2020 LSBC 18
Decision issued: April 17, 2020
Citation issued: October 25, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

RENE HENRI DAIGNAULT

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date:	March 12, 2020
Panel:	Kenneth M. Walker, QC, Chair Monique Pongracic-Speier, QC, Lawyer Guangbin Yan, Public representative
Discipline Counsel:	Jaia Rai
Counsel for the Respondent:	William G. MacLeod, QC

INTRODUCTION

[1] This hearing came to us with an agreed statement of facts on "allegation 1" of the amended citation. The Law Society did not adduce any evidence in relation to "allegation 2" of the amended citation. Both the Law Society and counsel for the Respondent asked us to find professional misconduct on the agreed facts and asked us to consider that a two-week suspension was the appropriate disciplinary action. We heard submissions on both facts and disciplinary action and have agreed with both. These are our reasons.

[2] The Respondent, Rene Henri Daignault, is stated in the citation to have committed professional misconduct in respect of three transactions that went through his law firm's US and Canadian dollar trust accounts (collectively, the "Trust Account") between October 2011 and January 2012. In particular, the citation alleges that the

Respondent received and disbursed funds through the Trust Account on the instructions of a client without:

(a) providing any substantial legal services in connection with the trust matters; and

(b) advising the persons depositing the funds to the Trust Account, or persons on whose behalf the funds were being deposited, that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Professional Conduct Handbook* (the "*Handbook*") then in force.

[3] At the hearing of the citation on March 12, 2020, the parties tendered an agreed statement of facts. In the agreed statement of facts, the Respondent admits to certain actions and omissions, and admits that his conduct was professional misconduct, within the meaning of section 38(4) of the *Legal Profession Act* (the "*Act*").

[4] After reviewing the agreed statement of facts and hearing the parties, the Hearing Panel found that the conduct admitted by the Respondent was professional misconduct. We advised that our reasons for so finding would follow.

[5] The Hearing Panel also heard submissions on March 12, 2020 on the question of sanction. The Law Society and the Respondent both submitted that, in the particular circumstances of the case, a two-week suspension is appropriate. The Law Society does not seek costs.

ISSUES

[6] The issues before the Hearing Panel are:

(a) whether the conduct admitted by the Respondent is professional misconduct;

(b) whether the proposed disciplinary action is within the acceptable range for this misconduct; and

(c) the appropriate disposition as to costs.

STATEMENT OF FACTS

[7] The following facts are drawn from the agreed statement of facts.

Background

[8] The Respondent was called to the bar and has been a member of the Law Society of British Columbia since 1993.

[9] Since approximately 2002, the Respondent has practised as a sole practitioner through a law corporation, R.H. Daignault Law Corporation. The Respondent's areas of practice include securities law.

[10] The Respondent's law corporation maintains the Trust Account, a US dollar general account and a Canadian dollar general account.

[11] From approximately 2002 to 2013, the Respondent represented a corporation (the "Client"). The Respondent took instructions on the Client's matters from its principal (the "Principal"). At some time during the retainer, the Respondent considered the Principal to be a friend.

The Depositor 1 transaction

[12] On October 29, 2011, the Respondent received an email from a person ("Depositor 1") "confirm[ing] that USD 40,000 is on its way to your trust account" for the purchase of shares in an over-the-counter trading company connected to the Principal ("Company A"). The email indicated that the funds for the purchase would come from one entity (the "funder") and that the shares should be registered in the name of another entity (the "purchaser"). The names of the funder and the purchaser were given in the email. Depositor 1 described himself in the email as the managing partner of an asset management firm in Switzerland.

[13] Depositor 1, the funder and the purchaser were unknown to the Respondent. He did not make inquiries about them. Likewise, the Respondent did not know the identity of the vendor of the shares and did not inquire. He also did not inquire into the source of the funds that were to be sent to him.

[14] On October 31, 2011, the Respondent replied to Depositor 1's email and requested the purchaser's address so that he could provide it to the transfer agent. By reply the same day, Depositor 1 gave a Swiss address as the purchaser's contact address and a Panamanian address as the purchaser's domicile.

[15] The Respondent did not, in this email exchange or at any time thereafter, caution Depositor 1 that he (the Respondent) would treat the funds transferred into the Trust Account as the Client's funds; that he would take instructions only from the Client regarding the disbursement of the funds deposited by Depositor 1; and that

he (the Respondent) would not protect the interests of Depositor 1, the funder or the purchaser.

[16] On November 1, 2011, Depositor 1 wired $39,992.50 US to the Trust Account from a Swiss bank. The transfer documentation for the wire transfer indicates that the funder was an "overseas management company" in the British Virgin Islands.

[17] The Respondent admits that he received the funds from Depositor 1 in his capacity as the Client's lawyer.

[18] Based on the verbal advice of the Principal and in the absence of any written trust conditions, the Respondent treated the funds wired by Depositor 1 to the Trust Account as the Client's funds from the time of receipt.

[19] On November 1, 2011, the Principal gave the Respondent written instructions to disburse the funds. The Respondent paid $20,000 US out of trust to Company A as a loan. He also issued a cheque from the Trust Account to his general account in the amount of US $20,000 and then wired those funds to a California bank, to the credit of another company related to the Principal ("Company B").[1] The funds paid to Company B were a loan.

[20] After paying the funds from the Trust Account to Company A and Company B, the Respondent drafted convertible promissory notes in relation to the loans.

[21] When the Respondent disbursed the funds from the Trust Account on November 1, 2011, he did not know whether the share purchase for which the funds were paid into trust had completed. The Respondent learned some time later that the share transaction had not, in fact, completed.

[22] On November 2, 2011, the Respondent sent an email to Depositor 1 confirming receipt of US$39,992.50 into the Trust Account.

[23] Between December 2011 and February 2012, the Respondent and Depositor 1 exchanged email correspondence about the incomplete share transaction. Then, on February 16, 2012, Depositor 1 emailed the Respondent and said:

> Hi Rene

[1] At the hearing of this matter, the Respondent explained that he made the transfer from his trust to his general account because the Rules of the Law Society in November 2011 prohibited a lawyer from making wire transfers from a trust account.

> I am told that we should be receiving the USD 40k back from the [Company A] subscription. Please confirm and I will send you transfer instructions.

[24] The following day, the Respondent replied to Depositor 1:

> That was the rumor I heard too. But unfortunately I have not seen any funds.
>
> If, and when, the funds show up I will let you know and get your wire instructions then. …

[25] In another email to Depositor 1 on the same day, the Respondent said:

> What I am waiting for is the receipt of the funds to be returned, if I am to receive any, as the client may be sending them from some other account.

[26] Between October 2012 and January 2013, the Respondent and Depositor 1 exchanged other emails about the funds paid to the Trust Account in the Depositor 1 transaction. At some times, Depositor 1 claimed that the funds were paid under an escrow agreement. The evidence shows that there was no such agreement and that the claim was fallacious.

[27] The Respondent never returned the funds to Depositor 1, or to the funder or the purchaser in the Depositor 1 transaction. There is no evidence that the shares at issue in the Depositor 1 transaction were not eventually received or the purchase funds returned in place of delivery of the shares. No civil action was taken against the Respondent in relation to the Depositor 1 transaction.

[28] In early 2012, Depositor 1 was arrested in Manitoba. He was subsequently charged with money laundering, convicted and sentenced to three years in prison. In 2014, the British Columbia Securities Commission found Depositor 1 guilty of conduct contrary to the public interest for his part in illicit stock promotion. The Securities Commission suspended Depositor 1 from participating in trading activities for five years. The criminal and administrative penalties against Depositor 1 do not relate to any of the transactions at issue in the citation against the Respondent.

Investigation by the Law Society

[29] On December 27, 2012, Depositor 1 complained to the Law Society that he had provided US$32,992.50 to the Respondent to purchase shares in a company but that

the shares were never received.[2] On February 5, 2013, Depositor 1 provided further details of his complaint.

[30] In February 2013, the Law Society opened a file and began to investigate Depositor 1's complaint. In the course of the investigation, the Law Society examined other Trust Account transactions, including the two that follow.

The Depositor 2 transaction

[31] On October 26, 2011, the Respondent received US$40,828.70 into the Trust Account by wire transfer from a Panamanian company ("Depositor 2"), which transmitted the funds on behalf of a client (the "payor"). Soon after receiving the funds, the Respondent learned they were for the purchase of shares in Company A.

[32] On October 28, 2011, the Principal gave the Respondent written instructions to pay US$40,000 from the Trust Account to a bank in Santa Monica, California "[f]or the purpose of wiring funds to [Company B] as loan proceeds for a convertible note." Acting on those instructions, the Respondent issued a cheque from the Trust Account to his general account, and paid US$40,000 to Company B by wire transfer from his general account. The Respondent then advised the Principal by email that the wire transfer was complete.

[33] The Respondent had no knowledge of, or involvement in, the transaction for which he received and disbursed the funds in the Depositor 2 transaction. In particular, the Respondent did not know: the identity of the payor; the relationship between Depositor 2 and the payor; or the identity of the parties to the share transaction. Moreover, the Respondent did not know the details, terms and conditions of the share transaction. He did not request, obtain or prepare any written documentation pertaining to the Depositor 2 transaction.

[34] The Respondent did not, at any time, caution Depositor 2, the payor, or any person or entity that the Respondent believed had deposited the funds into the Trust Account, that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force.

[35] The Respondent did not know whether the Depositor 2 share transaction had completed when he paid funds out of the Trust Account. In fact, the Depositor 2 share transaction had not completed.

[2] The error in the statement of the amount sent to the Trust Account is Depositor 1's error.

[36] On November 7, 2011, the payor sent an email to the Respondent that noted that "the sum of $40,830" was wired to "your US$ trust account for the purchase of … shares of [Company A]." The email continued, "to date we have received no paper from you and so we are enquiring into receipt of a Purchase and Sale Agreement and eventual receipt of the shares."

[37] The Respondent did not respond to the payor's email.

[38] The payor sent further emails to the Respondent on February 7 and 14, 2012 requesting a refund of the Depositor 2 funds by payment in trust to another British Columbia law firm. The Respondent forwarded the February 7 and 14, 2012 emails to the Principal. The Principal sent the Respondent an email on February 15, 2012 stating that he would "work on this."

[39] The funds the Respondent held in trust to the Client's credit in mid-February 2012 were not sufficient to repay the Depositor 2 funds.

[40] On February 23, 2012, a business associate of the Principal, who was also among the Respondent's clients, wired US$100,000 into the Trust Account and gave the Respondent written authorization to take instructions from the Principal as to the disbursement of these funds. On February 29, 2012, the Principal instructed the Respondent to refund the Depositor 2 transaction from the proceeds deposited by the business associate. The Respondent did so the same day by paying US$40,828.70 in trust to the law firm indicated by the payor.

The Depositor 3 transaction

[41] On December 6, 2011, a company ("Depositor 3") paid US$33,760.50 to the Trust Account. The Respondent did not communicate with Depositor 3. The Respondent permitted the Trust Account to be used to receive and disburse the Depositor 3 funds, based on instructions from the Principal.

[42] Upon receipt of the Depositor 3 funds, the Respondent credited the funds to the Client. The Respondent was informed by the Principal that the Depositor 3 funds were payment for consulting services that the Principal had delivered through the Client. When asked during the Law Society investigation why the funds went through the Trust Account and were not paid directly to the Client, the Respondent stated that he "suspect[ed]" that the Client "never had a bank account."

[43] The Respondent did not provide any legal services in connection with the receipt or disbursement of the Depositor 3 funds.

[44] Between December 8, 2011 and January 2, 2012, the Respondent disbursed the Depositor 3 funds from the Trust Account in four tranches. On December 8, 2011, the Respondent paid out $3,000 as a loan to a corporate entity. On December 19, 2011, the Respondent paid out $22,000 as a loan to the Principal. On December 21, 2011, the Respondent paid out $8,000 as a loan to cover an invoice for Company B's audit fees. Finally, on January 2, 2012, the Respondent disbursed funds in part payment of an invoice he had issued to the Client.

[45] The Respondent did not advise Depositor 3, or any other person or entity he believed deposited the funds to the Trust Account, that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force.

Citation

[46] On October 25, 2018, the Law Society issued a citation against the Respondent (the "original citation"). The original citation alleged professional misconduct, pursuant to section 38(4) of the *Act* on two grounds. First, the original citation alleged that, between 2004 and 2012, the Respondent used his trust account to receive and disburse funds on behalf of the Client in four transactions in which the Respondent: failed to provide any substantial legal services in connection with the trust matters; failed to make reasonable inquiries regarding the circumstances surrounding the trust deposits; and failed to advise the persons depositing the funds that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force. The four transactions identified in allegation 1 of the original citation include those involving Depositors 1, 2 and 3.

[47] Second, the original citation alleged that between 2004 and 2009, the Respondent used the Trust Account to receive and disburse funds on behalf of a company in which the Respondent had an interest (the "non-arms-length company"). The Law Society alleges that the non-arms-length company was used to facilitate 11 transactions in circumstances where the Respondent failed to:

(a) provide any substantial legal services in connection with the trust matters;

(b) advise the persons depositing the funds into the Trust Account that he was not protecting their interests, as required by Chapter 4, Rule 1 of the *Handbook* then in force;

(c) advise the persons depositing the funds that the Respondent was accepting and disbursing the funds on behalf of the non-arms-length company; that he had an interest in the non-arms-length company; that

he was acting for the non-arms-length company and not for any party to the transaction; and that, in the circumstance he was "effectively taking instructions from yourself regarding the disbursement of the funds"; and

(d) guard against carrying on business through the non-arms-length company in such a way that a person might reasonably find it difficult to determine whether, in any matter, the Respondent was acting as a lawyer, or might reasonably expect that, in carrying on business through the non-arms-length company, the Respondent would exercise legal judgment and skill for the protection of that person, as required by Chapter 7, Rule 6 of the *Handbook* then in force.

[48] On February 19, 2020, the Law Society issued an amended citation. The amended citation makes the allegations at issue in this Decision.

[49] In addition, the amended citation alleges that, between 2004 and 2005, the Respondent used the Trust Account to receive and disburse funds, purportedly on behalf of the non-arms-length company, and as a vehicle for facilitating three transactions, in circumstances where the Respondent failed to do one or both of:

(a) provide any substantial legal services in connection with the trust matters; or

(b) advise the persons depositing the funds to his trust account, or persons on whose behalf the funds were being deposited, that he was not protecting their interests as required by Chapter 4, Rule 1 of the *Handbook* then in force.

[50] The Law Society did not proceed with those aspects of the amended citation related to the non-arms-length-company.

Admission of misconduct

[51] The Respondent admits the facts set out above in relation to each of the Depositor 1, 2 and 3 transactions and admits that he committed professional misconduct in respect of the Law Society's allegations in relation to those transactions.

ANALYSIS

Professional misconduct

[52] The first task of the Hearing Panel is to determine whether the Respondent's conduct in any of the Depositor 1, 2 and 3 transactions is professional misconduct. In other words, we must determine whether his admission of professional misconduct should be accepted.

[53] Professional misconduct occurs where there is "a marked departure from the conduct that the Law Society expects of its members": *Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171. A "marked departure" involves a "fundamental degree of fault" or a "gross neglect" of duties as a lawyer: *Martin* at para. 154. The test is an objective test: *Law Society of BC v. Sangha*, 2020 LSBC 03 at para. 67. The Law Society bears the onus of proof on the balance of probabilities: *Law Society of BC v. Dent*, 2015 LSBC 37 at para. 54.

Failure to provide the caution

[54] We begin with the allegation that the Respondent committed professional misconduct in one or more of the Depositor 1, 2 and 3 transactions by failing to provide the caution required by Chapter 4, Rule 1 of the *Handbook* then in force (the "caution"). At the times of the transactions, Chapter 4, Rule 1 of the *Handbook* provided:

> A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and the unrepresented person that the latter's interests are not being protected by the lawyer.

[55] The Respondent admits that he did not advise any of those involved in the Depositor 1, 2 and 3 transactions that he was not protecting the interests of those who were not his clients. The Respondent therefore breached the Rule in respect of all three transactions. Does the breach rise to level of misconduct?

[56] The reason why a lawyer in British Columbia is required to give the caution when dealing with unrepresented persons is the concern that "an unsophisticated and unrepresented party in his or her dealings with a lawyer will develop the impression that the lawyer is representing them in circumstances where the impression is not accurate": *Law Society of BC v. Skogstad*, 2008 LSBC 19 ("*Skogstad* facts") at para. 54. The Hearing Panel appreciates that it is unlikely that the unrepresented persons involved in the Depositor 1, 2 and 3 transactions were "unsophisticated." Certainly, it cannot be said on the evidence that Depositor 1 was "unsophisticated."

Nonetheless, the protection of the public requires that lawyers consistently adhere to the requirement to provide the caution. This is reflected in the use of the word "must" in Chapter 4, Rule 1.

[57] Moreover, the Hearing Panel observes that the Respondent failed to provide the caution in three separate transactions over a span of weeks between late October 2011 and early January 2012. The repeated failure to provide the caution shows a persistent disregard for the Respondent's professional obligations. This constitutes a marked departure from, and gross neglect of, the Respondent's duties as a lawyer.

Failure to provide any substantial legal services in connection with the trust transactions

[58] We turn to the allegation that the Respondent committed misconduct by his failure to provide any substantial legal services in connection with one or more of the Depositor 1, 2 and 3 trust transactions.

[59] The admitted facts show that no legal services were provided in connection with the Depositor 2 and 3 transactions. To the extent that the Respondent provided legal services in relation to the Depositor 1 transaction, they were provided to the Client *after* the transactions through the Trust Account and not in *connection* with it. The factual element of the allegation is made out in respect of each transaction.

[60] Was the failure to provide substantial legal services in connection with trust transactions misconduct? The parties' written submissions diverge on this point. The Law Society acknowledges that, in 2011 to 2012, neither the Law Society Rules nor the *Handbook* included an express requirement that lawyers use their trust accounts to receive and disburse funds only if providing related legal services. The Law Society argues, however, that the obligation was implicit. In support of this argument, the Law Society points to publications and bulletins issued between 1999 and 2005 commenting on lawyers' obligations to guard against becoming unwitting facilitators of crime or fraud, and to the reasoning in *Law Society of BC v. Hops*, 1999 LSBC 29, *Skogstad* facts and *Law Society of BC v. Skogstad*, 2009 LSBC 16 ("*Skogstad* DA"). The Law Society also submits that, in any event, the Hearing Panel is not asked to decide whether in 2011 to 2012 a lawyer was subject to a "stand-alone" professional obligation to forebear from allowing his trust account to be used for transactions except where the lawyer provides substantial legal services in connection with the transaction.

[61] In response, the Respondent argues that it is significant that, as of 2011 to 2012, no lawyer in British Columbia had been disciplined for receiving funds into trust in the absence of significant related legal services. The Respondent also argues that Law

Society publications warning lawyers to be on guard against those aiming to ensnare unwitting lawyers in fraudulent schemes are inapt to the circumstances of the case.

[62] We agree with counsel for the Respondent to the extent that Law Society publications warning lawyers to be on the alert for fraudsters do not particularly assist with the analysis required in this case. This case does not involve a lawyer as dupe to a fraudster. It is therefore unnecessary for the Hearing Panel to analyze the "anti-fraud" bulletins cited by counsel for the Law Society.

[63] We also agree with the Law Society that we need not determine whether lawyers in 2011 to 2012 were subject to a "stand-alone" obligation not to permit funds to be transacted through their trust accounts, except when related legal services were provided. The citation against the Respondent alleges that *one or more* of the Respondent's failures to caution unrepresented parties, and to provide substantial legal services in connection with the trust transactions, constitutes professional misconduct. In the agreed statement of facts, the Respondent admits that his conduct in respect of *both* omissions constitutes misconduct. Counsel for the Respondent explained at the Hearing that it is the "two things together" that constitute the misconduct in this case.

[64] We are satisfied that the Respondent's global admission of misconduct is correct. The Respondent's decision to allow the Client to process three transactions through the Trust Account, although he did *no* legal work in connection with those transactions, is an element of his professional misconduct in respect of the Depositor 1, 2 and 3 transactions.

[65] Lawyers' trust accounts are not the same as ordinary bank accounts. They exist to allow lawyers to complete transactions in which the lawyer acts as legal adviser and facilitator: *Skogstad* facts. Transactions that flow through a lawyer's trust account are, therefore, cloaked by solicitor-client privilege. Solicitor-client privilege is stringently protected. It has been described "as close to absolute as possible": *Canada (Attorney General) v. Federation of Law Societies*, 2015 SCC 7 at para. 44.

[66] It has long been understood that lawyers must guard against potential misuse of their trust accounts precisely because solicitor-client privilege applies to lawyers' trust transactions for clients. The principle that a lawyer's trust account should be used only in connection with the lawyer's legal work for the client is the profession's basic firewall against the abusive use of trust accounts. *Skogstad* facts affirmed the importance of maintaining this firewall.

[67] In *Skogstad* facts, the hearing panel found that the respondent had committed professional misconduct by failing to provide the caution required by Chapter 4, Rule 1 of the *Handbook*. In the course of so finding, the hearing panel dealt with the respondent's decision to allow his firm's trust account to be used as a means for investors to funnel investment proceeds to the lawyer's client. The hearing panel said at para. 61:

> Trust accounts must only be used for the legitimate commercial purposes for which they are established, namely to aid in the completion of a transaction in which the lawyer or law firm plays a role as legal advisor and facilitator. The Respondent … was merely a convenient and apparently legitimate conduit for funds from the individual investors to the various schemes decided upon by F for V. The trust account served no legitimate role in these events and should not have been so employed.

[68] This passage was later adopted and applied by the hearing panel in *Law Society of BC v. Gurney*, 2017 LSBC 15 at para. 79.

[69] The facts at issue in *Skogstad* facts are distinguishable from the instant case, in as much as the lawyer's client in *Skogstad* 2008 was involved in fraud. There is no evidence of fraud in this case. Nonetheless, the lawyer's duty to ensure that their trust account is used for the purposes for which it was intended does not depend on whether the client's eventual use of money paid through the trust account proves to be illicit. To maintain public confidence in the profession, a trust account must only be used for the legitimate commercial purpose for which it was established; it must "not be used as a convenient conduit": *Gurney* at para. 79.

[70] In 2011 to 2012, the Respondent ought to have known that he was professionally obliged not to permit his trust account to be used for transactions that were unconnected to legal work. We therefore find that the Respondent's failure to provide any substantial legal services in connection with the Depositor 1, 2 and 3 trust transactions is part and parcel of his professional misconduct in respect of those transactions.

DISCIPLINARY ACTION

[71] Having found the Respondent culpable for professional misconduct under s. 38(4) of the *Act*, the Hearing Panel is required to impose disciplinary action: s. 38(5) of the *Act*. By statute, penalties may range from a reprimand to disbarment. The hearing panel has a measure of discretion in determining the appropriate disciplinary action: *Law Society of BC v. Lessing*, 2013 LSBC 29 at paras. 49 to 51.

Our paramount concern is to uphold and protect the public interest in the administration of justice: s. 3 of the *Act*.

[72] The parties jointly submit that a two-week suspension is an appropriate disciplinary action for the Respondent's misconduct. Having regard to the particular facts of the case, we agree.

The legal framework

[73] The legal framework for determining an appropriate disciplinary action where professional misconduct is proven is elaborated in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, in *Lessing* and in *Law Society of BC v. Faminoff*, 2017 LSBC 04.

[74] The imposition of disciplinary action is an individualized process: *Faminoff* at para. 84. Generally speaking, however, the hearing panel will aim to balance the protection of the public interest and allowing the lawyer to practise. In the event of conflict between these two factors, however, the protection of the public will prevail: *Lessing.*

[75] *Ogilvie* sets out a range of factors that may be considered in disciplinary dispositions:

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

(b) the age and experience of the respondent;

(c) the previous character of the respondent, including details of prior discipline;

(d) the impact upon the victim;

(e) the advantage gained, or to be gained, by the respondent;

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

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

(h) the possibility of remediating or rehabilitating the respondent;

(i) the impact on the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed disciplinary action on the respondent;

(k) the need for specific and general deterrence;

(l) the need to ensure the public's confidence in the integrity of the profession; and

(m) the range of penalties imposed in similar cases.

[76] The *Ogilvie* factors are guidelines and not a straightjacket. They are to be applied through the lens of what is required to protect the public interest in the circumstances of the given case: *Law Society of BC v Straith*, 2020 LSBC 11 at para. 95. Accordingly, not all *Ogilvie* factors will come into play in every case, and the relative weight of the applicable factors may vary from case to case: *Lessing* at para. 56.

Factors and considerations applicable in the present case

[77] The relevant *Ogilvie* factors may be conveniently grouped as follows.

Circumstances related to the proven misconduct

[78] The Respondent's misconduct in relation to the Depositor 1, 2 and 3 transactions was serious. The Hearing Panel is struck by the fundamental nature of the Respondent's failings and the repetitive nature of the misconduct. The duty to caution under Chapter 4, Rule 1 of the *Handbook* and the requirement to act as gatekeeper to one's trust account are elemental professional obligations. The Respondent's failures to meet these basic standards of professional conduct in three different transactions supports the imposition of a suspension, rather than a lesser penalty.

[79] There is no evidence of loss in the Depositor 2 and 3 transactions, although the Respondent's misconduct certainly created conditions where loss could have occurred. The facts do not disclose whether Depositor 1 or anyone connected with him sustained loss. We do, however, harbour serious doubts about Depositor 1's credibility. His conviction for money laundering and his false claim that the funds he deposited into the Trust Account were subject to an escrow agreement do not inspire confidence in the veracity of his complaint that he suffered loss in the Depositor 1 transaction.

[80] The Hearing Panel also appreciates that there is no evidence of fraud in the Depositor 1, 2 and 3 transactions, and that the Respondent's misconduct in respect of them was not dishonest. He neither sought nor enjoyed gain from his

misconduct. Inattention, rather than intention, lay at the root of the Respondent's culpable acts and omissions.

[81] We consider that the mitigating factors in the circumstances of the proven misconduct are relevant to the appropriate length of suspension, rather than to whether a suspension is warranted.

The Respondent's circumstances

[82] The Respondent has been in practice since 1993. He has no disciplinary history.

[83] The Respondent admitted to his misconduct after the amended citation was issued. He expressed regret that his acts and omissions gave rise to a complaint and investigation against him. He has also given his written commitment to the Tribunal to strictly comply with his professional obligations under the Law Society Rules and the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

[84] The Law Society and counsel for the Respondent submit that specific deterrence is not a factor in this case, but both submit that a two-week suspension is necessary. We accept that, in all the circumstances, a suspension of two weeks is required.

Guidance from prior cases

[85] Prior cases provide limited guidance with respect to the appropriate disciplinary action in this case.

[86] There are numerous cases in which a lawyer has been disciplined for failing to provide the caution required by Chapter 4, Rule 1 of the *Handbook.* Some of these are cases in which the disciplinary action was determined pursuant to the consent resolution process provided for in Rule 4-30. Three examples of Chapter 4, Rule 1 decisions are: *Law Society of BC v. Ebrahim*, 2010 LSBC 14; *Law Society of BC v. Jensen*, 2015 LSBC 10; and *Law Society of BC v. Dent*, 2016 LSBC 05 ("*Dent* DA"). In those cases, the respondents were subject to a fine and a reprimand or a fine and costs. It is important to note, however, that *Ebrahim*, *Jensen* and *Dent* 2016 did not involve an additional allegation that the respondent received and disbursed trust funds without providing substantial legal services in connection with the trust transactions.

[87] *Hops, Skogstad* DA and *Gurney* were decisions involving use of the respondent's trust fund in the absence of the respondent providing significant legal services to the client.

[88] In *Hops*, various misconduct allegations were made in relation to the receipt into the respondent's trust account of approximately $300,000. The money was sent in a series of wire transfers by an unrepresented third party intending to make investments in a client's investment scheme. The scheme was fraudulent. The only part of the citation that was proved was the respondent's failure to give the caution required by Chapter 4, Rule 1 of the *Handbook*. The hearing panel ordered a reprimand, a fine of $10,000 and costs of $7,500. In arriving at the disciplinary action, the hearing panel noted that the respondent was not involved in the investment transactions and had permitted his trust account to be used as a vehicle for a fraud. On review, the Benchers reduced the fine and costs to $3,000 each, on the footing that the respondent's conduct should not be described as "dishonourable or disgraceful" but was better described as "unbecoming as being contrary to both the best interests of the public and the legal profession, and tended to harm the standing of the legal profession": *Hops* at para. 59.

[89] We find *Hops* to be of limited assistance in assessing the appropriate disciplinary action in this case. The penalty in *Hops* turned on the "peculiar nature" of the transactions through the respondent's trust account, and the respondent's failure to question the business efficacy of their underlying transactions: *Hops* at paras. 53 and 59. Those circumstances are different from the circumstances prevailing in the present case.

[90] In *Skogstad* DA (which is the disciplinary action decision in the proceedings at issue in *Skogstad* facts), the respondent was found to have committed misconduct by failing to give the Chapter 4, Rule 1 caution and by failing to record the source of all funds he received, contrary to Rule 3-60 of the Law Society Rules then in effect. The hearing panel heard joint submissions on penalty and accepted them. The panel imposed a three-month suspension and ordered the respondent to pay $20,000 in costs. As discussed above, the respondent's client in *Skogstad* facts and DA was engaged in fraud.

[91] *Gurney* involved misconduct arising from the respondent receiving into and disbursing from trust more than $25 million over the course of seven months in 2013. The funds were received and paid out in relation to the client's credit and lending scheme. The circumstances of the transactions were suspicious. The hearing panel found that the respondent had failed to make reasonable inquiries about the circumstances of the transactions, including the subject matter and objectives of his retainer, and had failed to provide any substantial legal services in connection with the trust matters. The hearing panel ordered a six-month suspension, with conditions on return to practice, and disgorgement of the $25,845 fee that the respondent had earned as a result of his misconduct. In assessing the

disciplinary action, the hearing panel treated the amounts and frequency of the transactions as aggravating factors. The panel also took into account the respondent's lack of understanding of the nature and extent of his misconduct, his age and his long experience as a solicitor, having been called to the bar in 1968. The panel expressed concern about the respondent's prospects for rehabilitation.

[92] *Skogstad* DA and *Gurney* offer limited guidance to determine the appropriate disciplinary action in this case. The conduct at issue in those cases was considerably more severe than in the present case, and the circumstances of the disciplined lawyers are distinguishable from the Respondent's circumstances.

Other public interest considerations

[93] In considering the appropriate disciplinary action, we have considered what is required to maintain public confidence in the legal profession and to offer general deterrence against similar misconduct in the future.

[94] The misconduct proven in this case is dated. It occurred more than eight years ago. A suspension of two weeks for misconduct that occurred so long ago is sufficient to maintain confidence in the profession now.

[95] Moreover, since the time of the events at issue, the *Handbook* has been repealed and replaced by the *BC Code*.

[96] Section 7.2-9 of the *BC Code* has replaced Chapter 4, Rule 1 of the *Handbook.* The substantive content of section 7.2-9 differs to some extent from the version of Chapter 4, Rule 1 in effect at the time of the Depositor 1, 2 and 3 transactions. Section 7.2-9 now provides:

> When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:
>
> (a) urge the unrepresented person to obtain independent legal representation;
>
> (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
>
> (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

[97] The *BC Code* also now contains the following commentaries in respect of section 3.2-7, which provides that a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud:

> [3.1] The lawyer should also make inquiries of a client who:
>
> (a) seeks the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or
>
> (b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.
>
> [3.2] The lawyer should make a record of the results of these inquiries.

[98] The development of the *BC Code* since the Respondent's misconduct attenuates the need to factor general deterrence into the length of the suspension called for in this case. The *BC Code* gives contemporary guidance to lawyers on their professional obligations when dealing with unrepresented persons, and in relation to transactions through lawyers' trust accounts.

Delay

[99] As noted in para. 30 above, the Law Society's investigation into the Respondent's practice started in February 2013 and continued until the original citation was issued some five and a half years later, on October 25, 2018. The amended citation was issued on February 19, 2020.

[100] Simply put, the investigation into the Respondent and his practice was of extremely long duration. It does not foster public confidence in the Law Society's regulatory process for an investigation into the type of conduct at issue in the Respondent's case to take five and a half years. Counsel for the Respondent did not argue that delay is a defence to the citation, but did argue that it should be taken into account in deciding the length of suspension that ought to apply in this case. The Law Society agreed that it would be appropriate to take delay into account.

[101] Unreasonable delay may be considered in mitigation of penalty: *Christie v. Law Society of BC*, 2010 BCCA 195 at para. 31. We have taken delay into account in finding that a two-week suspension is appropriate in this case.

DECISION ON DISCIPLINARY ACTION:

[102] For the reasons set out above, we conclude that a two-week suspension is the appropriate disciplinary action.

[103] At the Hearing of the citation, the Respondent submitted that, if ordered by the Hearing Panel, he would be prepared to start a suspension on May 1, 2020. The Law Society submitted that the "usual order" is that a suspension will commence in the month following the Tribunal's decision. That said, the Law Society did not oppose a May 1, 2020 start date. The Hearing Panel notes that May 1, 2020 is a Friday.

[104] A new consideration has arisen since the citation was heard: the effects of the Covid-19 pandemic. It is unknown to us whether and, if so, how, the Respondent's clients and the public may be affected by the pandemic and this suspension. It is unknown how long British Columbia's state of emergency may persist.

[105] In light of changed circumstances since March 12, 2020, we order that the Respondent be suspended from the practice of law for two weeks beginning May 4, 2020 or such other date as the parties may agree. The Hearing Panel strongly encourages the parties to use best efforts to determine an appropriate date for the Respondent to start his suspension, should May 4, 2020 prove to be unsuitable. If the parties are unable to agree, one of them may apply to vary the start date under Rule 5-12(1)(c).

COSTS

[106] Section 46 of the *Act* and Rule 5-11 give the hearing panel jurisdiction over the matter of costs. Rule 5-11(4) provides that the hearing panel may order that no party recover costs.

[107] The parties in this case submit that costs should not be paid by either party. We agree. Although the Law Society has been successful in proving the elements of the first allegation of the amended citation brought to hearing, numerous allegations made in the original citation were withdrawn in the amended citation and the Law Society did not proceed with the second allegation of the amended citation. Moreover, the Law Society abandoned the second allegation of the amended citation, which concerned transactions relating to the non-arms-length company.

[108] In the circumstances, it is appropriate that neither party should have costs.

[109] The Hearing Panel has considered Rule 5-11 and the parties' submissions on costs. We order that no costs are payable by either party.

CONFIDENTIALITY ORDER

[110] The Client, the Principal and the non-arms-length company have not expressly or impliedly waived solicitor-client privilege over their communications with the Respondent. Likewise, they have not released the Respondent from his duty to keep confidential the details of their affairs. The Respondent therefore seeks, and the Law Society consents to, an order to protect privilege and confidentiality, pursuant to Rule 5-8(2). We order as follows:

(a) If any person, other than a party, seeks to obtain a copy of any exhibit filed in these proceedings, client names, identifying information, and any other information that is protected by client confidentiality and solicitor-client privilege must be redacted from the exhibit before it is disclosed to that person;

(b) If any person, other than a party, applies for a copy of the transcript of these proceedings, client names, identifying information, and any other information that is protected by client confidentiality or solicitor-client privilege must be redacted from the transcript before it is disclosed to that person;

(c) No person is permitted to broadcast or publish any client names, identifying information, or any other information protected by client confidentiality or solicitor-client privilege, that was stated in the course of the hearing; and

(d) These redactions also apply to the original citation and the amended citation.