2021 LSBC 29
Decision issued: July 20, 2021
Citation issued: September 26, 2018

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

PETER DARREN STEVEN HART

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing dates:	February 3, 2021
Panel:	Lindsay R. LeBlanc, Chair Thelma Siglos, Public representative Thomas L. Spraggs, Bencher
Discipline Counsel:	Alison R. Kirby
Counsel for the Respondent:	J.M. Peter Firestone

BACKGROUND

[1] In our decision on Facts and Determination, (*Law Society of BC v. Hart*, 2020 LSBC 51), we found that the Respondent had committed professional misconduct by misappropriating trust funds in the sum of $4,000 and acting in a conflict of interest in respect of four separate client matters involving the withdrawal of $531,000 held by the Respondent in his capacity as Executor and used for financing the operation of the Respondent's law firm.

[2] Similar to the Facts and Determination hearing, no witnesses were called by either party, and the evidence presented to the Panel consisted only of the marked Exhibits.

POSITION OF THE PARTIES

[3] The parties are largely divided on what they submit should be the appropriate discipline for the Respondent's professional misconduct.

Law Society

[4] The Law Society submits that the Respondent's misconduct is so egregious that an order of disbarment is appropriate. The Law Society also seeks an order for costs in the amount of $17,396.70 pursuant to the tariff, payable by May 31, 2021 (or such date as this Panel finds appropriate).

[5] Relying on *Law Society of BC v. McGuire,* 2006 LSBC 20, the Law Society submits that the sanction for intentionally misappropriating client funds is disbarment unless there is evidence of exceptional circumstances explaining or mitigating the misconduct.

[6] The Law Society also submits that disbarment is not limited to cases involving misappropriation or the most serious cases or most serious offenders – it can be ordered when the panel determines that the need for public protection makes it the most appropriate disciplinary action in all of the circumstances.

The Respondent

[7] The Respondent submits that the appropriate discipline is a suspension of four to five months. The Respondent takes no issue with the Bill of Costs presented by the Law Society.

[8] The Respondent submits that the facts of this case do not rise to the level where the public interest and the need to protect the public requires disbarment as the misappropriation falls in line with the following cases: *Law Society of BC v. Low*, 2019 LSBC 37; *Law Society of BC v. Sas*, 2016 LSBC 03 and 2017 LSBC 08; *Law Society of BC v. Reuben*, [1991] LSDD No. 10; and *Law Society of BC v. Strother*, 2015 LSBC 56 and 2017 LSBC 23.

[9] With respect to the professional misconduct arising from the conflict of interest, the Respondent submits that it is of the type and magnitude of conduct recognized in *Strother* where a five-month suspension was ordered.

SUMMARY OF THE LAW

[10] Section 38 of the *Legal Profession Act* states that, where a hearing panel finds, as this Panel did, that a lawyer's actions constitute professional misconduct, the panel must do one or more of the following:

(a) reprimand the respondent;

(b) fine the respondent;

(c) impose conditions or limitations on the respondent's practice;

(d) suspend the respondent for a period of time or until any conditions or requirements imposed by the panel are met;

(e) disbar the respondent; or

(f) require the respondent to do one or more remedial actions or make submissions respecting their competence to practice law.

[11] In cases involving multiple findings of misconduct, the usual approach in assessing the appropriate disciplinary action is to first determine on a global basis the type of sanction to be imposed, taking into account the nature of all the misconduct (*Law Society of BC v. Gellert*, 2005 LSBC 15).

[12] The parties have submitted a global approach is appropriate, and we have followed that approach.

[13] This Panel is guided by s. 3 of the *Legal Profession Act*, which states that it is the object and duty of the Law Society to uphold and protect the public interest in the administration of justice.

[14] In *Law Society of BC v. Lessing*, 2013 LSBC 29 at para. 55, the benchers confirmed that the "…objects and duties set out in section 3 of the Act are reflected in the factors set out in *Law Society of BC v. Ogilvie*, 1999 LSBC 17 at paras. 9 and 10 …." In *Ogilvie*, the panel set out 13 factors that, while not exhaustive:

> … might be said to be worthy of general consideration 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 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.

[15] Those factors have been considered in many discipline decisions. In *Law Society of BC v. Dent*, 2016 LSBC 05 at para. 16, the panel stated:

> 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.

ANALYSIS AND DECISION

[16] The following *Ogilvie* factors are the most relevant to the determination of the appropriate sanction in this proceeding.

Nature, gravity and consequences of conduct

Misappropriation of trust funds

[17] Lawyers are routinely entrusted with funds provided to them. The Law Society has established a set of rules governing the receipt and handling of those funds to ensure the public continues to have public confidence in the legal profession and the holding by lawyers of their money.

[18] The rules relating to the holding of trust funds and avoiding conflicts of interests are fundamental to overseeing how lawyers can properly handle clients' money.

[19] Misappropriation of trust funds and acting in a conflict of interest related to the handling of client funds is the most serious misconduct a lawyer can commit as any breach has the potential to undermine the public's confidence in the profession and the trust afforded to lawyers.

[20] In *Law Society of BC v. Tak,* 2014 LSBC 57, the panel stated at paras. 35 and 38:

> Misappropriation of client trust funds is perhaps the most egregious misconduct a lawyer can commit. Wrongly taking clients' money is the plainest form of betrayal of a client's trust and is a complete erosion of the trust required for a functional solicitor-client relationship. The public is entitled to expect that the severity of the consequences reflect the gravity of the wrong. In the absence of multiple, significant mitigating factors, public confidence is the procession and its ability to regulate itself would be severely compromised if anything short of disbarment is ordered for misappropriation of client funds.
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> …
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> There should be no doubt that a strong message of general deterrence should be sent to other members of the Law Society in respect of misappropriating funds, and it should be unequivocal that such misconduct will almost certainly result in the revocation of the right to practise law.

[21] The Respondent was found to have misappropriated trust funds. This is the most egregious and serious of conduct and the penalty must reflect the same.

Conflict of interest

[22] In *Law Society of BC v. Coglon*, 2006 LSBC 14, at para. 6, the Panel stated that the duty of loyalty to one's client is one of the core values of the legal profession, perhaps the core value.

[23] In *Law Society of Upper Canada v. Horgan*, 2010 ONLSHP 12, the lawyer had power of attorney and was executor and beneficiary of a former client. For four years after his client's death, he accepted annuity payments made on her behalf for which he was criminally convicted of theft. The lawyer was given the opportunity to surrender his licence and, failing that, the licence would be suspended. Of importance in this decision was that the lawyer was not acting as a lawyer; however, in receiving and managing the funds in the manner that he did, the actions of lawyer and those of trustee/executor were found to be not easily separated.

[24] The Respondent was found to have withdrawn $531,000 of client funds to finance the operation of his law firm. To make the conduct worse, the Respondent while using the client's money funnelled part of the interest earned on these loans for his own privately held company.

[25] The Panel has found that the Respondent's conduct was intentional and self-serving and raises to the most egregious of conduct.

Breach of Act/Rules

[26] The Respondent was also found to have committed a breach of the Act and Rules by failing to report to the Law Society two unsatisfied judgments.

[27] This conduct on its own would be less serious; however, the Panel has considered this breach of the Act and Rules within the global framework of considering the appropriate penalty.

Character and professional conduct record

[28] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 20, 1994, and he practises primarily in the areas of family law, estate litigation and personal injury.

[29] The Respondent's prior professional conduct record consists solely of an undertaking given during the course of the investigation into the misconduct underlying the citation. The Respondent has no other prior disciplinary record.

[30] The Respondent did not testify during the facts and determination or the disciplinary action phase, and there was no evidence submitted by the Respondent concerning the possibility of rehabilitation. The Panel has been left with the statements made by the Respondent during a Law Society interview that he thought he could do what he was doing. That is not answer enough given the nature of the misconduct and the sums of money that were involved.

[31] The Respondent produced six character references in support of his good character.

[32] The first letter is from lawyer Christopher M. Considine, QC, and provides observations on the Respondent's parenting and his professionalism during one or two cases. The letter does not speak to the specific matters contained in the citation and is of little assistance to the Panel in determining sanction.

[33] The second letter is from lawyer Del Elgersma, who states that the Respondent is intelligent, careful and an effective advocate for his clients and a person of integrity and good character. Reference is made to the effective litigation services provided and how pleased clients have been with the Respondent's reputation. Again, this letter does not speak to the specific matters contained in the citation and is of little use.

[34] The third letter is from lawyer Glenda Lianne Macdonald and is similar to the letter provided by Del Elgersma. Ms. Macdonald speaks to the Respondent's good character as a lawyer and father. Again, the letter does not address the allegations in the citation and is of little assistance.

[35] The fourth letter is from lawyer and accredited Family Law Mediator Rebecca Alleyne and speaks to the Respondent being respectful, courteous and professional during various family law mediations. While these are all attributes that make for a good lawyer, the letter does not address the misappropriation of trust funds or serious conflicts of interest committed by the Respondent.

[36] The fifth and sixth letters are from employees of the Respondent. The employees do not state that they are aware of the citation or the prior findings of misconduct and, having considered the employee/employer relationship that exists, the Panel has given little weight to these two character references.

[37] In *Law Society of BC v. Johnson,* 2016 LSBC 20, the review panel held that too much weight on character letters would put the friends and colleagues of the lawyer in the place of the panel and detract from the panel's duty to protect the public interest. We find that this is one of those cases where the character references cannot negate from the seriousness of the conduct.

[38] With consideration to the severity of the misconduct, we find this factor to be neutral. We also find that there are no exceptional circumstances that can be considered under this *Ogilvie* factor.

Impact upon the victim

[39] No client ultimately lost any money. The clients were paid back with ten per cent interest. The Respondent's company kept five per cent of the interest that was never delivered back to the clients.

[40] The clients were never given an opportunity to consider the risk of the transaction or obtain independent legal advice. The money was used as the Respondent saw fit without any independent inquiry concerning risk.

[41] The impact on these clients is an unseen harm – the potential loss of confidence in the systems imposed by the Law Society.

[42] We do not find this factor to be mitigating, as the Respondent urged us to do.

Advantage gained, or to be gained, by the respondent

[43] The Respondent accepts that his law firm benefited from all of the loans and that his cash flow was less demanding for the firm. The Respondent denies that the loans were solely to benefit him in his relationship with his bankers.

[44] We have found that the conduct was self-motivated. The Respondent gained from the conduct, and we do not agree that there is a distinction to be made such as the Respondent would like us to find.

Possibility of remediating or rehabilitating the respondent

[45] The Respondent submitted that there is nothing to suggest that he is not governable and will not learn from this. There was no evidence from the Respondent on this factor, and we find that the statement in submission is of little assistance and not a mitigating factor.

Impact of the proposed penalty on the respondent

[46] The Respondent submits that he has practised for 27 years, he has two children and a disbarment would be the ultimate penalty and tantamount to economic capital punishment.

[47] Disbarment is a serious penalty and would have serious impacts on the Respondent. However, if the sanction imposed does not reflect the seriousness of the conduct, public confidence in the integrity of the legal profession will be eroded.

Public confidence in the profession

[48] As prior panels have found, the question this Panel must consider is whether the public will have confidence in the proposed disciplinary action when comparing it to similar cases.

[49] In *Law Society of BC v. Lebedovich,* 2018 LSBC 17, the Panel held at para. 26:

> The legal profession is self-regulated by the Law Society. The public must be satisfied that the Law Society has the public interest in mind as it regulates. The sanction imposed must reflect the seriousness with which the Law Society, and through it the legal profession, views the intentional misappropriation of trust funds.

[50] Without exceptional circumstances, disbarment is the penalty for misappropriation of funds. Even if there were some circumstances warranting a lengthy suspension instead of disbarment for the misappropriation, the additional conflicts of interest and breach of the Rules considered globally justify disbarment to ensure the public remains confident that, when they deposit money in a lawyer's trust account, those funds will not be personally used by the lawyer.

Range of sanction in prior cases

[51] While the range of penalties in prior cases is a helpful analysis and one that justifies disbarment here, the Panel has considered such cases in the context of determining whether exceptional circumstances exist in this case.

[52] The Law Society directed this Panel to the following cases:

(a) *Law Society of BC v. Gellert,* 2014 LSBC 05 – the lawyer misappropriated over $14,000 in client trust funds, made discourteous and threatening comments regarding a Law Society auditor, failed to respond to the Law Society and breached three Law Society Rules. The panel concluded that disbarment was the only appropriate disciplinary action suitable in the circumstances as there was no compelling evidence of any extraordinary mitigating circumstances to satisfy the panel that disbarment was not required.

(b) *Ogilvie* - the lawyer misappropriated $7,000 from client accounts by rendering accounts that misstated the services he had provided and then transferred trust funds in satisfaction of the fraudulent accounts. He also failed to account for trust funds in relation to five files that totalled $96,000. The lawyer failed to respond to the Law Society and did not participate in the hearing as he had previously suffered a stroke and was no longer practising law. The lawyer was disbarred.

(c) *Law Society of BC v. Harder*, 2006 LSBC 48 – the lawyer misappropriated client trust funds of between $42,396.11 and $56,626.21, failed to provide an acceptable level of service, failed to remit PST and GST, and breached various Law Society accounting rules. The lawyer provided that he suffered from depression as a mitigating factor. The lawyer was disbarred.

(d) *Law Society of BC v. Ali*, 2007 LSBC 57 – the lawyer misappropriated approximately $7,000 from six clients over two years in 13 transactions. The lawyer submitted (through counsel) that the transactions were mistakes and none were intentional and that her record keeping was inadequate. The lawyer was disbarred, and the panel found that the lawyer's explanations were not credible and that the misappropriations were deliberate. The lawyer had no prior disciplinary history.

(e) *Law Society of BC v. Briner*, 2015 LSBC 53 – the lawyer misappropriated $50,439.44 received on behalf of a client, failed to cooperate with the Law Society and breached various trust accounting rules. The lawyer deposited client funds to another client's ledger to cover an overdraft, then withdrew the funds without authorization. The lawyer had a prior conduct review cited. The lawyer was disbarred.

[53] The Respondent directed this Panel to the following cases:

(a) *Law Society of BC v. Lowe*, 2019 LSBC 37 – the lawyer misappropriated $9,107.65 by pre-billing estimated disbursements, by directly depositing the funds upon receipt into his general account and subsequently reclassifying the funds as "disbursement revenue" for "administrative convenience". The lawyer also breached a number of the Law Society trust accounting rules. The panel found that the misconduct was due to a longstanding honest belief that the pre-billed disbursements were not trust funds. The lawyer was suspended for five months.

(b) *Sas* – the lawyer was found to have misappropriated trust funds by zero balancing out her trust account. The amount involved was $1,947.39. The lawyer was suspended for four months. The panel concluded that the mitigating factors outweighed the aggravating in this case.

[54] All of these cases have been considered in determining the sanction to be imposed along with the other factors described above.

Summary of the *Ogilvie* factors

[55] The public's confidence in the legal profession was undermined by the Respondent's actions, and our decision must be seen to deter similar professional misconduct.

[56] The Respondent submits there are significant mitigating circumstances the Panel should consider. The Respondent submits that the responses he provided to the Law Society during the investigation into this matter are enough for this Panel to determine that disbarment is not warranted. In summary, the Respondent says that he thought he had the authority to take and use the client's funds in the manner that he did. In retrospect the Respondent admits that his assumption was incorrect. The Respondent submits that his conduct is similar to that in *Lowe* and *Sas.*

[57] The Panel has previously found that the Respondent, without authority to do so, took the client's trust funds to finance his law firm. A full summary of the scheme created by the Respondent is described in the Facts and Determination decision. Interest was paid on the trust funds; however, a portion of the interest payment was retained by a company owned and controlled by the Respondent and not provided back to the client. The money was not taken for administrative convenience and this case is distinguishable from *Lowe* and *Sas*.

[58] At no time did the Respondent have the authority to remove the funds from trust, and even if there were a mistaken belief that the authority existed, the Respondent would have known that he did not have the authority to loan or invest the funds in the manner that he did. The use of the funds was self-motivated and not without risk to the client. The Respondent's company financially benefited from the scheme without the knowledge or consent of the client.

[59] The Law Society maintains a rigorous set of rules on the opening and maintaining trust accounts. The Respondent has not provided any evidence of the systems he maintained to ensure mistakes of this nature do not happen or how the mistake, he alleges, could have happened. The only evidence the Panel has to assess the

mitigating circumstances is the Respondent's statement that he thought he had authority to use the funds.

[60] Even if we were to accept the Respondent's statement that he thought he had authority, where would that authority have come from? The Respondent did not seek the consent of the client who deposited the funds. The Respondent operated in a vacuum, and the Panel finds that he could not have reasonably held the belief that he did have the authority to use the funds.

[61] The Respondent's behaviour falls more in line with the cases cited by the Law Society where disbarment was the appropriate remedy.

[62] Having found there existed no reasonable belief that the funds could be withdrawn and used to fund his legal practice, the Panel observes that the Respondent has not provided any other reasonable factors that we could assess in determining the appropriate sanction.

[63] The Panel concludes that disbarment is necessary to ensure the public continues to have confidence in the rules regulating the profession.

COSTS

[64] As the Respondent did not dispute the costs sought by the Law Society, the Panel grants an order for costs in the amount of $17,396.70 payable by December 31, 2021.

ORDER

[65] This Panel orders that the Respondent:

(a) is disbarred under section 38(5)(e) of the *Legal Profession Act*; and

(b) pay the Law Society of British Columbia by December 31, 2021 costs and disbursements in the amount of $17,396.70.