2021 LSBC 40
Decision Issued: October 13, 2021
Hearing File No.: 20200017
Citation Issued: March 13, 2020

LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL
HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

SAMUEL THEODORE GRAY COLE

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	February 22, 23, 24, 25, 26, 2021 and April 12, 2021
Panel:	Geoffrey McDonald, Chair Ralston Alexander, QC, Lawyer Cyril Kesten, Public representative
Discipline Counsel:	Lisa Ridgedale Leah Shepherd
Counsel for the Respondent:	Patrick Sullivan

INTRODUCTION AND OVERVIEW

[1] The Respondent appeared before the Panel in response to a Citation issued March 13, 2020, alleging:

1. Between approximately March 19, 2014 and April 3, 2014, you counseled and or facilitated KR, the principal of your client C Ltd., a publicly listed

entity, to indirectly purchase shares of C Ltd. when you knew, or ought to have known, that indirect participation by the principal in the private placement financing contravened the directive of a securities regulator, contrary to rules 2.2-1 and 3.2-7 of the *Code of Professional Conduct for British Columbia*.

2. Between approximately February 4, 2014 and April 3, 2014, you counseled and or facilitated KR, the principal of your client C Ltd., a publicly listed entity, to indirectly purchase shares of C Ltd., without making reasonable inquiries as to whether KR was in possession of material undisclosed information regarding C Ltd. such that KR's direct or indirect participation in the share purchase may contravene section 57.2(2) of the *Securities Act*, RSBC 1996, c. 418, contrary to rules 2.2-1 and 3.2-7 of the *Code of Professional Conduct for British Columbia*.

3. On or about March 10, 2014 and April 2, 2014, you assisted your client C Ltd., a publicly listed entity, in filing documents with a securities regulator that represented there was no undisclosed material information about C Ltd., without making reasonable inquiries about the accuracy of those representations in circumstances where inquiries were required, contrary to rules 2.2-1 and 3.2-7 of the *Code of Professional Conduct for British Columbia*.

[2] The Law Society asserts that each of these allegations constitute professional misconduct pursuant to section 38(4) of the *Legal Profession Act*, SBC 1998, c. 9.

[3] Evidence was presented February 22 through 26, 2021. Five witnesses testified, including the Respondent. After filing written submissions, the parties made oral arguments on April 12, 2021.

ISSUES

[4] There are two issues before the Panel. Did the Respondent commit the factual elements that make up each allegation? Secondly, if that conduct is proven to have occurred, does it amount to professional misconduct?

BURDEN OF PROOF, ESSENTIAL ELEMENTS AND EVIDENCE

Burden of proof

[5] The Law Society disputed whether it must prove every element of each allegation and the evidence that is required. In its written submissions, the Law Society took the position that it " … does not have to prove each evidentiary element on a balance of probabilities" (Law Society Written Submissions para. 195). In its sur-reply, the Law Society further asserted:

> … 'context is all important', and where appropriate, the adjudicator should consider, amongst other things, the seriousness of the allegations in consideration of the evidence required to meet the standard of proof. As stated by the Supreme Court of Canada in its decision of *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 94, the evidence that will be required to reach the standard of proof will be affected by the nature of the proposition that the party with the burden is seeking to establish and the particular context of the case. (Law Society Sur-Reply at para. 5)

[6] The Law Society's position is unsupported by the case law and is contrary to the principles of natural justice. It is well established that the Law Society faces the burden of proving the allegations on a balance of probabilities (*Foo v. Law Society of BC*, 2017 BCCA 151 at para. 63). Further, the parameters of the hearing are set by the citation. The Law Society is entitled to draft the citation against the Respondent as it deems appropriate; however, having done so it must prove each essential part of those allegations. This was summarized in *Law Society of Upper Canada v. Zaretsky*, 2013 ONLSHP 54 at para. 144:

> *The Law Society must establish each factual element of the alleged misconduct on a balance of probabilities*. In light of the serious consequences to the licensee of a finding of professional misconduct, the evidence must be scrutinized with care and it must be sufficiently 'strong and unequivocal' – or put differently, sufficiently 'clear, cogent and convincing' – to satisfy the balance of probabilities test.
>
> [emphasis added]

[7] In *F.H. v. McDougall*, 2008 SCC 53, the court explicitly set the balance of probabilities test as the sole standard of proof and rejected the idea that the seriousness of an allegation altered the test. The court commented at paras. 40, 45 and 46:

> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. *However, these considerations do not change the standard of proof.* …
>
> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> [46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. …
>
> [emphasis added]

[8] Citations are serious matters and the resulting hearings are conducted to protect the public interest. A finding of professional misconduct can have dire consequences for a lawyer. The context of a disciplinary hearing requires that the panel be satisfied that each essential factual element be proven on clear, cogent and convincing evidence on the balance of probabilities standard.

Essential elements

[9] The Respondent made extensive arguments regarding the essential elements of each allegation. He argues that the Law Society must prove the following:

> Allegation 1:
>
> (a) KR made an indirect purchase of C Ltd. shares;
>
> (b) There was a directive by a securities regulator that KR could not participate in the C Ltd. private placement;
>
> (c) The Respondent knew, or ought to have known, that KR was indirectly participating in the C Ltd. private placement; and

(d) The Respondent either counselled or facilitated KR to indirectly purchase C Ltd. shares.

Allegation 2:

(a) There was a direct or indirect purchase of C Ltd. shares by KR between February 4, 2014 and April 3, 2014;

(b) KR possessed material undisclosed information regarding C Ltd.;

(c) The Respondent either counselled or facilitated KR to directly or indirectly purchase shares of C Ltd.; and

(d) The Respondent was required to make inquiries of KR concerning whether he had material undisclosed information and the Respondent either did not make inquiries or those inquiries were insufficient.

Allegation 3:

(a) The Respondent filed documents with a securities regulator on March 10, 2014 and/or April 2, 2014, which represented that there was no material undisclosed information (the "Filed Documents");

(b) Material undisclosed information existed at the time the Filed Documents were submitted by the Respondent; and

(c) The Respondent was required to make reasonable inquiries about the accuracy of information on the Filed Documents and did not make sufficient inquiries.

[10] The Panel disagrees with the Respondent in several important respects. Allegation 1 alleges that the Respondent either counselled or facilitated KR to indirectly participate in the purchase of C Ltd. shares. If the Law Society establishes that the Respondent counselled KR to indirectly purchase C Ltd. shares contrary to a directive of the regulator, then the allegation is factually proven regardless of whether such a purchase occurred. Similarly, Allegation 2 does not require KR to have indirectly purchased shares of C Ltd. This allegation is complete if the Respondent, after either counselling an indirect purchase or facilitating the indirect purchase, failed to make reasonable inquires to determine if section 57.2(2) had been breached with respect to the purchase of C Ltd. shares. Finally, Allegation 3 could be proven even if material undisclosed facts do not exist. Rather, the allegation is complete if the Respondent submitted the Filed Documents in

circumstances where he should have made reasonable inquires with respect to the accuracy of the Filed Documents and failed to do so.

[11] At the Hearing the Respondent admitted some essential elements of the allegations. With respect to Allegation 1, the Respondent admitted that there was a directive from the securities regulator prohibiting KR from participating directly or indirectly in the private placement financing. On Allegation 3, the Respondent agreed that he had submitted the Filed Documents on March 10, 2014 and April 2, 2014 and that those documents represented that there was no undisclosed material information about C Ltd. The Respondent disputes the other elements of these allegations and all the elements of Allegation 2.

[12] In correspondence to counsel for the Respondent, the Law Society particularized Allegation 3 to documents filed on March 10, 2014 and April 2, 2014. The Respondent relied on this particularization in his response to the Citation.

Evidence

[13] The Panel heard from five witnesses: Kevin Hisko, AW, KR, JH and the Respondent. Three of the witnesses, KR, AW and the Respondent, testified regarding the events at issue. The evidence of KR and the Respondent differed in several key respects – particularly whether the Respondent counselled KR to indirectly participate in the private placement financing. This requires an evaluation of each witness' credibility in accordance with the principles set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185 to 187. When making this evaluation, the Panel must always be mindful that the Law Society bears the burden of establishing the facts underlying the citation. The Respondent does not have to prove or disprove anything. Fortunately, as in *Bradshaw*, the Panel has the advantage of numerous email exchanges, letters and other documents created at the time of events that provide an accurate reflection of what happened. Because their evidence is so intertwined with the facts, the evidence of these three witnesses is addressed in the Facts portion of this decision.

[14] Mr. Hisko was external counsel retained by the Law Society to investigate this matter. The primary purpose of Mr. Hisko's evidence was to tender a variety of documents and statements that he obtained during his investigation.

[15] JH was called by the Respondent to give opinion evidence regarding the meaning of material facts under the *Securities Act*. The Respondent attempted to tender JH as an expert but had declined to provide evidence that JH has expertise or specialized knowledge such that he should be recognized as one. As this is an

administrative hearing, JH was permitted to provide his opinion, though it was of limited use to the Panel.

FACTS

[16] The Respondent and KR had known each other professionally prior to the events at issue; the Respondent in his capacity as a lawyer and KR as a businessperson.

[17] KR and AW were in a long-term romantic relationship in the winter of 2013 and spring of 2014. Their relationship broke down in June 2014. Prior to these events, KR funded some investment accounts for AW's benefit. Though largely managed at the direction of KR, these previous investments were AW's property.

Chronology of events

[18] In January 2014, M Co. was a privately owned company that produced high-end briefcases and luggage. KR viewed M Co. as a business opportunity and was interested in acquiring it and transitioning it into a publicly-traded company.

[19] On January 17, 2014, KR requested the Respondent to draft a letter of intent between himself and M Co. to acquire M Co. The Respondent, after seeking some further information from KR by email, provided " … a first run draft" letter of intent at 5:28 pm that evening. The email exchange is Exhibit 5 in this proceeding.

[20] Between January 17 and 22, 2014, the Respondent and KR had multiple email communications regarding the M Co. acquisition (Exhibit 7). The Respondent and KR planned to complete the acquisition through a reverse takeover by a shell company trading on a public stock exchange. The letter of intent between KR and M Co. was merely a stopgap for the purpose of enabling other steps necessary for the transaction to occur.

[21] On January 22, 2014, the Respondent provided KR with the final version of the letter of intent between KR and M Co. (Exhibit 6).

[22] On January 30, 2014, KR executed the letter of intent with M Co. drafted by the Respondent. KR emailed the Respondent advising him that the letter of intent had been signed and that they now needed to seek out an appropriate shell company to raise capital and go public with a minimum of "snags from the Exchange" (Exhibit 10). In that email, KR asked the Respondent to contact BH to discuss if he had a suitable shell company for the acquisition.

[23] On February 4, 2014, KR identified C Ltd. as a potential shell company that might be appropriate for the acquisition. At that time, C Ltd. was a company listed on the TSX Venture Exchange (TSX-V) describing its principle business as being the acquisition and exploration of mineral properties.

[24] KR emailed the Respondent on February 4, 2014 asking for his advice on two potential company structures for the acquisition drafted by BH (the "BH Proposals") using C Ltd. The email chain is Exhibit 8. In both structures, KR is identified as participating in the first round financing. The Respondent replied to KR that he did not see any issues and suggested a five-step plan for the acquisition. That plan was as follows:

> 1. Resume trading on the shell, and see how the price settles after a few days;
>
> 2. Announce the seed round to recapitalize the shell (nothing about the transaction at this stage);
>
> 3. Close the seed, and clean up payables on the shell;
>
> 4. Announce the deal with M Co. and halt the stock (ensure pricing works with acquisition round), following which money from the seed could be lent to M Co. with TSXV approval; and
>
> 5. Close the acquisition round, and hold funds in escrow to be released on closing of the acquisition.
>
> Don't need more than a few weeks from start to finish on all the rounds … then it's just a matter of closing the deal as a change of business. (Exhibit 8)

[25] In a February 5, 2014 email, the Respondent wrote:

> … *The M Co. business will be acquired in an RTO transaction involving an existing public entity* ... we're still settling on structure, but the decision will ultimately be driven by the components of the existing business that will be retained by the pubco, and the requirements of the pubco to complete an audit of that business. (Exhibit 9)
>
> [emphasis added]

[26] On February 6, 2014, the Respondent gave KR further advice regarding C Ltd.'s structure and suitability for the acquisition (Exhibit 10).

[27] Throughout February there were a number of emails, telephone calls and meetings involving the Respondent, KR and others moving forward the acquisition of M Co. through a reverse takeover by C Ltd. KR and the Respondent remained in regular contact about the acquisition.

[28] KR was added to the board of C Ltd. This was announced in a February 18, 2014 press release. The Respondent testified that KR had been added to the board so that KR " … could have some oversight and control over the restructuring of [C Ltd.]" (Transcript February 24, 2021, page 118, line 24 to page 119, line 1). In the press release, the business of C Ltd. continued to be " … the acquisition and exploration of mineral properties."

[29] On February 19, 2014, the corporate records were transferred to the Respondent's law firm. From that point forward the Respondent's law firm were the solicitors for C Ltd.

[30] On March 7, 2014, C Ltd. issued a press release announcing its intention to raise $700,000 through a private placement (Exhibit 14). In the press release, C Ltd. provided the following description of its business activities:

> C Ltd. is currently a Canadian based exploration stage company. To date, the principal [sic] business of the Company has been the acquisition and exploration of mineral properties. The Company intends to identify and acquire a new qualifying project or business.

[31] The Respondent made written submission to the TSX-V on March 10, 2014, seeking conditional approval of the seed financing through the planned private placement (Exhibit 15). Attached to that letter was a signed Form A Listing Notification and a signed Form C Notice of Proposed Share Issuance/Financing. The Form C, under the title "Share Issuance/Financing Restriction", stated:

> 1. This transaction does not and will not:
>
> (a) involve or form part of a series of transactions that may result in a Change of Business or a Reverse Takeover …

[32] Both the Form A and the Form C specified that there was no material undisclosed information. The Form A and the Form C were signed by C Ltd.'s Corporate Secretary, KE. The Respondent testified that he did not prepare the letter but agreed that he had reviewed the letter and its attachments and that it was sent under his signature. This letter and its attachments are the first of two filings that are at issue in Allegation 3.

[33] On March 18, 2014, the Respondent sent an email to EW, Listed Issuer Services Analyst with the TSX-V, seeking approval for the planned private placement (Exhibit 25).

[34] EW replied on March 19, 2014 advising that the private placement could proceed " … as long as there will be no insiders participating, given the amount is over $500,000 for working capital" (Exhibit 25). As a member of C Ltd.'s board, KR was an insider. EW's direction that insiders not participate was a directive of a securities regulator.

[35] The Respondent forwarded EW's email to KR. The email was likely forwarded the same day, March 19, 2014. An important conflict in the evidence is what happened immediately after KR received this email. KR testified that he immediately contacted the Respondent by telephone and the Respondent suggested using AW as a nominee to purchase shares. The Respondent testified that no such telephone call occurred and at no time did he ever have a conversation where he counselled KR to illegally circumvent the TSX-V directive by purchasing shares through a nominee.

[36] On March 24, 2014 and the next day, AW purchased shares in C Ltd. KR provided the funds for the purchases. Of particular note was the March 25, 2014 purchase that was facilitated by the Respondent and his law firm. The purchase, 1,400,000 common shares purchased for $70,000, would later be amended to 1,130,000 shares and require a refund of $13,500 (Exhibit 20). Though the funds had been provided to his law firm in trust for AW's benefit, the Respondent asked KR to whom the funds should be refunded.

[37] Because AW had more than a ten per cent interest in C Ltd., a personal information form had to be filed with the TSX-V. The Respondent provided AW with the form and gave some direction on how it should be completed (Exhibit 19). The Respondent told AW in the email that he expected she " … would answer *NO* to all of the questions" (Exhibit 19, emphasis in original). He further described the form as "just one of these hoops we have to jump through" and asked when she could come to his office to notarize the form for filing. They met shortly thereafter, and the Respondent notarized the form.

[38] On March 28, 2014, the Respondent submitted by email the Amended Form C Notice of Proposed Share Issuance/Financing signed by KE (Exhibit 21). Exhibit 21 set out the details of the private placement: 14,500,000 shares to be issued at five cents per share. It specified that the proceeds from the private placement were to be used for outstanding debts and general working capital. The Amended Form C included:

1. This transaction does not and will not:

   (a) involve or form part of a series of transactions that may result in a Change of Business or a Reverse Takeover …

[39] On April 2, 2014, the Respondent continued the March 28, 2014 email chain with EW, writing her three times at 9:26 am, 11:56 am and 2:25 pm (Exhibit 25). The 9:26 am email stated the following:

1. KR, a director of the Company, has confirmed that there is no undisclosed material information regarding the Company, with the exception of the closing of this private placement.

[40] EW, on behalf of the TSX-V, replied the next morning:

> Based on the representation by the Company via your email dated April 2, 2014, we confirm that the Company may go ahead and close the proposed private placement. …

[41] On April 3, 2014, C Ltd. issued a press release announcing the private placement with gross proceeds of $700,000 (Exhibit 26). The Respondent drafted the press release. In that press release C Ltd. represented its business to be mining related and that it was seeking out a " … new qualifying project or business."

[42] On April 23, 2014, C Ltd. and M Co. entered into a letter of intent for C Ltd. to acquire M Co. through a reverse takeover.

[43] C Ltd. issued a press release on April 25, 2014 announcing that it had entered into a letter of intent effective April 23, 2014 to acquire M Co. and that this acquisition "will constitute a change of business for the Company under the policies of the Exchange …" (Exhibit 30).

[44] In the months following, C Ltd. completed the reverse takeover of M Co. KR and AW ended their romantic relationship and KR, with the assistance of the Respondent as counsel, negotiated the transfer to himself of AW's shares of C Ltd.

EVIDENCE OF THE RESPONDENT

[45] The Respondent's evidence accorded with the above chronology. The Respondent provided the evidence below with respect to insider trading by KR, undisclosed material facts, confirming the accuracy of information on documents he filed and whether KR was his client:

(a) Regarding the regulator's March 19, 2014 email (Exhibit 25) prohibiting insiders from taking part in the private placement, the Respondent unequivocally asserted that KR did not contact him. He was emphatic that he did not and never would counsel anyone to indirectly participate in a private placement financing through a nominee contrary to a directive by the regulator. Moreover, the Respondent testified that, though he was aware KR was listed by BH on February 4, 2014 as one of the private placement financing participants (Exhibit 8), he never discussed it with KR;

(b) With respect to undisclosed material facts, the Respondent was consistent in his view that, because the deal between C Ltd. and M Co. had not been "finalized" fully, there were no material facts to disclose. Though the acquisition of M Co. occurred in accordance with the plan described by the Respondent on February 4, 2014 in Exhibit 8, he viewed the acquisition not to be certain until the letter of intent was signed between C Ltd. and M Co. in April 2014;

(c) The Respondent stated that it was not his practice to confirm the accuracy of the information on the forms that he filed with the TSX-V. Moreover, the Respondent testified that he viewed KR and KE, Corporate Secretary of C Ltd., as sophisticated and experienced businesspeople who were familiar with the operations of public companies and filings with the TSX-V. As such, though he sometimes reviews forms with an inexperienced client, he would never review the forms with individuals such as KR or KE; and

(d) The Respondent testified that, between January and May 2014, KR was not his client. Rather, he viewed himself as counsel for C Ltd. only.

[46] The Panel did not find the Respondent to be a credible witness. The Respondent was evasive and selective in his answers. He gave the impression that he was using his knowledge and experience as a lawyer to tailor his evidence rather than answer honestly and completely.

EVIDENCE OF KR

[47] KR's evidence also followed the above chronology. KR gave the following evidence regarding the events following EW's March 19, 2014 email, ownership of AW's C Ltd. shares, and whether the Respondent was his lawyer:

(a) KR was explicit that, immediately after being forwarded EW's email on March 19, 2014, he contacted the Respondent. KR was taking part in the acquisition with the expectation that he would profit by taking part in the private placement financing. KR was not receiving a salary, stipend or other form of pay for working on this acquisition. If he did not take part in the private placement financing, he was unlikely to profit. KR testified that he was angry when he saw the prohibition and called the Respondent to ask what he should do next. He said the Respondent counselled him to use his girlfriend, AW, and profit through her;

(b) KR testified that he acted on the Respondent's suggestion. He was in a romantic relationship with AW and clearly hoped they would one day marry. At that time, KR viewed AW's participation in the private placement financing as almost equivalent to him personally taking part. It must be noted that KR consistently testified that the shares AW purchased through the private placement legally belonged to her; and

(c) KR clearly viewed the Respondent as his personal lawyer. After identifying M Co. as a company he wished to take public as a business venture, he sought out the Respondent for legal advice and legal services to bring that about. KR said he was inexperienced with public companies – in his prior work he had done investor relations or carried out tasks where he was instructed by more experienced businesspeople as to what he should do. He explained that taking a private company public was a new experience and he was relying on the Respondent.

[48] KR presented as a credible witness. He came across as trying to genuinely answer the questions honestly and completely. However, KR also testified that he had agreed to facts that were untrue when settling with the BC Securities Commission and suggested that he had not committed insider trading. The Panel has been cautious with KR's evidence, carefully weighing it with the *Bradshaw* factors and the totality of the evidence.

EVIDENCE OF AW

[49] AW's evidence was simple and consistent with the other evidence. She was in a romantic long-term relationship with KR in January 2014. Previous to these events KR had set up, funded and directed several investments for her benefit. AW believed that KR had arranged for her to take part in the private placement financing, but she could not say with certainty. The Respondent contacted her by email, and she followed his instructions to carry out the financing. KR provided all

of the funds for the purchase. AW had no particular interest in taking part in the private placement financing. She simply did as she was told by KR and the Respondent.

[50] When AW broke up with KR in June 2014, she said he began to pressure her to "give back" the C Ltd. shares. She became concerned that she could face tax liabilities for doing so and sought legal advice. Eventually the shares were returned to KR in a manner that limited her potential tax consequences.

[51] AW presented as a credible witness.

FACTUAL FINDINGS

Counselling KR to indirectly take part in the private placement financing

[52] The Respondent and KR give completely incompatible accounts. According to the Respondent, KR never contacted him about the March 19, 2014 email from the TSX-V prohibiting insiders from taking part in the private placement financing. KR says that he contacted the Respondent immediately to discuss what he should do now that he was prohibited from taking part. He says that the Respondent counselled him to have his girlfriend take part instead.

[53] Evaluating all of the available evidence and mindful of the factors set out in *Bradshaw*, the Panel finds that, after the March 19, 2014 email, KR immediately contacted the Respondent to ask what he should do next. In that conversation, the Respondent counselled KR to circumvent the regulator's directive by having AW take part in the private placement financing. This finding is based on the following:

(a) From the outset of this acquisition, KR intended to take part in the private placement financing. He intended to make a profit on this business deal by being a party to that financing. If he could not take part in the financing, KR would not make any money from the acquisition;

(b) Though they may not have discussed it verbally, the Respondent was well aware that KR intended to take part in the private placement financing. The Respondent had reviewed the proposed private placement financing proposals, both of which involved KR taking part;

(c) The Respondent's claim that KR did not contact him after receiving the email is unbelievable. The various email chains in evidence clearly show that KR frequently and regularly sought the Respondent's advice

about virtually every aspect of this acquisition. Upon being informed that he was prohibited from participation in the private placement that was essential to his profiting from the acquisition, the only reasonable expectation is that KR would contact the Respondent immediately. The Respondent's evidence that KR did not do so is unreasonable and inconsistent with the regular contact shown by the various email chains that are in evidence; and

(d) Despite KR being prohibited from taking part in the private placement financing, he continued to work on the acquisition after March 19, 2014. The only reasonable inference is that he had found another way to profit from the acquisition – namely through AW. This conclusion is supported by AW's evidence that, after they broke up, KR began to pressure her to "give back" the C Ltd. shares.

[54] On March 19, 2014, the Respondent counselled KR to use AW as a nominee to take part in the private placement financing contrary to the directive of the regulator. The purpose of the Respondent's advice was to circumvent the directive of the regulator that prohibited insiders such as KR from taking part.

Facilitating KR to indirectly take part in the private placement financing

[55] The Panel finds that the Respondent did facilitate KR's indirectly taking part in the private placement financing. Having advised KR to use AW as a nominee on March 19, 2014, the Respondent contacted her a few days later to assist her in completing the purchase. The Respondent personally assisted AW with the purchase. The Respondent's law firm accepted the funds for the purchase from KR through KR's business firm. AW was clear that she was taking part in the private placement financing at the direction of KR and did so with the assistance of the Respondent. In every practical way, AW was KR's nominee in the private placement financing.

[56] The Panel is mindful of KR's evidence that he viewed AW's shares as legally belonging to her. KR suggested that he did not actually commit insider trading and disputed some of the factual admissions he had made with the BC Securities Commission as part of his settlement. The Panel does not give any weight to this evidence. As noted above, AW clearly was his nominee, acting on his instructions and using his funds. The plan went awry for KR when the romantic relationship ended and AW obtained independent legal advice. The insider trading and the subsequent actions by the BC Securities Commission had a very negative effect on

KR's career and finances. The Panel finds that KR's claims that AW's participation was in some way legitimate to be inaccurate, after-the-fact excuses.

Factual findings on Allegation 1

[57] There was a directive by the TSX-V that insiders like KR not take part in the private placement financing. The Respondent counselled KR to use AW as his nominee to indirectly take part. The Respondent then facilitated KR to use AW as his nominee, preparing and filing the required documents and receiving funds in trust from KR's company to pay for the purchase. The Law Society has proven the factual elements of Allegation 1.

Factual findings on Allegations 2 and 3

[58] Allegations 2 and 3 revolve around whether the Respondent failed to make reasonable inquiries regarding the possible existence of undisclosed material facts. Allegation 2 alleges that the Respondent should have made reasonable inquiries of KR's representations. Allegation 3 relates to forms signed by C Ltd.'s Corporate Secretary, KE, and filed by the Respondent with the TSX-V on March 10, 2014, and/or an April 2, 2014 email sent to the TSX-V by the Respondent.

[59] The Law Society strongly asserts that the Respondent was under an obligation to make reasonable inquiries of KR and/or KE to determine whether undisclosed material facts existed. That position ignores the simple fact that the Respondent was intimately well informed with every aspect of this acquisition. The acquisition proceeded in accordance with the plan he set out on February 4, 2014. The Respondent shepherded the acquisition through each stage. There were no inquiries to make because the Respondent knew he had counselled KR to breach the regulator's directive that no insiders take part in the private placement financing. He had then facilitated KR's indirect participation. The Respondent knew that the representation in KE's Amended Form C that he filed on March 28, 2014, representing that the private placement was not part of a transaction or series of transactions for a "… Change in the Business or a Reverse Takeover", was manifestly false. The Respondent knew there were undisclosed material facts and chose to ignore them and filed materials he knew contained inaccurate information with the TSX-V.

[60] The Respondent's claims that the transaction was not certain until the C Ltd. and M Co. letter of intent signed on April 23, 2014, are not credible. Nor were the parts of KR's evidence agreeing with that position. There is no bright line for when a material fact exists, but on the circumstances of this case, material undisclosed facts

were obvious by mid-March 2014. Any one of the following was a material undisclosed fact that the Respondent was aware of in late March 2014:

(a) KR was added to the board to ensure C Ltd. completed the restructuring and reverse takeover of M Co. as planned;

(b) KR had indirectly taken part in the private placement financing using AW as his nominee, contrary to the directive of the TSX-V;

(c) The private placement financing was for the sole purpose of restructuring C Ltd. and then completing a reverse takeover of M Co.; and

(d) The private placement financing was part of a transaction or series of transactions to complete a Change of Business from a mining exploration company into a high-end luggage company.

[61] However, the Citation does not allege that the Respondent filed false information; rather, it alleges that he failed to make reasonable inquiries. The Panel is bound by the allegations in the Citation. At all times the Respondent was fully informed of the acquisition and the filings he made with the TSX-V. The Panel is unable to conclude that he failed to make reasonable inquiries. He knew exactly what he was doing and did it anyway.

[62] The Law Society has failed to prove the factual elements of Allegations 2 and 3, and they are accordingly dismissed.

Was KR the Respondent's client?

[63] The Panel asked counsel whether KR was the Respondent's client. The Respondent's evidence was that he had never been formally retained by KR and KR was not his client in early 2014. While the Respondent had not been formally retained by KR, the evidence overwhelmingly supports that KR had consulted the Respondent and had reasonably concluded that the Respondent had agreed to render legal services on his behalf. The Respondent drafted the initial letter of intent between KR and M Co. The Respondent instructed and advised KR how to proceed with the acquisition and carry out the reverse takeover. That legal advice and work was provided well before the Respondent became corporate counsel on February 19, 2014. KR was at all relevant times the Respondent's client as defined in rule 1.1-1 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

Does Allegation1 amount to professional misconduct?

[64] The Panel must determine whether " … the facts as made out disclose a marked departure from that conduct the Law Society expects of its members" (*Law Society of BC v. Martin*, 2005 LSBC 16 at para. 171). The test is objective. If the lawyer's conduct falls markedly below appropriate conduct, then the lawyer has committed professional misconduct (*Law Society of BC v. Kim*, 2019 LSBC 33).

[65] All lawyers are required " … to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity" (*BC Code*, rule 2.2-1). Questionable, dishonourable and dishonest actions by a lawyer in professional life undermine the administration of justice. If a lawyer behaves in such a manner " … the Society may be justified in taking disciplinary action" (*BC Code*, rule 2.2-1, commentary 3). Section 3.2-7 of the *BC Code* prohibits lawyers from assisting in or encouraging any dishonesty or fraud.

[66] In this case, the Respondent knowingly counselled and then facilitated his client to indirectly participate in a private placement financing contrary to the TSX-V regulator's directive. Such conduct is dishonest and falls far below the standard that the Law Society expects of lawyers. The Panel finds that the Respondent has committed professional misconduct with respect to Allegation 1 of the Citation.

CONCLUSION

[67] For the reasons set out above, the Law Society has proven the Respondent committed professional misconduct with respect to Allegation 1. Allegations 2 and 3 are dismissed.