2021 LSBC 33
Decision issued: August 3, 2021
Citation issued: November 1, 2017

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a section 47 review concerning

AMARJIT SINGH DHINDSA

RESPONDENT

DECISION OF THE REVIEW BOARD

Review date:	March 4, 2021
Review Board:	Elizabeth J. Rowbotham, Chair Gavin Hume, QC, Lawyer Jacqueline McQueen, QC, Bencher Ruth Wittenberg, Public representative William R. Younie, QC, Lawyer
Discipline Counsel:	Ilana Teicher
Counsel for the Respondent:	Duncan K. Magnus

[1] On November 1, 2017 a citation was issued to Amargit Singh Dhindsa (the "Respondent") for a hearing to inquire into his conduct. Although the citation contained two allegations, the Law Society only proceeded with one allegation, which stated:

> Between 2010 and 2015, you disclosed your Juricert password to one or more members of your law firm staff and caused or permitted such staff to affix your digital signature on electronic instruments contrary to one or both of Rule 3-64(8)(b) of the Law Society Rules [formerly Rule 3-

56(3.2)(b)] and rule 6.1-5 of the Code of Professional Conduct for British Columbia.

This conduct constitutes professional misconduct or breach of the Act or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

[2] The Respondent denied the allegation, and a hearing to determine the facts of the matter was conducted on November 14 and 15, 2018 and January 22, 2019.[1] The hearing panel determined that the Respondent had disclosed his Juricert password to two members of his law firm staff and, for a period of over three years from approximately January 2012 to March 2015, permitted his staff to affix his electronic signature to documents filed with the Land Title Office. The panel determined that such conduct constituted professional misconduct (the "Facts and Determination Decision").

[3] A hearing on disciplinary action was held on January 8, 2020. The panel determined that the appropriate discipline consequence for the professional misconduct was a four-month suspension ("Decision on Disciplinary Action").

[4] The Respondent filed a Notice of Review of the Facts and Determination Decision and the Decision on Disciplinary Action seeking a dismissal of the citation in its entirety or, in the alternative, that a fine or shorter suspension be substituted for the discipline action.

GROUNDS OF REVIEW

[5] The Respondent's grounds of review can be summarized as:

(a) Bias:

(i) The panel displayed a reasonable apprehension of bias towards the Respondent.

(b) Evidentiary Errors:

(i) The panel refused to admit the affidavit evidence of HD;

(ii) The panel disregarded exculpatory evidence and misapprehended the evidence generally;

[1] The hearing on January 21, 2019 was adjourned to January 22, 2019 due to the unavailability of the Chair.

(iii) The panel misapplied the law on assessing the credibility of witnesses; and

(iv) The panel admitted evidence that was not properly rebuttal evidence, allowing the Law Society to split its case to the prejudice of the Respondent.

(c) Disciplinary Action:

(i) The panel erred in imposing a four-month, or any, suspension, and a fine would have been a more appropriate sanction.

STANDARD OF REVIEW

[6] Before considering the grounds of review, it is necessary to consider the standard of review to be applied.

[7] In this regard, the *Law Society of BC v. Hordal*, 2004 LSBC 36 and *Law Society of BC v. Berge*, 2008 LSBC 07 line of cases establish that the standard of review by a review board of a hearing panel's decision is "correctness, except where the hearing panel has heard *viva voce* testimony and had the opportunity to assess witnesses' credibility, in which case the review board should show deference to the hearing panel's findings of fact." *Harding v. Law Society of BC*, 2017 BCCA 171 at paragraph 42, *Vlug v. Law Society of BC*, 2017 BCCA 172, paragraph 2.

[8] When considering the issue of the appropriate sanction or penalty imposed by the hearing panel, the review board should determine if, in light of the impugned conduct, the sanction or penalty falls within a range of sanctions or penalties that have been applied in similar situations in the past. *Hordal*, paragraphs 16 to 20.

[9] In his written submissions the Respondent suggests that the standard of review is correctness on questions of law alone, and reasonableness on questions of mixed fact and law and relies on the decision in *Re Applicant 8*, 2016 LSBC 12. It is the view of this Review Board that the standard of review articulated in *Applicant 8* has been overtaken by the Court of Appeal's endorsement in *Harding* and *Vlug* of the standard of review applied in the *Hordal* and *Berge* line of decisions.

ISSUES ON REVIEW

[10] As the Respondent's submissions respecting reasonable apprehension of bias are based on the comments made by some of the panel members and also on the

Respondent's arguments regarding the panel's treatment of evidence and procedural rulings, we will deal with the evidentiary and procedural matters before turning to the issue of reasonable apprehension of bias.

EVIDENTIARY AND PROCEDURAL RULINGS

[11] On this Review, the Respondent submits the panel erred:

(a) in refusing to allow affidavit evidence tendered by the Respondent and wrongly imposing an adverse inference on the Respondent for failing to call a staff member;

(b) in disregarding exculpatory evidence and misapprehending the evidence generally;

(c) in its application of the test of credibility; and

(d) by allowing the Law Society to call rebuttal evidence and split its case to the prejudice of the Respondent.

Affidavit of HD

[12] On the first day of the hearing, the Respondent sought admission of an affidavit sworn by HD (the "Affidavit"). HD was a conveyancer employed by the Respondent. The Affidavit had been obtained by the Respondent the day prior and a copy delivered to counsel for the Law Society. The panel was informed by counsel for the Respondent that HD had health concerns and was advised to avoid stress and, thus, could not attend and give oral evidence at the hearing. No medical evidence was presented to the panel confirming that HD's health prohibited HD from attending to testify.

[13] The Respondent submitted that, in the circumstances, the inability of HD to attend should affect the weight given to the Affidavit, not its admissibility. The Law Society objected to the Affidavit being admitted. The application to admit the Affidavit was adjourned to allow counsel for the Law Society to contact HD and discuss the matter, potentially allowing the Law Society to withdraw its objection.

[14] When the panel reconvened the next day, the Respondent submitted the contents of the Affidavit contained relevant facts. HD deposed in the Affidavit:

(a) that she at no time saw the Respondent tell staff to use his Juricert;

(b) that she was not aware of CW using the Respondent's Juricert;

(c) what the standard process was in the Respondent's office for Juricerting documents, including when the Respondent was absent; and that there had been no deviation from that process.

[15] In response, counsel for the Law Society confirmed that, while she had been able to speak to HD, the Law Society maintained its objection to the Affidavit being admitted. The Law Society acknowledged that the contents of the Affidavit were relevant but submitted that the importance of the Affidavit evidence and the issue of credibility outweighed the alleged inability of HD to attend the hearing. Counsel for the Law Society submitted that the Law Society would be prejudiced by an inability to cross-examine HD. The panel adjourned to consider the application. The panel had a copy of the Affidavit for the purpose of determining, as the panel stated, relevance and admissibility.

[16] After deliberating, the panel ruled the Affidavit inadmissible, and the Chair of the panel gave the following reasons:

> We are on the record again. Thank you. We have reviewed the case law, and the ruling is – I'll begin with Rule 5-6(6):
>
> The hearing panel may accept any of the following evidence:
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> (a) an agreed statement of facts;
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> (b) oral evidence;
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> (c) affidavit evidence;
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> (d) evidence tendered in a form agreed to by the respondent or applicant and Society counsel;
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> (e) an admission made or deemed to be made under Rule 4-28;
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> (f) any other evidence it considers appropriate.
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> The respondent seeks to admit the evidence of witness [HD], paralegal at the office of Dhindsa Law. The Law Society is opposed to the affidavit evidence. The submissions from respondent's counsel is [*sic*] that providing evidence in person would be stressful as this witness is in her late stages of pregnancy. Her affidavit indicates that she needs to avoid stressful situations. Counsel for the Law Society has indicated that she's

> not disputing the relevance necessarily but submits that the right to cross-examine is required of this particular witness as she was present during a critical time during the time in question of this hearing.
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> The right to cross-examine is fundamental. This case is about the credibility of all witnesses. The evidence of [HD] goes to the heart of the respondent's credibility. There is no independent evidence as to why this witness cannot attend. We have reviewed the case of [*Law Society v.*] *Goddard* [2006 LSBC 12] provided by the respondent and find that it is distinguishable based primarily on the fact that there was no one appearing on behalf of the respondent, so the issue of cross-examining the affiants wasn't at issue in *Goddard*. The Law Society should be entitled to cross-examine this witness in person. Accordingly, the panel is not prepared to accept the affidavit of [HD].

[17] Before us, the Respondent submits:

(a) The ruling not to admit the Affidavit indicates the panel was biased towards the Respondent;

(b) As the case law and the Law Society Rules (the "Rules") do not give an automatic right of cross-examination and specifically permit evidence by way of affidavit, the panel erred in failing to admit the Affidavit;

(c) The panel did not consider issues such as necessity, reliability or weight and simply refused to receive the Affidavit.

[18] In response, the Law Society submits no error was made in refusing to admit the Affidavit because:

(a) The ruling was fair and did not indicate bias or predisposition against the Respondent; and

(b) The probative value of the Affidavit evidence was clearly outweighed by the inability of the Law Society to cross-examine HD.

[19] While strict traditional rules of evidence do not apply in the administrative hearing context, a hearing body cannot determine admissibility of evidence completely at its unfettered discretion. Any discretion to allow or refuse to admit evidence must be made recognizing the duty to ensure there is a fair hearing. As recognized by the panel, Rule 5-6(6)(c) of the Rules states that a panel may admit affidavit evidence. As submitted by the Respondent, the inability to cross-examine an affiant is not, by itself, a bar to admissibility of an affidavit.

[20] In that regard, the Respondent referenced *R. v Johnston*, 2014 BCCA 144, which confirms that the inability to cross-examine a witness is generally not a bar to the admissibility of evidence. However, *Johnston* does not stand for the proposition that all affidavits must be admitted, with the trier of fact then to determine weight.

[21] Setting aside the issue of bias for the time being, which we will address later, we find that the panel was correct and made no error in refusing to admit the Affidavit on an evidentiary basis. Having heard submissions, the panel adjourned and considered the application. In giving reasons, noting the lack of independent evidence explaining why HD could not attend, the panel noted that the credibility of all witnesses was in issue at the hearing and that the Affidavit evidence would go to the heart of the Respondent's credibility. In ruling not to allow the Affidavit to be filed, the panel exercised its discretion in a manner that was fair, considered and not arbitrary.

Adverse finding against the Respondent

[22] The Respondent submits the panel imposed an adverse finding against him when the panel found, at paragraph 50 of the Facts and Determination Decision as follows:

> AB testified that the Respondent only logged in a few times in the entire year of 2014 and then mostly to check his calendar. A few times in a year is not frequent enough to cover the number of times documents needed to be juricerted when he was out of the office. It is also worthy of note that, other than AD, no other former or current employee was called to verify his practice of logging in remotely to juricert documents. The Respondent testified that the emails and texts sent to him asking him to login remotely to juricert documents were not saved to the files. He did not describe any efforts made to locate such emails on the law firm's server.

[23] In stating that no other employees were called to verify the Respondent's practice of remotely logging in to Juricert documents, the panel did not err and made no adverse finding that such evidence would not assist the Respondent's case. The panel was, in reviewing the evidence and making its findings, simply stating what the evidence was before it for consideration and that potential witnesses had not testified.

Failure to consider exculpatory evidence and misapprehended the evidence generally

[24] The Respondent submits the panel disregarded exculpatory evidence and misapprehended the evidence generally. In written and oral submissions, the Respondent drew our attention to evidence the Respondent submits the panel failed to consider adequately or at all.

[25] The evidence the Respondent submits the panel failed to consider included:

(a) While BS felt uncomfortable using the Respondent's password and had a good relationship with Gerald Palmer, she did not bring her discomfort to Mr. Palmer's attention;

(b) The Respondent saved his password on a shadow drive for security, and it did not make sense that he would share it with his staff indirectly through the shadow drive rather than directly with staff;

(c) It was inconsistent for the Respondent to create a remote login to Juricert documents if he intended to have staff affix his signature;

(d) CW did not know who gave her the password and testified the Respondent did not give her instructions on how to use the password;

(e) CW testified that Mr. Palmer had refused to Juricert documents when she asked him to;

(f) The Respondent believed that Mr. Palmer was Juricerting documents when the Respondent was not in the office;

(g) There was no evidence the Respondent asked either CW or BS to apply his Juricert signature to documents;

(h) KS was aware RB could remotely log in to provide banking information;

(i) If KS and CW appeared to need to wait for the Respondent to sign trust cheques, it was logical they would wait for the Respondent to Juricert documents; and

(j) It was inconsistent for Mr. Palmer to be asked to Juricert some documents and not others.

[26] To summarize, the Respondent submits the reasons of the panel reveal shortcomings in the analysis of evidence and a failure to refer to or address in

detail, or at all, certain evidence and alleged difficulties with it. The Respondent submits these are deficiencies establishing that the panel disregarded, failed to consider, or misapprehended evidence.

[27] The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019, SCC 65, confirmed that, on a review of a tribunal's decision, the onus is on the party challenging reasons and stated at paragraph 100:

> The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on that basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the Court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[28] *Vavilov* references an earlier Supreme Court of Canada decision, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, where at paras. 16 and 18 the Court said the following:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 SCR 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* [*v. New Brunswick*, 2008 SCC 9] criteria are met.
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> …

> Evans JA in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 FCR 221, explained in reasons upheld by this Court (2011 SCC 57, [2011] 3 SCR 572) that *Dunsmuir* "seeks to avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the basis of its decision (para. 163).

[29] As stated in the authorities, and especially for any party affected, reasons must show why a tribunal made its decision and articulate those reasons in a transparent, intelligible and justifiable manner.

[30] The Record contains the Respondent's written submissions at the hearing. Those written submissions in large measure drew to the panel's attention the Respondent's submissions before us with respect to the evidence in the hearing and referred to in the Respondent's written submissions on this review.

[31] The reasons confirm that the panel considered oral testimony and documentary evidence. In the reasons, the panel reviewed in detail the evidence referred to, and logically explained how and why it made findings of fact. The panel then, referring to the law with respect to the applicable onus of proof, means of assessing credibility, and the test for professional misconduct, explained why it found the Law Society had proven the allegation against the Respondent.

[32] The panel's reasons do not, nor are they required to, discuss all of the evidence or all submissions made on behalf of the Respondent in the hearing. A careful review of the Record and the reasons reveal no indication the panel failed to consider what the Respondent submits is exculpatory evidence; or that the panel misapprehended the evidence generally. The reasons are transparent, intelligible and justifiable. Accordingly, we find the panel did not err in this regard.

Rebuttal evidence

[33] During the hearing, the Respondent testified to an arrangement with another lawyer, Gerald Palmer, whereby Mr. Palmer and the Respondent would affix their Juricert signatures to Land Title documents on each other's files. This arrangement started when Mr. Palmer commenced working in the same office as the Respondent at the end of December 2013. Exhibits 5 through 13 in the hearing, which covered the period between March 2014 and March 2015, established that Mr. Palmer affixed his Juricert signature to Land Title documents in some of the Respondent's files.

[34] AD, an employee of the Respondent, testified that other staff members asked Mr. Palmer to Juricert the Respondent's documents.

[35] After the Respondent's case closed, the Law Society sought to call Mr. Palmer as a rebuttal witness. The Law Society submitted that allowing Mr. Palmer's testimony was proper because it related to a defence presented without notice, namely the arrangement between the Respondent and Mr. Palmer for Juricerting each other's documents. The Respondent objected to Mr. Palmer testifying, submitting that the Law Society was seeking to split its case, that the evidence of the purported arrangement was not a new matter, that the issue had arisen in the Law Society's case and was not a proper matter for rebuttal evidence, and that allowing such evidence was prejudicial to the Respondent.

[36] The panel ruled, with written reasons to follow, that Mr. Palmer could testify in rebuttal, but restricted the evidence to that of Mr. Palmer and the Respondent Juricerting each other's documents. At paragraph 52 of the Facts and Determination Decision the panel stated its reasons:

> The panel ruled that the Law Society could call Mr. Palmer in reply but only on the practice of juricerting each other's documents. The reason for the ruling was that it was apparent that this defence and Exhibits 5 to 12 were new and the Law Society had not had the opportunity to deal with it in its case in chief. In *R v. Krause*, [1986] 2 SCR 466, Mr. Justice McIntyre wrote at p. 474:
>
> > Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief ... then the Crown may be allowed to call evidence in rebuttal.

[37] Before this Review Board, the Respondent submits the issue of an arrangement between Mr. Palmer and the Respondent to Juricert each other's documents was:

(a) raised with each Law Society witness;

(b) not a new issue when referred to evidence presented by the Respondent;

(c) prejudicial to the Respondent; and

(d) admitted contrary to the applicable authorities.

[38] The Law Society in response submits the reply evidence was:

(a) limited and in response to a new issue raised in the Respondent's evidence;

(b) in accordance with the relevant law; and

(c) not prejudicial to the Respondent.

[39] As discussed by the panel (see paragraph 16 above), Rule 5-6(6) prescribes what evidence a hearing panel may consider.

[40] We were referred to the following case law on the issue of rebuttal evidence:

John v. The Queen, [1985] 2 SCR 476

R. v. Krause, [1986] 2 SCR 466

R. v. Aalders, [1993] 2 SCR 482

R. v. P. (MB), [1994] 1 SCR 555

[41] The reasons for prohibiting a party from splitting a case are discussed in *John* at pages 480-481:

> … Clearly this is the situation referred to in criminal practice as the prosecution splitting its case. The wrongs which flow from such a practice are manifold and the practice has been prohibited from the earliest days of our criminal law. …
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> …
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> … This is a particularly lethal tactic where the evidence in reply raises a new issue and attacks the accused's credibility for this is the last evidence which the members of the jury hear prior to their deliberations. …

[42] In *Krause* the Court said, at page 473-474, the following:

> At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a

> criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 CCC (2d) 318 (Ont. CA), per Mackinnon JA, at p. 320, and for a civil case see: *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, [1967] 1 OR 18 (CA), *per* Schroeder JA, at pp. 21-22. This rule prevents unfair surprises, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence–as much as it deemed necessary at the outset–then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.
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> The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

[43] *Krause* was referred to in *Aalders*, a subsequent Supreme Court of Canada decision. In discussing rebuttal evidence in *Aalders*, the Court, at pages 498–499, said:

> In my view, the crucial question with regard to the admission of rebuttal evidence is not whether the evidence which the Crown seeks to adduce is *determinative* of an essential issue, but rather whether it is *related* to an essential issue which may be determinative of the case. If the reply evidence goes to an essential element of the case and the Crown could not have foreseen that such evidence would be necessary, then it is generally admissible. Thus, if a statement is made during the course of a witness's testimony at trial which conflicts with other evidence relating to an essential issue in the case, reply evidence will be permitted to resolve the conflict.
>
> It is true that the Crown cannot split its case to obtain an unfair advantage. Nor should the Crown be able to put in evidence in reply on a purely

> collateral issue. However, it is fit and proper that reply evidence be called which relates to an integral and essential issue of the case. In such circumstances, it would be wrong to deprive the trier of fact of important evidence relating to an essential element of the case. The course of a trial, particularly a criminal trial, must be based upon rules of fairness so as to ensure the protection of the individual accused. However, the rules should not go so far as to deprive the trier of fact of important evidence, that can be helpful in resolving an essential element of the case.
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> [emphasis in the original]

[44] *R. v. P.* does not assist in this matter. That decision is distinguishable, as the issue in that case was not rebuttal evidence but whether the Crown, before the defence elected to call evidence, could re-open its case and allow a witness who had already testified an opportunity to correct evidence that was stated to be mistaken.

[45] We find the panel did not err in permitting the rebuttal evidence of Mr. Palmer for the following reasons:

(a) The evidence was in the form of oral evidence admissible at the panel's discretion under Rule 5-6(6);

(b) The issue of an arrangement between the Respondent and Mr. Palmer was not introduced by the Law Society in its case. One Law Society witness, KS, testified in chief that, when the Respondent was not in the office, somebody had to Juricert the document. KS was asked about Mr. Palmer, and she testified that he only signed his own documents and that KS never asked Mr. Palmer to Juricert documents for the Respondent. We are not satisfied that that this evidence, in itself, shows the Law Society seeking to question KS specifically about some possible arrangement between Mr. Palmer and the Respondent for Juricerting each other's documents;

(c) CW, a witness called by the Law Society was questioned in cross-examination about Mr. Palmer Juricerting documents for the Respondent. Such testimony is not evidence elicited by the Law Society;

(d) The issue of an arrangement between the Respondent and Mr. Palmer was directly presented when the Respondent testified and through documentary evidence tendered by the Respondent, being Exhibits 5 to 12, indicating Mr. Palmer had Juricerted documents for the Respondent in certain of his files;

(e) No mention was made of Mr. Palmer Juricerting the Respondent's documents at the first or at least an early opportunity. On July 12, 2017 Andrew Rebane, then counsel for the Respondent, wrote a letter to the Law Society. In that letter Mr. Rebane stated that the Respondent's usual practice was for his administrative staff to email or tell him verbally they needed him to apply his Juricert signature, and if the Respondent was out of his office he would Juricert his document through his phone. The letter is silent with respect to Mr. Palmer Juricerting documents in the Respondent's absence from his office;

(f) The Respondent's Response to Notice to Admit did not mention Mr. Palmer Juricerting documents for the Respondent;

(g) The rebuttal evidence related to essential issues in the hearing, namely the credibility of the Respondent and who in the Respondent's office Juricerted documents; and

(h) Permitting Mr. Palmer to testify was fair. To the Law Society, the issue was unforeseen, and allowing Mr. Palmer's evidence enabled the Law Society to respond to an issue of which it had no notice before evidence relating to the issue had been tendered by the Respondent.

[46] As a result, we conclude that the Respondent was not prejudiced by the panel permitting the Law Society to call Mr. Palmer to testify as a rebuttal witness.

Credibility

[47] The Respondent submits that the panel misapplied the law on how to assess the credibility of witnesses, in particular in its treatment of *Faryna v. Chorny*, [1952] 2 DLR 354. For the following reasons this submission is rejected.

[48] The panel was required to make factual determinations following a hearing in which the testimony of the witnesses called by each party sought to establish narratives with no common ground. The Law Society asserted the Respondent improperly shared his Juricert password with his staff and permitted them to affix his electronic signature to documents in his absence. The Respondent consistently denied the allegation.

[49] The Law Society bears the burden of proving misconduct on the balance of probabilities. To meet the burden, relevant evidence is subject to scrutiny to determine the likelihood of alleged events occurring. "Clear, convincing and

cogent" evidence is required. *F.H. v. McDougall*, 2008 SCC 53, paragraphs 45 through 49.

[50] Making a determination in this matter required the panel to assess the credibility of each witness.

[51] The Court in *Faryna v. Chorny*, respecting the assessment of credibility, held as follows, at page 357:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. …
>
> The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in a particular case.

[52] The Law Society called the following witnesses:

(a) CW, a former employee of the Respondent;

(b) BS, a former employee of the Respondent; and

(c) Mr. Palmer, in reply, a practising lawyer. The Respondent purchased Mr. Palmer's practice in 2010, and Mr. Palmer moved into the Respondent's primary place of business for a period of time commencing in 2014.

[53] CW testified that she had received the Respondent's Juricert password during her first week of employment, and used it to file documents continuously and frequently while in the Respondent's employ.

[54] BS testified that she used the Respondent's Juricert password to file documents about 15 times each month during her employment.

[55] In his reply testimony, Mr. Palmer acknowledged that he Juricerted the Respondent's documents a few times, but otherwise sought to avoid involvement in the Respondent's files.

[56] In questioning the evidence of CW and BS, the Respondent raised the witnesses' mutual failure to identify any specific file where the alleged wrongful conduct could be established. The Respondent also pointed at CW's inability to name the individual who provided her with the Respondent's Juricert password.

[57] The Respondent raised concern that BS had left her employment with the Respondent in unhappy circumstances, suggesting that her evidence may be motivated by bad feelings. He also pointed to inconsistencies in her evidence.

[58] The Respondent provided evidence on his own behalf; through a current employee, AD, and AB, an IT consultant who provided technology services to the Respondent through AB's company.

[59] AB provided evidence of the Respondent's remote access systems and protocols and provided evidence of the Respondent's use of this system. AB testified that the Respondent logged in "a few times" in 2014, and mostly to check his calendar.

[60] In the assessment of credibility, the panel specifically considered the evidence of each witness and explained its findings, including that:

(a) The Respondent's assertion that documents "Juricerted" while he was physically absent from the office were either properly completed by him via remote log in, or by his colleague Mr. Palmer on his behalf, was not supported by other reliable evidence;

(b) AD apparently identified with the Respondent, was hostile to adverse witnesses, and gave evidence in an emotional and highly partisan manner. The panel determined that her evidence was unreliable where uncorroborated by other reliable witnesses or documents;

(c) The failure of either CW or BS to reference any specific file in the alleged wrongdoing was understandable given the duration of the alleged conduct and the large number of files allegedly involved, while also noting the absence of a file list for witness reference or provision of witness access to the documents filed in the proceeding;

(d) CW provided her evidence in an unbiased manner without animosity to the Respondent. The panel considered her inability to recall the source of the Respondent's Juricert password as bolstering her credibility, as she did not embellish, instead presenting her evidence in a clear and forthright manner that was unshaken on cross-examination;

(e) BS provided her evidence without evasion, hostility or animus to the Respondent.

[61] The Respondent did not articulate any specific argument detailing the manner in which the panel allegedly misapplied *Faryna*, nor did he make reference to specific conclusions indicative of a faulty approach.

[62] *Faryna* requires the panel to consider whether the evidence of a witness is consistent with an overall assessment of the probabilities of the matter, taken as a whole, based on all available evidence.

[63] Based on our review of the evidence and the reasons from the Facts and Determination Decision, the panel did not place undue reliance on the personal demeanour of any particular witness or any other particular element of credibility but instead considered and addressed the whole of the evidence in reaching its conclusions.

[64] In considering the Respondent's submissions respecting credibility, the Review Board is cognizant of the standard of review. The panel heard *viva voce* testimony prior to determining the facts. Their findings are entitled to deference except in the case of palpable and overriding error (*Hordal*). The Review Board finds no such error in this instance.

Bias

[65] The Respondent submits that, in reaching its decisions on Facts and Determination and Disciplinary Action, the panel displayed a reasonable apprehension of bias and as a result a new hearing should be ordered. For the following reasons that submission is rejected.

[66] In support of his submission the Respondent relied on the following case law:

Wewaykum Indian Band v. Canada, 2003 SCC 45

Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General), 2015 SCC 25

R. v. Edmond, 2014 BCSC 1375

Truckair v. Canada (Attorney General), 2011 NSSC 398

Stuart Budd & Sons Limited v. IFS Vehicle Distributors ULC, 2016 ONCA 60

[67] The Respondent also relied upon *Yukon Francophone School Board*.

[68] The test for a reasonable apprehension of bias is set out in the Supreme Court of Canada's decision in *Wewaykum Indian Band*. In that decision the Court, quoting from an earlier decision of the Court, stated, at paragraph 60:

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369, at p. 394, is the reasonable apprehension of bias:
>
> > … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[69] In paragraph 66 the Court said, in part:

> … To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was *in fact* either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. …
>
> [emphasis in the original]

[70] In paragraph 76 the Court said the following:

> First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".
>
> (*Committee for Justice and Liberty v. National Energy Board, supra,* at p. 395)

[71] In determining whether the presumption of judicial impartiality has been displaced, the decision maker's individual comments or conduct during the hearing of a matter should not be considered in isolation but should be considered within the context of the entire proceedings. *Stuart Budd & Sons* at paragraph 49.

[72] In support of his submission that the panel displayed a reasonable apprehension of bias, the Respondent directed the Review Board's attention to two exchanges that occurred during the course of the hearings on Facts and Determination and two exchanges that occurred during the hearing on Disciplinary Action.

[73] The first exchange occurred on November 15, 2018 at the end of the cross-examination of AD, an employee of the Respondent and a witness called on behalf of the Respondent. In that exchange Herman Van Ommen, QC confirmed that the witness had given evidence that she was not given the Respondent's Juricert password but that she, along with other staff, did have the password for the Respondent's desktop computer and were able to log into the Respondent's desktop computer.

[74] The second exchange occurred on January 22, 2019 between Mr. Van Ommen and the Respondent's counsel during counsel's closing submissions on Facts and Determination. The Respondent's counsel was submitting that the limited access the staff had to the Respondent's computer was evidence that they did not have access to his Juricert certificate. During the exchange between Mr. Van Ommen and the Respondent's counsel, Mr. Van Ommen stated:

> The prosecution of this case would have been very easy if all his staff had access to his Juricert certificate on their own computers.

[75] Those are the aspects of the three-day hearing on Facts and Determination that the Respondent has directed the Review Board's attention to in support of the submission the panel exhibited a reasonable apprehension of bias.

[76] The decision of the panel on Facts and Determination was issued on March 25, 2019.

[77] The hearing on Disciplinary Action occurred on January 8, 2020. The Respondent drew the Review Board's attention to the comments made by the Chair at the conclusion of the Law Society's evidence and submission on Disciplinary Action and prior to the Respondent's submissions on Disciplinary Action. The Chair advised the Respondent's counsel that before counsel began he should understand that the panel was considering a suspension for a longer period than the Law Society had submitted was appropriate.

[78] The Respondent also drew the Review Board's attention to an exchange that took place between Mr. Van Ommen and the Respondent's counsel during his submission on the appropriate penalty and the appropriateness of a suspension in the circumstances. In that regard the Respondent's counsel submitted:

> Mr. Magnus: In my submission, a reasonably informed person looking at this would think that there is a heavy – something unfair about it, like about suspending a lawyer when other lawyers who are dealing with this have conduct reviews or fines, and the conduct is all part and parcel of one time frame.
>
> Mr. Van Ommen: Although the distressing frequency of these conduct reviews concerning Juricert breaches makes you wonder. At some point the Law Society has to say, well, these conduct reviews are not being effective. We need to do something more. And I was, quite frankly, surprised by the number of Juricert conduct reviews there had been when you took us through that. Clearly –
>
> Mr. Magnus: But at what stage –
>
> Mr. Van Ommen: --it was not effective.

[79] In support of the proposition that the foregoing comments demonstrated a reasonable apprehension of bias, the Respondent relied upon several cases where the actions of the judge in the first instance led to the conclusion that a reasonable apprehension of bias arose in the circumstances.

[80] The first decision relied on was *Yukon Francophone School Board*. In paragraph 25 the Court indicated there is a strong presumption of judicial impartiality that is not easily displaced and "the test for a reasonable apprehension of bias requires a

'real likelihood or probability of bias' and that a judge's individual comments during a trial not be seen in insolation."

[81] At paragraph 37 of that decision the Court stated:

> But whether dealing with judicial conduct in the course of a proceeding or with "extra-judicial" issues like a judge's identity, experiences or affiliations, the test remains
>
> > whether a reasonable and informed person, with knowledge of all the relevant circumstances, viewing the matter realistically and practically, would conclude that the judge's conduct gives rise to a reasonable apprehension of bias. … [T]he assessment is difficult and requires a careful and thorough examination of the proceeding. The record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties. [Citations omitted; *Miglin v. Miglin*, 2003 SCC 24, at para. 26.]

[82] Relying on this test, the Court in *Yukon Francophone School Board* concluded that the judge's actions led to the conclusion there was a reasonable apprehension of bias. The instances, when viewed in the circumstances of the entire trial, that led to that conclusion included: the trial judge's unfavourable ruling on the admissibility of a line of cross-examination based on confidential information contained in a file, after advising the parties the day before that he would hear additional arguments and without hearing those arguments; the judge's rejection of a request to submit affidavit evidence from a witness who had suffered a stroke; the judge's accusation that counsel was trying to delay the trial and criticism of counsel for waiting half-way through the trial to make the application, suggesting that incident amounted to bad faith and warning of counsel that he could be ordered to pay costs personally with respect to the application. The judge also refused to allow reply submissions on costs to be filed. In particular the Court said, at paragraph 55:

> While the threshold for a reasonable apprehension of bias is high, in my respectful view, the "fine balance" was inappropriately tipped in this case. The trial judge's actions in relation to the confidentiality of student files, the request to have Mr. DeBruyn testify by affidavit, the disparaging remarks, and the unusual costs award and procedure, taken together and viewed in their context, would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias.

[83] The Respondent also relied upon *R. v. Edmond*. In that matter, while the trial judge did not interrupt the Crown in its closing submissions, the judge did interrupt defence counsel on numerous occasions. The Court found that the comments by the trial judge conveyed a strong sense that he had already decided the central issue. At paragraph 46, the Court stated:

> Trial judges are permitted to ask questions of counsel during submissions but they ought to be in the nature of seeking clarification on a point of evidence or law or otherwise designed to keep the trial on track. Often, in the present case the trial judge's commentary was unnecessary and did not serve to probe a relevant issue. The trial judge appeared pugnacious as most of the submissions made by defence counsel were immediately met with critical comments from him that were often confrontational or dismissive. Such comments do not appear to have been a genuine attempt to clarify counsel's position to better understand the evidence or the law. Moreover, the alleged inconsistency as to whether and in what manner the appellant confronted the complainant upon entering the suite (as between the testimony of the complainant and Ms. Raczova) is important to the factual matrix of the case.

[84] The Court went on to say, at paragraphs 50 and 51:

> In my view, judges are not expected to refrain from commenting upon counsels' submissions, nor are they restricted from pointing out the problems in those submissions as long as they do not unreasonably interfere with their presentation. Moreover, the modest use of innocuous humour is not incompatible with the role of the judge as an independent, impartial adjudicator. However, judges are expected to impartially listen to the submissions of counsel for all parties and to uphold the integrity of the court process by displaying a certain amount of decorum and civility while presiding.
>
> In the present case the trial judge made comments during the course of counsel's submissions that were unnecessarily derisive, sarcastic, and contained hints of mockery. For example, it was unnecessary for the trial judge to seize upon counsel's use of the word 'strict' and compare the *Residential Tenancy Act* to Olympic rules. It seems as though by this point in counsel's submissions the trial judge had become antagonistic; he took any opportunity to question and to berate defence counsel.

[85] The Court concluded that a reasonable apprehension of bias was demonstrated. As a result, a new trial was ordered.

[86] In *Truckair* the provincial court judge, before hearing from defence counsel, indicated that he was convinced of the Crown's argument that the court did not have jurisdiction to hear the application before it. Applying the appropriate bias test, the reviewing Court concluded that the comments would suggest that the judge favoured the Crown's argument without hearing from the defence. This, together with a few other comments made by the judge, resulted in a conclusion that a reasonable apprehension of bias had been demonstrated. The Court also noted, at paragraph 35, that a "leaning, an inclination or a predisposition to decide an issue or a matter can be sufficient to give rise to a reasonable apprehension of bias."

[87] Lastly, the Respondent relied upon *Stuart Budd & Sons*. In that matter the motions judge was found to have gone out of his way to assist the respondents by adjourning an application on his own motion so that the respondents could file further affidavit material to correct a fatal flaw to their position; to have made dismissive comments about the value of potential cross-examination; and to not give the respondents an opportunity to make oral submissions on two key arguments. The trial judge also made comments, without providing any factual or legal foundation for the comments to the effect that a motion brought by the respondent was an abuse of process and a "colossal waste of time"; and repeatedly criticized the appellants counsel on matters including their advocacy skills, knowledge of the law, and handling of the matter.

[88] The cases relied on by the Respondent to illustrate when the courts have found that a trial judge's actions resulted in a finding that there was a reasonable apprehension of bias stand in stark contrast to the exchanges between Mr. Van Ommen and the Respondent's counsel and the Chair's comment with respect to a possible penalty the panel was considering. The comments made during the course of the hearing do not, in our view, demonstrate a reasonable apprehension of bias. The two exchanges between Mr. Van Ommen and the Respondent's counsel set out in paragraphs 77 and 78 above do not give rise to a reasonable apprehension of bias. Mr. Van Ommen, on January 22, 2019, was simply making an observation with respect to the Respondent's argument. On the second occasion, on January 8, 2020, Mr. Van Ommen was expressing concern about the frequency of conduct reviews with respect to Juricert breaches.

[89] The question by Mr. Van Ommen to the witness on November 15, 2019 was simply confirming the evidence that she and other staff did have the ability to log in to the Respondent's desktop computer.

[90] None of the comments or the question by Mr. Van Ommen support the submission that a reasonable right-minded person, viewing the matter realistically and

practically and having thought the matter through, would conclude that there was a reasonable apprehension of bias in the panel and they would not decide the matter fairly. In addition, the comment by the Chair at the beginning of the hearing on Disciplinary Action indicating that the panel was considering a substantive penalty in excess of four months also does not demonstrate a reasonable apprehension of bias. Instead, the panel was simply alerting counsel to the thoughts of the panel in order for him to be able to respond to the concerns that the panel had raised.

[91] In addition to the four exchanges discussed above, the Respondent suggested that the panel's comments in paragraphs 19 through 21 in the Facts and Determination Decision are further evidence of bias. Those paragraphs are in response to the Respondent's submission that, as 15 lawyers found to have shared their Juricert password had been dealt with by way of a conduct review, the conduct of the Respondent did not justify a lengthy suspension. That submission was rejected on the basis that the Respondent had a significant professional conduct record. In addition, the panel expressed concern that the wrongful conduct occurred over a lengthy period of time resulting in a risk that the land title registration system could be misused. Those comments do not demonstrate a reasonable apprehension of bias but are simply the panel's view with respect to the seriousness of the Respondent's actions.

[92] The Respondent also relies upon the refusal by the panel to permit the Respondent to tender evidence by a witness by way of an affidavit. As set out elsewhere in these reasons, the decision to refuse the affidavit was correctly made. It does not demonstrate a reasonable apprehension of bias.

[93] The Respondent also relied upon a decision of the panel to order disclosure of documents related to Exhibits 5 through 13 during the hearing in order to permit the Law Society to review those documents.

[94] Those documents were produced for the first time in the middle of the hearing. The Law Society applied for production of related documents and an adjournment in order to review them. After hearing argument, the panel granted the applications of the Law Society. Again, this was a considered decision and did not demonstrate a reasonable apprehension of bias.

[95] The Respondent also submitted that permitting the Law Society to split its case after the Respondent closed his case also raised a reasonable apprehension of bias. As discussed above, we are of the view that allowing the Law Society to call Mr. Palmer as a rebuttal witness did not prejudice the Respondent and the panel made that decision on the merits of the Law Society's application. That does not demonstrate a reasonable apprehension of bias.

Disciplinary action

[96] As set out above, the Respondent submits that the panel erred in imposing a four-month, or any, suspension and that a fine would have been a more appropriate sanction.

[97] Also as set out above, the standard of review when considering the appropriate discipline response is for the review board to determine if the sanction or penalty for the impugned conduct falls within an appropriate range of penalties, based on the circumstances of the misconduct and a consideration of penalties imposed in other cases of similar conduct. (*Law Society of BC v Faminoff*, LSBC 2017 04, paragraph 71).

[98] The Respondent submitted that a four-month suspension was beyond the normal range of penalty, that the penalty was overly severe and that a fine would have been an appropriate penalty.

[99] In this regard, the Respondent submitted that the panel gave either no weight or insufficient weight to the reference letters of Ms. M and Mr. B; disregarded the fact that there was no evidence that the Respondent received a pecuniary benefit or that the conduct reduced the Respondent's workload; erred in concluding that the wrongful conduct occurred hundreds or perhaps thousands of times; and disregarded the evidence that there were currently proper password protection systems in place. The Respondent also submitted that the panel inappropriately considered the Respondent's refusal to admit the misconduct as an aggravating factor in determining the discipline sanction and gave insufficient consideration to the fact that in 15 instances since 2012 the discipline sanction received by other lawyers for inappropriately sharing their Juricert passwords was a conduct review. In addition, the Respondent submitted that, by expressing consternation at the number of conduct reviews for sharing Juricert passwords and the need to do something more, the panel pre-judged the severity of the Respondent's conduct. The Respondent submitted that the decisions in *Law Society of BC v Williams*, 2010 LSBC 31 and *Law Society of BC v King*, 2019 LSBC 07, where a fine was imposed, were the most relevant discipline decisions and that a fine was the appropriate discipline outcome in the present matter.

[100] Counsel for the Law Society submitted that a four-month suspension was an appropriate disciplinary action when considered in light of the Respondent's Professional Conduct Record and the concept of progressive discipline; that the panel properly considered the principles of: protection of the public; denunciation; proportionality; and consistency and precedential value of sanctions.

[101] Counsel for the Law Society also submitted that the imposed sanction of a four-month suspension was appropriate and it would be inappropriate for the Review Board to "tinker" with it (*Hordal).*

[102] For the reasons that follow, this Review Board finds that the appropriate penalty in the circumstances of this matter is a suspension. However, we find that the appropriate duration of the suspension should be two months.

[103] In reaching our decision on penalty we carefully considered the submissions of the Respondent and the Law Society and the authorities referred to.

[104] As noted by the panel, the purpose and goal of disciplinary proceedings is summarized in *Law Society of BC v Nguyen*, 2016 LSBC 21, at paragraph 36 as:

> Still, the disciplinary action chosen, whether a single option from s. 38(5) or a combination of more than one of the options listed, must fulfill the two main purposes of the discipline process. The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.

[105] In determining the appropriate discipline action the panel considered the factors set out in *Law Society of BC v Ogilvie*, 1999 LSBC 17, which were summarized in Law *Society of BC v Dent*, 2016 LSBC 05 as:

(a) nature, gravity and consequence of conduct;

(b) character and professional conduct record of the respondent;

(c) acknowledgement of the misconduct and remedial action; and

(d) public confidence in the legal profession, including public confidence in the disciplinary process.

Nature and gravity of the misconduct

[106] As noted by the panel at paragraph 15 of the Decision on Disciplinary Action, the Law Society's *Code of Professional Conduct* (the "*Code*") provides, at section 6.1-5 and associated commentary that:

> A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not
>
> (a) permit others, including a non-lawyer employee, to use such access; or
>
> (b) disclose his or her password or access phrase or number to others.
>
> [1] The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

[107] As noted by the panel, the Law Society, through the *Benchers' Bulletin*, has reminded lawyers of their obligations when granted the right to affix a digital signature for documents to be filed in the Land Title Office.

[108] As described in *Williams* at paragraphs 12 and 13:

> Both the execution provisions under Part 5 of the *Land Title Act* and the electronic submission provisions under Part 10.1 are important safeguards of the integrity of the land title system in British Columbia. As officers under the *Act*, members of the legal profession play a key role in ensuring the integrity of transfer documents and safeguarding the system from fraud.
>
> Given the importance of the role played by lawyers who act as officers, conduct related to the electronic submission of improperly executed documents must be viewed as serious. In this case, the executed paper copy of the Form C release was not registrable because, on its face, it had not been witnessed by an officer. The Respondent overcame this impediment to registration not by obtaining a properly executed document, but by incorporating his electronic signature and inserting his name under the signature space for the officer, then submitting an electronic version.

[109] We agree with the panel that the integrity of the Land Title registration system is dependent on users not sharing their password to that system. In the present matter, the panel found that the Respondent's staff used his Juricert password from early 2012 to early 2015. Although no harm or fraud is alleged to have occurred, by sharing his password, the Respondent put the integrity of the Land Title registration system at risk. We find this to be serious misconduct.

Character and Professional Conduct Record of the Respondent

[110] The Respondent provided three character references. One was Ms. M, a lawyer who practises with the Respondent, who testified at the disciplinary phase of the hearing that she had no concerns about the Respondent's professionalism. It is self-evident that Ms. M was aware of the current discipline proceeding as she testified at it. It is, however, not clear whether Ms. M was aware of the Respondent's previous disciplinary record.

[111] Similarly, both Mr. B, who provided a character reference letter in support of the Respondent, and Ms. B who swore an affidavit, only referenced they had knowledge of the current disciplinary proceedings.

[112] As discussed by the benchers on review in *Law Society of BC v Johnson*, 2016 LSBC 20, paragraphs 42 to 45:

> With respect to the character letters, it is clear the hearing panel gave the letters some weight. However, there is only so much weight that character letters can be given. This is well stated by Gavin MacKenzie in his work *Lawyers & Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Carswell, 1993), at page 26-45:
>
> > Some types of evidence in mitigation of penalty are more reliable indicators of the likelihood of recurrence than are others. Character evidence is common and can be persuasive, but it is much less valuable if the witnesses are not fully informed of the facts. Even then, it is difficult to gauge the extent to which the evidence is affected by factors such as friendship. Virtually all lawyers are responsible for some good deeds, and virtually all are held in high esteem by some other lawyers and clients. The discipline hearing panel must ensure that the process is not transformed from a deliberative process into a referendum among members of the profession.
>
> …

> However, we must agree with Gavin MacKenzie's comments set out above. There is a question whether all authors of the character letters knew all the circumstances of the Respondent's PCR. For example, conduct reviews are not published. Many of the letters refer to the Respondent's reputation in the community and say that they have never heard of the Respondent committing such behaviour before. Significantly, none of the letters refers to the incident of 1997 when the Respondent was involved in a similar incident and disciplined in 2001.

[113] As in the present matter, it is unclear if the Respondent's character references were aware of his past disciplinary history as they made no mention of it or what he might have learned from it. Consequently, the panel did not err in not giving weight to those references.

[114] As noted by the panel, the Respondent has a significant Professional Conduct Record, which is summarized at paragraph 24 of the Decision on Disciplinary Action and consists of two conduct reviews in 2009; a referral to Practice Standards in 2009; another conduct review in 2013; a citation in 2013; and a further citation in 2017 (for conduct that arose around the same time as the facts giving rise to this proceeding).

Acknowledgement of the misconduct and remedial action

[115] The Respondent has consistently denied that he shared his Juricert password with staff, which he is entitled to do. While admission of conduct can be a mitigating factor, as the panel correctly noted, failure to admit misconduct is not an aggravating factor.

[116] Given the Respondent's position that he did not share his Juricert password with staff, it is unsurprising he has taken no "remedial" action per se. However, the staff members who the panel found had his password no longer work at his firm, and the Respondent has changed his password as prompted to by the Juricert system from time to time.

Public confidence in the legal profession, including public confidence in the disciplinary process

[117] The panel noted that, as gatekeepers of the land title registration system, lawyers must use that authority ethically and responsibly. We agree.

Range of Disciplinary Action

[118] There are few Law Society of BC discipline decisions on the inappropriate use of Juricert, but there have been several conduct reviews. Summaries of conduct reviews and discipline decisions are published in the *Benchers' Bulletin*, which is distributed to all lawyers in the province.

[119] The Respondent on review submitted that the panel, when determining the appropriate discipline sanction, gave insufficient consideration to the fact that since 2012 the discipline sanction 15 other lawyers received was a conduct review. At the initial hearing, the Respondent submitted that, because 15 other lawyers who shared their passwords had been dealt with by way of conduct review, the conduct was not so serious as to warrant a lengthy suspension.

[120] As the panel pointed out in its reasons, a conduct review is typically used when there is an admission and recognition of the wrongful conduct *and* where the lawyer does not have a significant professional conduct record. In this instance, while not relevant to the form of disciplinary sanction a panel can impose (reprimand, fine, suspension, disbarment) the Respondent's denial of wrongdoing likely made a conduct review a less viable avenue of discipline process. In the circumstances of this matter, and given the principle of progressive discipline, it is also likely the Respondent's professional conduct record also made a conduct review a less viable avenue of discipline. In any event, we agree with the Law Society's submissions that it is not the role of a hearing panel or a review board to review how a particular discipline matter should be dealt with (i.e., conduct review or citation). Such decisions are those of the Law Society's Discipline Committee. The role of the hearing panel is to determine, once a citation has been issued, if the Law Society has proved on a balance of probabilities the conduct the citation alleges to have occurred and, if so, whether the conduct constitutes professional misconduct.

[121] In *Williams*, a lawyer incorporated the lawyer's electronic signature into a Form C Release and caused the document to be filed electronically with the Land Title Office, even though the lawyer knew that the Form C Release had not been properly commissioned. In that matter, the lawyer was instructed by an out-of-province client to immediately remove a builders' lien that the lawyer had previously filed on the client's behalf. The lawyer emailed a form of release to the client for execution and instructed his assistant to send the client a Form C Release of lien. While the client signed and returned the Form C Release, the client's signature was not properly witnessed by an officer within the meaning of the *Land Title Act*. The lawyer then incorporated his signature into the Form C Release and

submitted it electronically to the Land Title Office. The lawyer self-reported his conduct to the Law Society. The lawyer was reprimanded for his conduct and ordered to pay costs.

[122] *King* involved a real estate transaction and a lawyer who was acting for HM and FD in the sale of real property. A third party, DM had filed a Certificate of Pending Litigation against title to the property. DM called the lawyer to ask her to remove the Certificate of Pending Litigation from the property. As DM was detained at the time, the lawyer attended the Surrey Pre-Trial Centre and met with DM. The lawyer breached her ethical duties by not advising DM that she was not acting for him and that he should obtain independent legal advice. DM signed the release of the Certificate of Pending Litigation. When the lawyer was preparing to file the release in the Land Title Office she noted she had forgotten to add the officer certification onto the release. The lawyer then altered the original release by cutting and pasting her officer certification, changing the file number on the top of the release, and applying her own initials as well as those purporting to be DM's to the amended portion of the release. The lawyer then affixed her signature and submitted the altered release and a Form 17 Cancellation of Charge to discharge the Certificate of Pending Litigation at the Land Title Office. The respondent was fined $8,000 and ordered to pay costs.

[123] The panel noted, at the time of the hearing, the present matter was the first instance where a discipline panel considered the wrongful sharing of a Juricert password. Since then, the wrongful sharing of a Juricert password, among other things, was considered in *Law Society of BC v. Wilson*, 2020 LSBC 20. In that matter, the Law Society and the lawyer made a joint submission that a fine of $15,000 and costs was an appropriate disciplinary sanction. The panel's Decision on Disciplinary Action in this matter was rendered after the *Wilson* hearing was concluded. Without the benefit of submissions on the effect of the decision on disciplinary action in this case, the panel in *Wilson*, at paragraph 31, determined that it was not appropriate for it to consider the decision without submissions on the facts and circumstances in that decision. However, the panel rejected the joint submissions that a fine of $15,000 was an appropriate discipline sanction and imposed a fine of $25,000 noting, at paragraph 33, that "…these facts are at a margin where a fine has been transitioned to a suspension in many similar factual situations … ."

[124] The Respondent submitted that the two most relevant decisions are those of *Wilson* and *King*.

[125] However, it is our view that a suspension is the appropriate discipline sanction. As noted in *Nguyen*, the first and overriding purpose of the discipline process is to

ensure the public is protected from acts of professional misconduct. Members of the legal profession play a key role in ensuring the integrity of the Land Title registration system and safeguarding the system from fraud.

[126] We recognize that this was the first instance where the sharing of a Juricert password was dealt with by citation. The fact that it was the first to be dealt with by citation does not, however, change the seriousness of the misconduct.

[127] The seriousness of the misconduct, together with the Respondent's Professional Conduct Record warrants a suspension of two months. As we are reducing the suspension imposed by the panel by half, which is a substantial amount, we do not consider that to constitute "tinkering".

[128] We order that the Respondent be suspended for a period of two months, with the suspension commencing September 1, 2021 or such other date on which the parties may agree.

COSTS

[129] While the Law Society applied for an order for costs in the Review, it did not make submissions in that regard. The Respondent requested that submissions on costs be made once all other matters have been dealt with.

[130] As no submissions on costs were heard during the review hearing, if the parties are not able to agree as to costs, they may make written submissions within 30 days of the date of the issuance of this decision.