobbin*, 1999 LSBC 27, at para. 25. The evidence before us on this point clearly establishes professional misconduct. .
- [34] As set out earlier, the Respondent did deliver a letter to counsel for the Law Society the day before the hearing. This letter falls into the category of "too little, too late". Although she indicates that she did not renew her membership in the Law Society, this does not relieve the Law Society from dealing with her conduct while she was a practising lawyer. Further, while she attempts to justify certain matters that are not included within the citation, she does not provide any information that justifies or excuses the conduct set out in the citation, including the failure to respond to the Law Society.



**DECISION**

[35] For the reasons set out in this decision, we find that each of the allegations in the amended citation is established on the evidence presented to us and that the conduct set out in each of the allegations constitutes professional misconduct.

**NON-DISCLOSURE ORDER**

[36] The Law Society requests an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information or privileged information not be disclosed to members of the public.

[37] In order to prevent the disclosure of confidential or privileged information to the public, we order under Rule 5-8(2) that if a member of the public requests copies of the exhibits or transcripts in these proceedings, those exhibits and transcripts must be redacted for confidential or privileged information before being provided to the public.