2021 LSBC 07
Decision issued: February 16, 2021
Citation issued: June 14, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

KENSEELAN GOUNDEN

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing Date:	October 27, 2020
Panel:	John Waddell, QC, Chair Lance Ollenberger, Public representative Chelsea Wilson, Lawyer
Discipline Counsel:	Jordanna Cytrynbaum
Counsel for the Respondent:	Henry C. Wood, QC

INTRODUCTION AND OVERVIEW

[1] The citation in this matter (the "Citation") was authorized by the Discipline Committee on June 5, 2019 and was issued on June 14, 2019. The Citation was amended on January 23, 2020.

[2] Pursuant to the Citation, the allegations against the Respondent, Kenseelan Goundan, are as follows:

1. Between approximately June 25, 2017 and July 9, 2019, in the course of the Respondent's employment as chief executive officer of B.C. Courthouse Libraries Society ("CLBC"), he:

(a) misappropriated from CLBC some or all of $3,524.99 to which he was not entitled; and

(b) submitted claims on 27 CLBC expense reimbursement claim forms, one or more of which the Respondent knew or ought to have known were either falsified to claim more than he had paid for those expenses or did not relate to CLBC business, or both

("Allegation 1")

2. On or around June 22, 2018, in the course of the Respondent's employment as chief executive officer of CLBC, the Respondent submitted claims on an expense reimbursement claim form dated June 22, 2018, one or more of which he knew or ought to have known were previously submitted to the Canadian Avalanche Association ("CAA") for reimbursement and which did not relate to CLBC business, and in some cases were falsified

("Allegation 2").

[3] The Citation alleges that the entirety of the conduct described in the Citation constitutes professional misconduct or conduct unbecoming a lawyer, pursuant to section 38(4) of the *Legal Profession Act* (the "*Act*"). That section was amended in 2018 to refer to "conduct unbecoming the profession", but nothing turns on the change of terminology.

[4] The Respondent admits proper service of the Citation through his counsel and waives the requirements of Rule 4-19 of the Law Society Rules (the "Rules").

[5] The Respondent admits the conduct at issue in the Citation and that such conduct amounts to professional misconduct or, in the alternative, conduct unbecoming the profession.

[6] The parties jointly made a submission (the "Joint Submission") with respect to the Respondent's admission of professional misconduct or conduct unbecoming, and the parties' agreement concerning the appropriate penalty.

[7] For the reasons given below, the Panel accepts the Respondent's admission of professional misconduct, as well as the parties' Joint Submission regarding the proposed disciplinary action. The Panel also orders the Respondent to pay the Law Society costs in the amount of $5,326.25.

ISSUES

[8] The issues before the Panel are:

(a) whether the conduct admitted by the Respondent amounts to professional misconduct or, in the alternative, conduct unbecoming the profession ("Issue 1"); and

(b) whether to impose the disciplinary action proposed in the Joint Submission ("Issue 2").

FACTS

Agreed Statement of Facts

[9] The parties submitted an Agreed Statement of Facts dated March 23, 2020. The following facts generally mirror the Agreed Statement of Facts, unless otherwise noted.

The Respondent's background

[10] The Respondent was called to the bar and admitted as a member of the Law Society of British Columbia on May 17, 1992. From 1998 to 2017, the Respondent was employed by the Law Society of British Columbia; first as a Professional Conduct lawyer; and later as the Manager of Professional Standards and Practice Advice.

[11] In 2011, the Respondent commenced employment as general counsel for the College of Psychologists of British Columbia ("CPBC").

[12] On June 5, 2017, the Respondent began his employment with CLBC as chief executive officer ("CEO"). Although the CEO role with CLBC was a full-time position, the Respondent was permitted to continue to provide legal services to the CPBC outside of CLBC work hours.

CLBC expenses

[13] The Respondent's written offer of employment from CLBC dated January 30, 2017 provides that "relationship building, lunches, dinners and travel" are a function of the role of the CEO. It also says that the Respondent will be reimbursed for all reasonable out-of-pocket business related expenses actually and properly incurred.

[14] The Respondent's Executive Employment Agreement with CLBC dated June 19, 2018 provides that CLBC will reimburse the Respondent for "reasonable expenses incurred … in the course of his duties as Chief Executive Officer … ."

[15] The Respondent used both a corporate CLBC credit card and his own credit card for business expenses.

Allegation 1

[16] The Respondent admits, as set out in Allegation 1, that between approximately June 25, 2017 and July 9, 2018, in the course of his employment as CEO of CLBC, he:

(a) misappropriated from CLBC some or all of $3,524.99 to which he was not entitled; and

(b) submitted claims to CLBC on 27 separate expense reimbursement claim forms, that contained claims that the Respondent knew or ought of have known were either:

(i) altered to claim for more than he paid for the expenses;

(ii) did not relate to CLBC business; or

(iii) both.

[17] The claims the Respondent improperly submitted to CLBC for reimbursement related to such matters as parking, mileage, meals, hotel costs, airfare, ferry costs and taxi fare. The requests for reimbursement were improper because the expenses at issue were not incurred in the course of the Respondent's employment with CLBC and the Respondent knew he was not entitled to be reimbursed for those expenses. In a number of instances, the Respondent admitted to having altered airfare receipts, airline tickets and accommodation receipts to seek reimbursement for slightly more than the original value of the expense.

Allegation 2

[18] The Respondent further admits, as set out in Allegation 2, that on or around June 22, 2018, in the course of his employment as CEO of CLBC, he:

(a) submitted claims to CLBC on an expense reimbursement claim form dated June 22, 2018, that contained claims that the Respondent knew or ought to have known:

(i) had previously been submitted to CAA for reimbursement;

(ii) did not relate to CLBC business, and

(iii) in some cases were altered.

[19] This allegation arises from the Respondent's attendance at a CAA board retreat on June 14, 2018 in Canmore, Alberta. CAA had agreed to pay the Respondent's hotel room in Calgary directly and to reimburse him for any other proper expenses he incurred for the trip, including car rental and airfare.

[20] On June 14, 2018, the Respondent received an email from CAA confirming that it had paid for a hotel room in Calgary through Expedia for the night of June 14, 2018. CAA had paid the $123.11 hotel charge using its corporate MasterCard.

[21] On June 22, 2018, the Respondent submitted an expense reimbursement claim form to CLBC for the same expenses he had previously submitted to CAA for the Canmore/Calgary trip. In the expense form, the Respondent also sought reimbursement from CLBC for the Expedia hotel charge that CAA had paid directly.

[22] The Respondent admitted to having altered four receipts attached to the June 22, 2018 expense form so as to increase the Air Canada, car rental, Expedia and Victoria Airbnb charges, and to change the credit card number on the Expedia receipt to make it appear that the Respondent had paid for the hotel using his personal Visa card.

[23] The Respondent admitted that, at the time he submitted the June 22, 2018 expense form to CLBC, he knew he was not entitled to reimbursement for the Canmore/Calgary trip as the trip was not related to CLBC business. He also admitted that he had already submitted the receipts for expenses he incurred to CAA for reimbursement.

[24] The Respondent also admitted that, at the time he submitted the June 22, 2018 expense form, he knew he was not entitled to reimbursement for the Victoria Airbnb charge as it did not relate to CLBC business.

[25] The Respondent admitted to having received a cheque from CAA for the claims he submitted to CAA for reimbursement. His misconduct with CLBC then came to light, and he did not cash the cheque.

Resignation and self-reporting

[26] In or around June or July 2018, CLBC discovered the Respondent's misconduct in relation to the June 22, 2018 expense reimbursement form he had submitted to CLBC. CLBC confronted the Respondent about the June 22, 2018 expense reimbursement form.

[27] On July 7, 2018, the Respondent submitted a letter of resignation to CLBC. At the Hearing, the parties clarified that the Respondent also resigned from his position with CPBC shortly after he submitted his letter of resignation to CLBC.

[28] On July 18, 2018, the Respondent self-reported to the Law Society. In his letter, the Respondent acknowledged the improper claims related to the June 22, 2018 expense reimbursement form but did not disclose that he had previously submitted 26 other expense reimbursement forms containing improper claims for reimbursement or that included receipts and other documents that he had altered to claim more than the original value of those expenses.

[29] In August 2018, in the context of the investigation, the Respondent provided a voluntarily undertaking:

(a) not to accept trust funds or operate a trust account; and

(b) to limit his practice of law to performing legal services for CPBC and performing legal services as an employee of a law firm in New Westminster, British Columbia, with all invoices for legal services and disbursements being approved in writing by the principal of that firm.

Reimbursement of CLBC by the Respondent

[30] On August 8, 2019, the Respondent paid CLBC $4,317.10 in full reimbursement for the expense claims he had wrongfully submitted. At the Hearing, the Respondent submitted that, due to a misunderstanding between the parties, $4,317.10 is a bit more than the amount by which the parties had agreed that the Respondent was required to reimburse CLBC. The Respondent submitted that he is not seeking any return of funds from CLBC.

Expert reports

[31] The Law Society and the Respondent each tendered expert reports.

[32] The Respondent tendered:

(a) two expert reports from Dr. Rene Weideman, a psychologist and the Respondent's treating therapist;

(b) an expert report from Dr. Marie Fennemore, a psychiatrist and independent expert; and

(c) an expert report from Dr. Michael Elterman, a psychologist and independent expert.

[33] The expert reports of Dr. Weideman, Dr. Fennemore and Dr. Elterman provide information about the context in which the Respondent's behaviour occurred. They show that the Respondent has a lengthy personal history of multiple traumatic experiences. The Respondent's experts offer different theories as to why the Respondent may have committed the misconduct in issue and report that the Respondent is motivated to continue therapy to gain further insights into his behaviour.

[34] At page 13 of her expert report, Dr. Fennemore makes the following recommendations:

1. Mr. Gounden not be allowed to work as a sole practitioner.

2. Ongoing psychotherapy which may help Mr. Gounden gain insight. As per my discussion with Dr. Weideman, I believe that an experienced psychotherapist will be able to move between providing supportive work, and in time move towards more insight-oriented and reparative therapy.

3. A high level of vigilance and supervision to monitor for any evidence of stress, or psychological decompensation, by his family doctor and/or psychotherapist.

4. A high level of supervision should Mr. Gounden be involved with, or have access to, any significant funds, financial transactions or similar proceedings in the foreseeable future.

[35] The conditions in the disciplinary sanction proposed in the Joint Submission are based on Dr. Fennemore's recommendations for mitigating the risk of further misconduct by the Respondent.

[36] The Law Society tendered an expert report from Dr. David Morgan, a forensic psychiatrist with experience addressing criminal behaviour. His report is a critique of the reports from the Respondent's experts. Dr. Morgan did not interview or

meet with the Respondent. The second expert report from Dr. Weideman is a reply to the expert report of Dr. Morgan.

[37] None of the experts testified at the Hearing.

[38] Importantly, all of the experts agree that there is a very low risk that the Respondent will reoffend. Also, in a letter dated October 27, 2020, Dr. Morgan confirms that he had considered the conditions recommended in Dr. Fennemore's expert report and agrees that these conditions will assist in the future management of the Respondent.

Letters of character reference

[39] The Respondent tendered letters of character reference from 12 individuals who know the Respondent in his professional capacity and are aware of the particulars of the Respondent's misconduct. The referees are mostly senior members of the legal profession in the province, including six former Benchers. The references attest to the Respondent's ethics, integrity, strong moral character, dedication to his community and charitable causes, remorse for his misconduct and efforts to rehabilitate himself. The references indicate that the Respondent's misconduct is utterly out of character for him. They are consistently of the view that the Respondent is a good person and an effective lawyer worth saving.

The Respondent's statement

[40] The Respondent gave a statement at the Hearing, in which he expressed remorse for his misconduct and apologized. He stated that he is committed to continuing with therapy and to not engaging in any misconduct ever again.

ANALYSIS

Issue 1: professional misconduct or conduct unbecoming

Onus and standard of proof

[41] The onus of proof in Law Society hearings is well known and consistently applied. The standard was articulated by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53. In *Law Society of BC v. Schauble*, 2009 LSBC 11 at para. 43, the panel cited the court in *McDougall*, and held:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities. "… evidence must be scrutinized with care" and "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. …"

[42] The onus is therefore on the Law Society to prove on a balance of probabilities that the Respondent's conduct amounts to professional misconduct or conduct unbecoming.

Test for professional misconduct

[43] The term "professional misconduct" is not defined in the *Act*, the Rules or the *Code of Professional Conduct for British Columbia* (the "*BC Code*"). The leading case regarding what constitutes professional misconduct is *Law Society of BC v. Martin,* 2005 LSBC 16. In *Martin,* the panel held at para. 171 that the test is:

> … whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members …

[44] The panel commented at para. 154 of *Martin*:

> The real question to be determined is essentially whether 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.

[45] The test is an objective one: *Law Society of BC v. Sangha,* 2020 LSBC 03 at para. 67.

Test for conduct unbecoming

[46] The definition of "conduct unbecoming the profession" is found in section 1 of the *Act*, which provides as follows:

> "conduct unbecoming the profession" includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board,
>
> (a) to be contrary to the best interest of the public or of the legal profession, or
>
> (b) to harm the standing of the legal profession;

[47] Section 3 of the *Act* sets out the object and duty of the Law Society, which includes:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers, …

[48] Further guidance on the meaning and application of the words "best interests of the public" are found in the Canons of Legal Ethics in the *BC Code*. Under section 2.1, the introductory paragraph of the Canons states:

> A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.
>
> In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

[49] Also in the Canons, under the duty to oneself, rule 2.1-5(f), states:

> (f) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

[50] Section 2.2 of the *BC Code* is entitled "Integrity". Commentaries 2 and 3 of rule 2.2-1 state:

> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> [3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that

knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

[51] A useful working distinction between professional misconduct and conduct unbecoming is that professional misconduct refers to conduct occurring in the course of a lawyer's practice whereas conduct unbecoming refers to conduct in the lawyer's private life: *Law Society of BC v. Berge,* 2005 LSBC 28 ("*Berge* 2005") at para. 77, citing *Law Society of BC v. Watt,* 2001 LSBC 16, [2001] LSDD No. 45 at para. 5.

[52] In *Berge* 2005, the panel cited at para. 78 the following passages from *Watt*:

> 19. "Conduct unbecoming a lawyer" is an inclusively-defined term in Section 1(1) of the *Legal Profession Act* which refers to the conduct being considered in the judgment of the Benchers to be either contrary to the best interest of the public or of the legal profession or to harm the standing of the legal profession. Justice Clancy, of the Supreme Court of British Columbia, held, in *Re Pierce and the Law Society of British Columbia* (1993) 103 DLR (4th) 233 at 247:
>
> > When considering conduct unbecoming, the Benchers' consideration must therefore, be limited to the public interest in the conduct or competence of a member of the profession.
>
> 20. The Benchers discipline Members for some "off-the-job" conduct because lawyers hold positions of trust, confidence and responsibility giving rise to many benefits but imposing obligations not shared with most other citizens. For most other citizens, the criminal proceeding for possession of cocaine is all the formal proceeding they would face. For some, in addition to the criminal proceeding, possession of cocaine might also entail loss of employment or virtually-forced resignation from public office. For some, essentially those in the professions, there may be disciplinary proceedings in addition to the criminal proceedings. Mr. Watt's act, because of his privileged professional standing, has more than one aspect and gives rise to more than one legal consequence. *Regina v. Wigglesworth,* (1984) 11 CCC (3d) 27 @ 32-33 is to that effect. If a lawyer acts in an improper way, in private or public life, there may be a loss of public confidence in the lawyer, in the legal profession generally, and in the self-regulation of the legal profession if the conduct is not properly penalized in its professional aspect. It is possible that conduct unbecoming may lead to controversy about the legal profession and lawyers, which may disrupt the proper functioning of lawyers in British

> Columbia as they relate to clients, interested third parties (such as witnesses, police officers, and service providers), other lawyers (within and without the jurisdiction), the judiciary, the press, and, put generally, anyone who may be expected to rely on lawyers behaving in a dependable, upright way. The behaviour of lawyers must satisfy the reasonable expectations which the British Columbia public holds of them. By their behaviour, lawyers must maintain the confidence and respect of the public; lawyers must lead by example. In this, Mr. Watt, as he has acknowledged, failed.

[53] In *Law Society of BC v. Berge*, 2007 LSBC 07 ("*Berge* 2007"), at para. 38, the Benchers on review made the following comments regarding the standard of conduct expected of lawyers in their private lives:

> The Benchers find that lawyers in their private lives must live up to a high standard of conduct. A lawyer does not get to leave his or her status as a lawyer at the office door when he or she leaves at the end of the day. The imposition of this high standard of social responsibility, with the consequent intrusion into the lawyer's private life, is the price that lawyers pay for the privilege of membership in a self-governing profession.

Misappropriation

[54] "Misappropriation" is not defined in the *Act*, the Rules or the *BC Code*. Rather, it is a concept that has developed through decisions of Law Society hearing panels.

[55] The concept of "misappropriation" was described by the panel in *Law Society of BC v. Ahuja*, 2019 LSBC 31 (reversed on other grounds 2020 LSBC 31), at paras. 83 to 85 and 108, as follows:

> Counsel reminded us that "misappropriation" has been defined broadly as any unauthorized use of clients' funds. The Law Society directed us to *Law Society of BC v. Sahota*, 2016 LSBC 29, where the panel set out at paras. 61 to 63 an overview of misappropriation:
>
> > … Any unauthorized use qualifies. It does not need to amount to stealing, as long as there is an unauthorized temporary use for the lawyer's own purpose. Personal gain or benefit to the lawyer is not required.

> Further, the panel in *Law Society of BC v. Harder*, 2005 LSBC 48, provided at para. 56 the following helpful language to the quest for clarity on this issue:
>
> > A useful further clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers* 114 NJ 209 @ 221 [SC 1989] where the Court stated:
> >
> > > Misappropriation is "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." …
> > >
> > > The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.
> >
> > Thus, 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.

As to the mental element required to find misappropriation, counsel for the Law Society directed us to *Law Society of BC v. Gellert*, 2013 LSBC 22, where the panel stated at para. 71, in part:

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

Counsel for the Law Society argued that the range of misconduct that has been described as misappropriation includes:

(a) taking client funds and returning them in short order or doing so under severe personal financial pressures: see *Gellert* at para. 72;

> (b) taking client funds by repeated negligence and careless inattention to trust accounting obligations: see *Sahota*; and
>
> (c) wilful blindness about whether "clients had been billed for disbursements that were not incurred and that [the lawyer] was therefore not entitled to withdraw monies held in trust for them to pay those bills …": see *Law Society of BC v. Sas*, 2015 LSBC 19 at para. 226.
>
> …
>
> We recognize that a finding of misappropriation does not require a mental element that rises to the level of dishonesty as that term is used in criminal law: see *Gellert* at para. 71; and *Harder* at para. 56. As the panel in *Gellert* put it at para. 73:
>
> > The definition of misappropriation, and in particular its mental fault element, is driven by a recognition that the proper handling of trust funds is one of the core parts of the lawyer's fiduciary duty to the client. … Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out (*Law Society of BC v. Ali*, 2007 LSBC 18, para. 104, 106).

[56] The test in *Gellert* has been consistently cited and followed in British Columbia, including in *Law Society of BC v. Chaudhry*, 2018 LSBC 31, where the panel held at para. 37:

> Conduct meeting this definition is misappropriation regardless of whether the lawyer received any personal benefit. It also matters not that the lawyer intended to, or did return, the funds in short order. Nor does it matter that the amount involved was small or that the lawyer was acting in response to personal financial pressures. See *Gellert* (F & D), at para. 72; *Ali* (F & D), at para. 104; *Harder* (F & D), at para. 56; *Sahota* (F & D), at para. 61.

[57] Misappropriation is not limited to the taking of client trust funds. The definition of misappropriation is the unauthorized taking of another's property or money and converting it to one's own use: *Law Society of BC v. Hudson*, 2014 LSBC 02 at para. 19, citing *Black's Law Dictionary*, 8th Edition.

[58] The improper or unauthorized taking of funds by a lawyer from his or her employer constitutes misappropriation. In *Law Society of BC v. Hainer*, 2007 LSBC 48, the panel found that the respondent misappropriated funds from her employer when she failed to remit funds received from clients on account of services provided by the law firm. In *Schauble*, the panel held that the respondent knowingly and intentionally misappropriated funds in keeping fees from files for himself rather than splitting the fees with his firm, when he did not honestly believe that he was entitled to keep the fees for himself.

[59] In summary, misappropriation occurs when a lawyer takes funds for an unauthorized purpose, whether knowingly or through sufficiently culpable negligence or incompetence.

[60] In the instances of both misappropriating client funds and misappropriating funds from an employer, there is a breach of trust to a person or party to whom a lawyer owes duty of honesty and loyalty: *Law Society of BC v. Kaminski*, 2018 LSBC 14 at para. 52.

Application of legal tests

[61] As indicated earlier in these reasons, the Respondent admits the conduct described in the Citation and that such conduct constitutes professional misconduct or conduct unbecoming. The question for the Panel is whether that conduct is properly characterized as professional misconduct or conduct unbecoming.

[62] The Panel decided at the Hearing that the Respondent's conduct is properly characterized as professional misconduct and accepted the Respondent's admission of professional misconduct. These are our reasons.

[63] The Respondent's conduct occurred in his capacity as a lawyer and an employee of CLBC. The Respondent engaged in this conduct while he was acting as the CEO of CLBC and was a practising lawyer with CPBC. The conduct in issue did not occur in the Respondent's private life, but rather in the course of his practice, and it is therefore properly characterized as professional misconduct (*Berge* 2005, at para. 77).

[64] The evidence establishes that the Respondent's conduct constitutes a marked departure from the conduct that the Law Society expects of lawyers. His behaviour displays gross culpable neglect of his duties as a lawyer (*Martin*, at paras. 154 and 171).

[65] Further, the Panel accepts the Respondent's admission that his conduct, as set out in Allegation 1, amounts to misappropriation. The Respondent's conduct occurred over the course of a year, during which he submitted 27 expense reimbursement forms to CLBC seeking to be reimbursed for improper expenses. CLBC paid the Respondent for these improper claims, and the Respondent made personal use of those funds. The evidence establishes that the Respondent intentionally misappropriated the funds. He knew that he was taking the funds for an unauthorized purpose. Misappropriation includes the unauthorized taking of funds from one's employer (*Hudson,* at para. 19; *Hainer; and Schauble).*

[66] On five separate occasions, the Respondent submitted to CLBC receipts and other documents that he had altered. He submitted these altered documents to CLBC with his expense reimbursement forms with the intention of claiming more than the value of the original charges.

Issue 2: disciplinary action

Proposed sanction

[67] In the Joint Submission, the parties agree to the following disciplinary action:

> The Respondent will be suspended for 16 months, plus the following conditions:
>
> (i) The Respondent will practise in a firm setting with at least one other practitioner acceptable to the Law Society;
>
> (ii) The Respondent will practise under a Supervision Agreement on terms acceptable to the Law Society;
>
> (iii) The Respondent is prohibited from operating a trust account, and from having any signing authority over a trust account;
>
> (iv) The Respondent is required to continue his psychotherapy counseling and shall direct his therapist to:
>
> 1. Produce an annual status report to the Law Society; and
>
> 2. Notify the Law Society in the event the therapist detects any development that raises a reasonable concern that the Respondent may engage in similar misconduct.

[68] The Panel must decide whether to accept the disciplinary action proposed in the Joint Submission.

Joint Submission

[69] This matter comes before the Panel as a Joint Submission with respect to the Respondent's admission of professional misconduct and the parties' agreement concerning the appropriate penalty. It does not come before the Panel pursuant to Rule 4-30.

[70] In recent years, hearing panels have assessed joint submissions made outside of a Rule 4-30 hearing context based on whether the disciplinary action jointly submitted was "fair and reasonable" (*Law Society of BC v. Di Bella,* 2019 LSBC 32 at para. 57).

[71] There is another test followed by other law societies throughout Canada known as the "public interest test". This test arose from the criminal case of *R. v. Anthony-Cook,* 2016 SCC 43. As articulated at paras. 32 to 34 in *Anthony-Cook,* a joint submission should only be departed from in the following circumstances:

> Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.
>
> In *Druken*, 2006 NLCA 67, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2,* 2010 NLCA 19, at para. 56 (CanLII), when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".
>
> … Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead to reasonable and informed persons, aware of all the relevant circumstances, including

> the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. …

[72] In *Law Society of Upper Canada v. Archambault,* 2017 ONLSTH 86, this "public interest test" was applied in the context of professional regulatory hearings. The panel cited the explanation of Justice Moldaver in *Anthony-Cook* and wrote at para. 15:

> On behalf of the unanimous Supreme Court, Justice Moldaver explained why this stringent test is necessary, in comments that also apply to joint submissions before this Tribunal. His reasoning at paras. 35-44, adapted to our context, emphasizes that there needs to be a high degree of certainty that a joint submission will be accepted because:
>
> - Joint submissions are a proper and necessary part of the system, and benefit the administration of justice and all participants including the licensee, complainants, witnesses, and counsel.
>
> - A joint submission helps the Law Society as prosecutor and the public interest, since an admission makes a finding of misconduct certain. The prosecution avoids the risk that flaws in its case, such as weaknesses in witness testimony, the unwillingness of a witness to testify, or evidence that is not admissible will affect whether a finding is made.
>
> - Witnesses and complainants may prefer to avoid the stress of testifying, and may appreciate the acknowledgement of responsibility that comes from an admission.
>
> - The licensee likely obtains a penalty that is more lenient than he or she might expect after a contested finding and/or penalty hearing. The costs and stress associated with contested hearings are minimized and certainty is maximized.
>
> - Joint submissions play an essential role in saving the justice system time, resources and expenses.
>
> - Law Society and licensee representatives are highly knowledgeable about the circumstances and the strengths and weaknesses of their respective positions. Law Society representatives put forward the public interest and licensee representatives focus on their clients'

> interests. They are together well-placed and can be relied upon to arrive at a joint submission that reflects both interests.

[73] In *Law Society of BC v. Laughlin*, 2020 LSBC 47, the review board determined that it was not necessary to determine which test should be followed in British Columbia because, regardless of which test is applied, the review board found that the hearing panel erred in departing from the joint submission. Similarly, in this matter, the parties submit that it is not necessary for the Panel to determine the applicable test because the proposed disciplinary action satisfies both formulations in that it is: a) fair and reasonable in all the circumstances, and b) meets the "public interest" test.

Sanctioning principles

[74] Pursuant to section 3 of the *Act*, the Law Society's mandate is to protect the public interest in the administration of justice. The sanction imposed in this matter must have regard to, and be consistent with, this statutory mandate.

[75] Whether the proposed disciplinary action is appropriate in this case is to be considered within the non-exhaustive list of factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17. Those factors are:

(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 upon the respondent of criminal or other sanctions or penalties;

(j) the impact of the proposed penalty 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] In *Law Society of BC v. Lessing*, 2013 LSBC 29, the review panel reaffirmed the *Ogilvie* factors and noted that the factors reflect the objects and duties of the Law Society as set out in section 3 of the *Act*. The review panel placed particular emphasis on public protection, including public confidence in the profession generally.

[77] In *Law Society of BC v. Dent*, 2016 LSBC 05, the panel noted at paras. 16 to 18 the following regarding how the *Ogilvie* factors should be considered when determining sanction:

> It is time to provide some simplification to this process. It is not necessary for a hearing panel to go over each and every *Ogilvie* factor. Instead, all that is necessary for the hearing panel to do is to go over those factors that it considers relevant to or determinative of the final outcome of the disciplinary action (primary factors). This approach flows from *Lessing*, which talks about different factors having different weight.
>
> There is an obligation on counsel appearing before the hearing panel to point out to the panel those factors that are primary and those factors that play a secondary role. Secondary factors need to be mentioned in the reasons, if those secondary factors tip the scales one way or the other. However, in most cases, the panel will determine the appropriate disciplinary action on the basis of the primary factors without recourse to secondary factors.
>
> In addition, it is time to consolidate the *Ogilvie* factors, ("consolidated *Ogilvie* factors"). It is also important to remember that the *Ogilvie* factors are non-exhaustive in nature. Their scope is only limited by the possible frailties that a lawyer may exhibit and the ability of counsel to put an imaginative spin on it.

[78] In *Dent*, the panel reduced the *Ogilvie* factors to the following four consolidated factors:

1. Nature, gravity and consequences of conduct;

2. Character and professional conduct record of the respondent;

3. Acknowledgement of the misconduct and remedial action; and

4. Public confidence in the profession including public confidence in the disciplinary process.

Application of sanctioning principles

Nature, gravity and consequences of the misconduct

[79] The nature and gravity of the misconduct in this case is at the most serious end of the spectrum. The Respondent's misconduct spanned nearly a one-year period and constituted a fundamental breach of trust. He falsified receipts and other documents and intentionally misappropriated funds from his employer. When he initially self-reported to the Law Society, the Respondent acknowledged the improper claims related to the June 22, 2018 expense reimbursement form, but failed to mention his other misconduct. The sanction imposed must reflect the seriousness with which a reasonably informed member of the public would view the totality of the misconduct in order to ensure public confidence in the integrity of the legal profession.

Character and professional conduct record of the respondent

[80] The Respondent is 55 years old. At the time of the Respondent's misconduct, he had been called to the bar for some 27 years. He had previously worked for the Law Society for approximately 18 years, including time working in the Professional Conduct Department. The Respondent was well aware that misappropriation is a serious matter and that serious consequences may be visited upon a lawyer for having engaged in such misconduct.

[81] The Respondent has no previous discipline history. The Respondent's character references demonstrate that the Respondent is a person with integrity and good morals and that the misconduct in issue is totally out of character for him. The Respondent is committed to attending therapy to better understand and address the impact of his traumatic history and to ensure that he does not misconduct himself in the future. All of the experts agree that the risk of the Respondent reoffending is low. The Law Society's expert, Dr. Morgan, agrees that the conditions on practice proposed by Dr. Fennemore, and incorporated into the proposed disciplinary sanction, are appropriate and mitigate the risk of future misconduct.

Acknowledgement of the misconduct and remedial action

[82] The Respondent made extensive admissions of fact, acknowledged the misconduct and repaid the misappropriated funds to CLBC**.** However, it is to be noted that, when he initially self-reported, the Respondent did not mention 26 instances of improper expense claims that later came to light.

Public confidence in the profession and disciplinary process

[83] In order for the public to have confidence in the profession and the disciplinary process, the sanction must be proportionate to the misconduct and be fair and reasonable in all of the circumstances, including in relation to sanctions given in other similar cases.

[84] Disbarment is usually considered the appropriate sanction for intentional misappropriation of funds. However, there are also a number of cases involving intentional misappropriation and other misconduct where a lengthy suspension was determined to be the appropriate sanction. These cases, like this one, included significant mitigating factors.

[85] In *Law Society of BC v. Reuben,* [1991] LSDD No. 10, the respondent lawyer denied that he failed to account for receiving trust funds and engaged in a pattern of dishonest behaviour with the Law Society. In the first instance, he was disbarred. On review, the disbarment was replaced with an 18-month suspension with conditions related to continuing therapy and working under supervision. The review panel overturned the disbarment on the basis that the respondent's public service record and psychiatric record showed hiss pattern of denial was linked to early trauma experienced as the child of Holocaust survivors.

[86] In *Law Society of BC v. Ranspot,* [1997] LSDD No. 52, over a period of 14 months, the respondent lawyer billed the Legal Services Society approximately $4,000 for services that had not been provided. The psychiatric evidence indicated that the respondent's behaviour was out of character and that the breakdown of his marriage was causing extreme distress and leading to alcohol abuse and depression. An 18-month suspension was ordered.

[87] In *Law Society of BC v. Gellert,* 2005 LSBC 15, the respondent lawyer failed to remit tax filings, failed to serve clients properly and misappropriated some $200 from estate funds held in trust. The medical evidence showed that the respondent's behaviour was rooted in depression, which had gone untreated at the time. The hearing panel ordered an 18-month suspension with conditions.

[88] In the case at hand, there are mitigating factors that support a lengthy suspension with conditions rather than disbarment, including:

(a) In his 29 years at the bar, the Respondent has not generated any discipline history;

(b) The Respondent has admitted and accepted responsibility for his misconduct. He has expressed great remorse for his actions. He has fully reimbursed CLBC;

(c) The Respondent has suffered a number of significant, traumatic events in his life. While the experts do not all agree on the Respondent's diagnosis, or the causal connection between the Respondent's traumatic history and the misconduct in issue, they do agree that the trauma has had a significant, negative impact on the Respondent;

(d) The Respondent has taken steps to rehabilitate himself and is committed to continuing with the treatment recommended by his treating therapist, Dr. Weideman. The experts agree that the therapeutic process with Dr. Weideman is helpful to the Respondent and that such therapy should mitigate the chances of further misconduct by the Respondent;

(e) The 12 individuals from whom the Respondent tendered letters of character reference consistently describe the Respondent as a person with integrity and good ethics and morals. The references indicate that the misconduct at issue is entirely out of character for the Respondent; and

(f) The practice conditions in the proposed disciplinary action are very restrictive. Importantly, the experts agree that the risk of the Respondent reoffending is low, and agree that these conditions should appropriately manage the risk of the Respondent reoffending.

Conclusion on sanction

[89] In determining the appropriate sanction, the protection of the public is of paramount importance. The proposed 16-month suspension is a lengthy suspension. The Panel is satisfied that it is within the range of penalties imposed in similar cases and that the additional restrictive conditions adequately address the need to protect the public.

[90] The Panel finds that the proposed disciplinary action strikes the appropriate balance between the gravity of the Respondent's misconduct and the other mitigating

circumstances. The proposed disciplinary action is fair and reasonable in all the circumstances. Further, the sanction does not bring the administration of justice into disrepute and is not otherwise contrary to the public interest. The acceptance of the proposed disciplinary sanction would not lead reasonable and informed persons, aware of all of the relevant circumstances, to believe that the proper function of the Law Society disciplinary system has broken down. The Panel accepts the disciplinary action proposed in the Joint Submission.

COSTS

[91] The Law Society submitted a bill of costs seeking costs totalling $5,236.25. The Respondent has agreed to pay the costs claimed in the bill of costs. The Panel orders the Respondent to pay the Law Society costs in the amount of $5,326.25.

NON-DISCLOSURE ORDER

[92] The parties seek an order under Rule 5-8(2) of the Rules that portions of the transcript and exhibits that contain confidential client information, privileged information or sensitive personal information contained in the medical legal reports not be disclosed to members of the public. Recent amendments to the applicable rules have made the order unnecessary, as explained in *Law Society of BC v. Edwards*, 2020 LSBC 57 at paras. 118 to 121. Like the panels in *Edwards* and *Law Society of BC v. Sangha*, 2021 LSBC 03, we decline to make the order sought.

SUMMARY OF ORDERS

[93] In summary, the Panel makes the following orders:

(a) The Panel accepts the Respondent's admission that the entirety of his conduct described in the Citation constitutes professional misconduct, pursuant to section 38(4) of the *Act*;

(b) The Panel accepts the disciplinary action proposed in the Joint Submission. The Respondent is suspended for 16 months beginning March 1, 2021 or such other date as the parties may agree upon and is subject to the following additional conditions:

(i) The Respondent must practise in a firm setting with at least one other practitioner acceptable to the Law Society;

(ii) The Respondent must practise under a Supervision Agreement on terms acceptable to the Law Society;

(iii) The Respondent is prohibited from operating a trust account and from having any signing authority over a trust account;

(iv) The Respondent is required to continue his psychotherapy counseling and must direct his therapist to:

1. produce an annual status report to the Law Society; and

2. notify the Law Society in the event the therapist detects any development that raises a reasonable concern that the Respondent may engage in similar misconduct; and

(c) The Respondent must pay the Law Society costs in the amount of $5,326.25 on or before June 30, 2021.