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THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

HONG GUO

RESPONDENT

DECISION OF THE HEARING PANEL ON DISCIPLINARY ACTION

Hearing dates:	August 10 and 11, 2021
Additional written submissions:	December 10, 2021
Panel:	David Layton, QC, Chair Jeevyn Dhaliwal, QC, Bencher Brendan Matthews, Public representative
Discipline Counsel:	Alison L. Kirby
Counsel for the Respondent:	Craig E. Jones, QC
Written reasons of the Panel by:	David Layton, QC

INTRODUCTION

[1] In our decision on Facts and Determination (2021 LSBC 20) ("F&D Decision"), issued May 20, 2021, we found that the Respondent committed professional misconduct regarding trust funds received from six clients. For each client, the trust funds comprised a modest cash advance received as a retainer to complete uncomplicated solicitor's work on a legal matter.

[2] The Respondent's professional misconduct in relation to these trust funds arose in two ways.

[3] First, she failed to ensure that the advance payments were deposited into a trust account, and instead she put them in her general account prior to delivering a bill for legal services, contrary to Rule 3-58 of the Law Society Rules ("Rules") and/or Rule 3-72 and s. 69 of the *Legal Profession Act* ("*Act*").

[4] Second, the Respondent received these trust funds in breach of an interim order, made by three Benchers under Rule 3-10 ("Rule 3-10 Order"), which prohibited her from handling client trust funds, contrary to rule 7.1-1(e) of the *Code of Professional Conduct for British Columbia* ("*BC Code*").

[5] As a disciplinary action, the Law Society asks us to suspend the Respondent for four months and to further order that, for a period of three years and thereafter until relieved by the Discipline Committee, she:

(a) practise law only as an employee of a law firm of three or more lawyers approved by the Executive Director;

(b) not handle any trust transactions, trust money, or be in any way responsible for authorizing, approving or documenting trust transactions; and

(c) not assume responsibility for any bookkeeping or the creation or maintaining of financial records normally handled by a law firm bookkeeper.

[6] The Respondent submits that the penalty for her professional misconduct should be a reprimand or a fine. She maintains that a fine, if imposed, should not be significant and suggests that it equal the total amount of trust funds she mishandled, namely, $2,740.

[7] The factual background and nature of the Respondent's professional misconduct is reviewed in detail in the F&D Decision. We have relied on our findings in that

decision in determining the appropriate disciplinary action, which, as explained below, is that the Respondent be suspended for one month for her professional misconduct.

GENERAL PRINCIPLES

[8] A disciplinary action imposed following a finding of professional misconduct must further the Law Society's statutory duty to uphold and protect the administration of justice, a primary focus of which is to protect the public from professional misconduct. Upholding and protecting the administration of justice also includes maintaining public confidence in the profession and the Law Society's discipline process. See s. 3, *Act*; *Law Society of BC v. Lessing*, 2013 LSBC 29, at paras. 54-55; *Law Society of BC v. Gellert*, 2014 LSBC 05, at para. 36; *Law Society of BC v. Faminoff*, 2017 LSBC 04 ("*Faminoff* (LSBC)"), at para. 80, affirmed 2017 BCCA 373 ("*Faminoff* (BCCA)"), at para. 37.

[9] Many of the factors that a panel typically considers in determining the appropriate disciplinary action are listed in *Law Society of BC v. Ogilvie*, 1999 LSBC 17, at para. 10. However, the factors identified in *Ogilvie* are not exhaustive, and not all of them are engaged in every case. Moreover, depending on the circumstances of the case, some factors will weigh more heavily than others. See *Gellert*, at paras. 38-41; *Faminoff* (LSBC), at paras. 81-85.

[10] The factors are often grouped under broad headings in assessing the appropriate penalty (*Faminoff* (LSBC), at para. 82). In the Respondent's case, we have grouped them under the following headings:

(a) nature, gravity and consequences of the professional misconduct;

(b) professional conduct record;

(c) reference letters;

(d) acknowledgment of misconduct and remedial action;

(e) range of sanctions in other cases;

(f) impact of proposed penalty;

(g) the principle of proportionality;

(h) public confidence in the legal profession; and

(i) allegations of systemic bias in the Law Society's discipline process.

ANALYSIS OF THE FACTORS

Nature, gravity and consequences of the professional misconduct

[11] As noted, the Respondent's professional misconduct has two discrete aspects: a failure to comply with the Rules governing trust funds; and a breach of the Rule 3-10 Order prohibiting her from handling trust funds.

[12] Starting with the former aspect of misconduct, a failure to comply with the Rules governing trust funds is usually a serious matter. As explained in the F&D Decision, at paras. 56-60, compliance with the Rules dramatically reduces, if not eliminates, the possibility that a client's funds will be mishandled and thereby protects the public and maintains public confidence in the legal profession and the Law Society's ability to regulate lawyers. The Respondent's breach of the Rules by putting trust funds directly into her general account is therefore serious.

[13] This serious misconduct nonetheless has mitigating aspects. The global amount of trust funds mishandled in relation to the Respondent's clients is fairly modest, totalling $2,740. In each instance, the duration of the misconduct was brief, amounting to a few days or so, and never more than a week. None of the clients lost any money or suffered any other form of actual harm. And, while the misconduct related to six clients and spanned from May to September 2018, there is no suggestion that the Respondent mishandled any other trust funds in this way during the March 2017 to October 2018 period covered by the audit that brought the specific problem to the Law Society's attention.

[14] Also mitigating is that, in the F&D Decision, we did not find that the Respondent knowingly breached the Rules governing the handling of trust funds. Her misconduct arose from gross culpable neglect in an objective sense, but did not involve a subjectively culpable state of mind such as a knowing or intentional breach, wilful blindness or recklessness as those concepts are defined in criminal law. While a subjectively culpable state of mind is not a precondition to a finding of professional misconduct, its absence is often mitigating in assessing the appropriate disciplinary action. It is nonetheless worth emphasizing that, as noted in the F&D Decision, given the context in which the Rule 3-10 Order was made, the Respondent should have had a heightened sensitivity to the importance of handling trust funds in strict compliance with the Rules.

[15] The second aspect of the Respondent's misconduct, namely, her breach of the Rule 3-10 Order that prohibited her from handling trust funds, is also serious. As observed in the F&D Decision, at para. 55, a failure to comply with an order made under the *Act* or the Rules undermines the Law Society's ability to regulate lawyers' conduct in the public interest, and so too, the public's confidence in the profession and the administration of justice more generally. Committing professional misconduct by breaching a Law Society order is a serious matter.

[16] Our comments at paragraph 14 above apply equally to the Respondent's breach of the Rule 3-10 Order. That is, the Law Society did not prove that the Respondent knowingly breached the Rule 3-10 Order, which is a mitigating factor in terms of the nature and gravity of the misconduct.

Professional conduct record

[17] Under Rule 4-44(5), in determining a disciplinary action, a panel may consider the respondent's professional conduct record ("PCR"). The definition section of the Rules defines a PCR as a record of all or some of a number of types of information, including: any conditions or limitations of practice imposed under the *Act* or Rules; recommendations made by a Practice Standards Committee; a Conduct Review Subcommittee report that has been delivered to the Discipline Committee; and findings of professional misconduct and associated disciplinary actions rendered by a panel under s. 38 of the *Act*.

[18] The Respondent's PCR is set out in chronological order below, although the entries at subparagraphs (e), (f), (g) and (i) are extremely brief because these matters will be discussed in detail later in this section of our reasons:

(a) *February 28, 2013 Practice Standards Recommendations*: On October 25, 2012, the Respondent was ordered to undergo a practice review, which was held on February 28, 2013 and resulted in recommendations related to: (i) ensuring that her real estate conveyancing staff were carrying out necessary tasks in a timely way; (ii) attending Canadian Bar Association ("CBA") real estate and immigration subsection meetings; and (iii) referring out all new criminal law, family law and litigation files, except for joint divorce petitions;

(b) *February 26, 2016 Conduct Review*: On December 3, 2015, a conduct review was held to discuss the Respondent's conduct in breaching a trust condition, imposed on her regarding $4,000 received in trust for her client, by releasing $3,000 of the funds to her client and withdrawing the remaining $1,000 to pay her fees and disbursements without complying

with the trust conditions, contrary to one or both of Chapter 11, Rule 7 of the *Professional Conduct Handbook*, then in force, and Rule 3-65(7) of the Rules. The Conduct Review Subcommittee's February 26, 2016 report states that the Subcommittee was "troubled" by the Respondent's "adamant refusal to acknowledge that she in any way handled the transaction in an inappropriate manner, even in hindsight." The report further noted that she "demonstrated no insight into how a situation could be prevented or avoided in the future." The Subcommittee therefore referred the Respondent to the Practice Standards Committee;

(c) *March 3, 2016 Practice Standards Recommendations*: On October 29, 2015, the Respondent was ordered to undergo a practice review, which was held on March 3, 2016 and resulted in recommendations that she: (i) continue to network with other lawyers and attend CBA subsection meetings; (ii) continue to reach out to other lawyers or practice advisors to obtain advice; and (iii) enter into a formal mentorship agreement with a lawyer satisfactory to the Practice Standards Department who will report back to that Department on a quarterly basis;

(d) *June 1, 2016 Conduct Review*: On March 4, 2016, a conduct review was held to discuss the Respondent's conduct in: (i) having her assistant prepare a document that was written in English and included a release, which she did not review prior to presenting it to a non-client for signature; and (ii) presenting the document to the non-client without discussion, even though the non-client was unrepresented, not proficient in English, and adverse in interest to her and her client. This conduct was inconsistent with the Respondent's duty to conduct herself honourably and with integrity under rule 2.2 of the *BC Code*. In its June 1, 2016 report, the Conduct Review Subcommittee noted that at the conduct review, the Respondent initially stated that she did not agree with the Subcommittee's concerns regarding her conduct, but that she agreed with those concerns after being prompted by her counsel.

(e) April 19, 2016 Undertaking to the Law Society;

(f) August 17, 2016 Rule 3-10 Order;

(g) March 30, 2017 Rule 3-10 Order varying the August 17, 2016 Rule 3-10 Order;

(h) *May 30, 2019 Administrative Suspension*: On May 30, 2019, the Respondent was administratively suspended under Rule 3-6 for failing to

substantively respond during the course of an investigation. The suspension was lifted on June 6, 2019;

(i) *November 4, 2020 Facts and Determination Decision*, reported as *Law Society of BC v. Guo*, 2020 LSBC 52 ("*Guo No. 1* (F&D)"); and

(j) *October 26, 2021 Disciplinary Action Decision in Guo No. 1*, reported as *Law Society of BC v. Guo*, 2021 LSBC 43 ("*Guo No. 1* (DA)"). Although this decision was released after the disciplinary action hearing in the matter before us, we later received and have considered written submissions from the parties regarding what impact, if any, it should have on the result in this case. Some of the points made in these submissions are referenced in our analysis at various places in these reasons.

[19] We agree with the Law Society that the F&D and DA decisions in *Guo No. 1* should be considered by us regardless of whether either or both of them are under review or appeal. In so concluding, we rely on *Law Society of BC v. Perrick*, 2018 BCCA 169 and *Law Society of BC v. Taschuk*, 2000 LSBC 22. The Respondent does not argue otherwise.

[20] The Law Society submits that the gravity of the Respondent's misconduct is made much more serious because it occurred in the context of multiple failed attempts by the Law Society to regulate her handling of trust funds, including after she reported an employee theft to the Law Society in April 2016. The Law Society says that the misconduct at issue before us is the culmination of the Respondent's continued inability to comply with its regulatory requirements.

[21] To understand this submission, it is necessary to review in more detail the history of this matter, in particular as it relates to the imposition of the Rule 3-10 Order.

[22] On April 4, 2016, the Respondent reported a multimillion-dollar employee theft of trust funds to the Law Society. She also notified the RCMP. It was ultimately determined that the theft was perpetrated by the Respondent's bookkeeper and another employee. The former provided trust cheques to the latter between late February and March 31, 2016 in the amount of $7.5 million. The final cheque was caught by the bank, but the two employees managed to steal $6,619,256. The Respondent had given many pre-signed cheques to the bookkeeper, which was a key component in facilitating the theft.

[23] The Law Society assembled a team to investigate the circumstances of the reported theft. An order was made under Rule 4-55 authorizing an investigation of the

Respondent's books and records. This order was served on the Respondent on April 14, 2016, following which various records and computers were seized and removed from her office. The Respondent confirmed to Law Society staff in attendance on that date that she would cooperate fully in the Law Society's investigation of the circumstances surrounding the theft.

[24] Following a preliminary analysis of the materials seized under the Rule 4-55 order, on April 19, 2016 the Respondent provided an undertaking to the Law Society, which, as noted at paragraph 18(e) above, forms part of her PCR. Among other things, this undertaking required her to: (i) provide updated client lists and reports to the Law Society as to her progress in eliminating the trust shortage; (ii) open a new trust account to handle all new client matters after that date; (iii) from May 1, 2016 onwards, only operate a trust account with a second signatory who was a lawyer approved by the Law Society; and (iv) hire a chartered professional accountant to reconcile her trust accounts. In this undertaking, the Respondent acknowledged that any breach may lead to discipline proceedings.

[25] On August 17, 2016, the Law Society obtained a consent interim order from three Benchers under Rule 3-10, which, as noted at paragraph 18(f) above, also forms part of the Respondent's PCR. This order required the Respondent to: (i) hire a forensic accountant to reconcile her trust accounts and provide updated client lists identifying the clients affected by the trust shortages; (ii) provide her written consent to the appointment of the Law Society as custodian over a CIBC trust account from which trust funds had been stolen and any files related to or affected by the trust shortage; (iii) prepare a payment plan on how to eliminate the trust shortage; (iv) ensure that all new client matters were handled only through two new trust accounts, which were specified in the order; and (v) not operate a trust account without a second signatory who was a lawyer approved by the Law Society.

[26] The Benchers made this order because they had serious concerns regarding the Respondent's own operation of her trust accounts, including concerns arising from: (i) evidence that she had provided signed blank trust cheques to her bookkeeper; (ii) her failure to perform trust reconciliations on her trust accounts prior to the alleged theft; (iii) her failure to cooperate fully with the Law Society in responding to the alleged theft, including by not complying with her April 19, 2016 undertaking; and (iv) the 2015 conduct review, mentioned at paragraph 18(b) above, which indicated that she had disbursed money from trust contrary to an undertaking yet subsequently lacked any insight into her conduct. See *Law Society of BC v. Guo*, 2016 LSBC 41.

[27] On March 30, 2017, the Law Society obtained a further Rule 3-10 order from three Benchers, which, as noted at paragraph 18(g) above, forms part of the Respondent's PCR. Among other things, this order varied the August 17, 2016 Rule 3-10 Order. The variations included prohibiting the Respondent from operating any trust account or handling any trust funds. This order also required the Respondent to enter into and comply with the terms of a practice supervision agreement by May 1, 2017 (later extended to May 10, 2017).

[28] The March 30, 2017 variation of the initial Rule 3-10 Order was made because the Benchers had significant concerns arising from the Law Society's continued investigation into the Respondent's practice. Among other things, these concerns related to the Respondent having misappropriated trust funds to cover the shortages arising from the employee theft and not complying with her April 19, 2016 undertaking and the initial Rule 3-10 Order.

[29] In *Guo No. 1*, referenced at paragraphs 18(i) and (j) above, the hearing panel in effect found that the Benchers' concerns in making and then varying the Rule 3-10 Order were generally made out and justified a finding of professional misconduct. Specifically, the Respondent was found to have committed professional misconduct by:

(a) failing to perform trust reconciliations, which resulted in the massive theft going undetected prior to the bookkeeper fleeing Canada with the cash on April 1, 2016 (*Guo No. 1* (F&D), at paras. 17, 29-30; *Guo No. 1* (DA), at para. 4);

(b) providing a large number of blank cheques to her bookkeeper, which also helped facilitate the theft (*Guo No. 1* (F&D), at paras. 38-50, 58, 60; *Guo No. 1* (DA), at para. 4);

(c) failing to adequately supervise her bookkeeper or improperly delegating to him trust accounting responsibilities, thereby facilitating the theft (*Guo No. 1* (F&D), at paras. 54-60; *Guo No. 1* (DA), at para. 4);

(d) intentionally breaching her April 19, 2016 undertaking by:

(i) not opening a new trust account for new client matters until July 25, 2016 (the undertaking required her to do so by May 1, 2016);

(ii) from May 16 to September 12, 2016, continuing to deposit trust funds totalling over $196 million from one or more of 165 new

client matters into one of the trust accounts from which her bookkeeper had stolen funds; and

(iii) between June 8 and July 12, 2016, withdrawing trust funds amounting to over $7.2 million by way of more than 30 cheques without those cheques having been signed by a second signatory (*Guo No. 1* (F&D), at paras. 81-95, 118-120; *Guo No. 1* (DA), at paras. 16, 20-21);

(e) between April and July 2016, in three instances misappropriating trust funds, totalling a little over $649,000, to enable her to complete real estate transactions for clients with respect to whom there were insufficient trust funds available by reason of the theft (*Guo No. 1* (F&D), at paras. 61-80, 113-117, 125-131; *Guo No. 1* (DA), at para. 3); and

(f) between August 18 and September 20, 2016, failing to comply with the August 17, 2016 Rule 3-10 Order by continuing to deposit trust funds totalling over $24 million from one or more of 28 new client matters into one of the trust accounts from which her bookkeeper had stolen funds (*Guo No. 1* (F&D), at paras. 96-99; *Guo No. 1* (DA), at paras. 16, 21).

[30] The panel in *Guo No. 1* found that the Respondent's professional misconduct also included additional misconduct, which appears not to have been causally linked to the theft, namely: (i) withdrawing funds from trust when there were insufficient funds held on deposit (at paras. 31-32, 34); (ii) in four instances, failing to report trust shortages over $2,500 (at para. 33); and (iii) making withdrawals from trust by debit memo (*Guo No. 1* (F&D), at paras. 35-37; *Guo No. 1* (DA), at para. 16).

[31] The panel in *Guo No. 1* concluded that the Respondent's misconduct viewed globally called for a "severe sanction" (*Guo No. 1* (DA), at para. 16) and noted that her failure to follow the Law Society trust accounting rules was in many ways "the foundational problem that led to the other difficulties described in the Citation" (*Guo No. 1* (DA), at para. 22). That panel rejected the Respondent's suggestion that her failure to comply with her undertaking or the Rule 3-10 Order could be explained by her being overwhelmed by the circumstances and unable to comply with the time limits imposed by the Rule 3-10 Order (*Guo No. 1* (DA), at para. 22). It also observed that, for the most part, the Respondent "continues to minimize her role in creating the environment that led to the theft," even though the theft was "largely based on blank trust cheques being provided to her bookkeeper and the Respondent's failure to properly supervise him" (*Guo No. 1* (DA), at paras. 36 and 81).

[32] The panel in *Guo No. 1* ordered that the Respondent be suspended for 12 months commencing November 1, 2021 as a result of her misconduct, rather than being disbarred as sought by the Law Society, because the following exceptional circumstances mitigated her misconduct: (i) she provided $2.6 million in family funds to help eliminate her trust shortage; (ii) her misappropriation of client funds, though deliberate, was essentially carried out because she was in difficult circumstances and believed that, by manipulating the funds, she could minimize the global impact of the theft; and (iii) with some exceptions, most if not all of the affected clients were eventually made whole through funds paid by the Respondent's family and defalcation insurance. However, the panel rejected the Respondent's contention that she did not benefit financially from the misappropriation. She had gained a direct advantage by avoiding having her clients' transactions collapse (*Guo No. 1* (DA), at paras. 60-65, 69-84).

[33] In sum:

(a) Prior to the multimillion-dollar theft being discovered, the Respondent had a PCR with several entries, including a conduct review in which she failed to show insight into the need to comply with trust conditions.

(b) In several different ways, the Respondent's failure to comply with Law Society regulatory requirements regarding the operation of her trust accounts facilitated the theft of millions of dollars from her clients.

(c) In response, the Law Society obtained the April 19, 2016 undertaking from the Respondent regarding various trust-related matters. She breached this undertaking.

(d) The Law Society obtained the August 17, 2016 Rule 3-10 Order to further protect the public interest in relation to the Respondent's trust accounts and trust funds. She breached that order.

(e) The Law Society obtained the March 17, 2017 variation of the Rule 3-10 Order, which imposed an absolute prohibition on the Respondent operating a trust account or handling trust monies. She breached the varied order by handling trust funds received from six clients during March 2017 to October 2018, and concomitantly contravened the Law Society's rules requiring that trust funds be deposited in a trust account. In doing so, she committed the professional misconduct that is the subject of the Citation before us.

(f) At the penalty phase in *Guo No. 1*, the Respondent continued to minimize her role in facilitating the multimillion-dollar theft by failing to comply with the Law Society's trust accounting rules.

[34] Given this chronology, we agree with the Law Society that the Respondent's professional misconduct in this case constitutes the continuation of a pattern of failing to comply with Law Society requirements governing the proper handling of trust monies and trust accounts. The common theme is a marked failure to adhere to the standards expected of lawyers with respect to these matters. This larger context of misconduct puts into real question the Respondent's ability to comply with regulatory requirements in the future. The need to impose a disciplinary action that protects the public, including through specific deterrence, therefore takes on added importance. The need for general deterrence is also accentuated because lawyers must know that repeated transgressions of the Law Society's regulation of trust matters is particularly serious and completely unacceptable.

[35] It follows that we reject the Respondent's contention that her professional misconduct in this case does not form part of a pattern of misfeasance regarding trust matters. In this regard, it is important to recognize that the Respondent's PCR does not relate only or primarily to a misappropriation of funds that she intended to mitigate the deleterious impact of the theft on her clients. Her misconduct, as found by the panel in *Guo No. 1*, extends substantially beyond the misappropriation of funds in an attempt to reduce harmful fallout from the theft. It is nonetheless worth adding that the panel in *Guo No. 1* rejected the Respondent's argument that the misappropriation did not constitute professional misconduct because it was necessary to protect her clients from harm (*Guo No. 1* (F&D), at paras. 114-117).

[36] Alternatively, the Respondent argues that a panel cannot place too heavy an emphasis on a racialized lawyer's PCR because the disciplinary system is biased against racialized lawyers, causing them to face regulatory scrutiny above and beyond that levelled at similarly situated non-racialized peers. We address this argument below, in considering the Respondent's general submission on bias. For now, suffice it to say that we reject the Respondent's argument that her PCR should be given less weight based on her allegation that the disciplinary system is biased, because she has failed to establish that any such bias exists in a manner that has negatively impacted her as a lawyer of Asian heritage.

Reference letters

[37] The Respondent has filed 13 letters of reference. Eight of these letters were also filed by the Respondent at the disciplinary action hearing in relation to the citation

in *Guo No. 1*, which took place on May 12 and 13, 2021. The remaining five letters were written by or on behalf of the clients whose matters are implicated in the professional misconduct at issue in this case ("Client Reference Letters"). The Respondent asks us to rely on these 13 letters to find that she is "a kind, respected member of the Chinese-speaking community, dedicated to her clients and worthy causes." Additionally, she relies on the Client Reference Letters to submit that no clients suffered any harm by reason of the professional misconduct in this case.

[38] We will start by addressing the eight reference letters that were also submitted at the disciplinary action hearing in *Guo No. 1*. Importantly, none of these letters indicates that the author knew about the Respondent's professional misconduct in the matter before us. Indeed, the letters are all dated prior to the release of the F&D Decision. Furthermore, only one of these eight letters indicates that the writer had read the decision in *Guo No. 1* (F&D). In fact, at least one of the letters appears to suggest that the Respondent committed no professional misconduct connected to or arising out of the theft, and several of the letters seem to contend that any misconduct on the Respondent's part was restricted to her taking steps necessary to protect her clients. These views are substantially inconsistent with the findings of professional misconduct made in *Guo No. 1* (F&D). Finally, none of the eight letters indicate an awareness of the entries on the Respondent's PCR that are unrelated to the matters discussed in *Guo No. 1* (F&D).

[39] For these reasons, we are unable to conclude that the signatories of the eight letters submitted at the disciplinary action hearing in *Guo No. 1* were sufficiently aware of the relevant facts so as to permit them to give an informed opinion as to the Respondent's character as a lawyer and, in particular, whether she is likely to be compliant with Law Society regulations in the future. This deficiency has led us to give these letters reduced weight. See MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, loose-leaf (Toronto: Thomson Canada Ltd., 2005) at p. 26-45; *Law Society of BC v. Johnson*, 2016 LSBC 20, at paras. 42, 45; *Law Society of BC v. Dhindsa*, 2021 LSBC 33, at paras. 110-113.

[40] There is another reason why we give these eight letters reduced weight. Many lawyers have done good work in the community, whether legal or otherwise, and consequently enjoy a positive reputation among their colleagues and in society more generally. However, our task is not to gauge the Respondent's popularity, but rather to impose a disciplinary action that appropriately furthers the objectives of protecting the public and its confidence in the justice system and the legal profession. Character letters can only go so far in this regard where, as in the case before us, the Respondent's misconduct comprises part of an extensive PCR evincing a pattern of failing to comply with Law Society regulation. See

MacKenzie, at p. 26-45; *Law Society of BC v. Hordal*, 2004 LSBC 36, at paras. 68-69.

[41] Turning next to the five Client Reference Letters, four are written by clients from whom the Respondent received the trust funds that led to the findings of professional misconduct in the case before us. The fifth is written by the adult child of one of those clients. Some of these letters appear to make assertions that are inconsistent with our findings in the F&D Decision. However, the Respondent accepts that the letters cannot be used to challenge those findings. Rather, she relies on these letters for two discrete purposes.

[42] First, the Respondent asks us to rely on the Client Reference Letters to find that no clients suffered actual harm as a result of her misconduct in this case. However, we have made this finding without the need to rely on the contents of the Client Reference Letters, as described at paragraph 13 above.

[43] Second, the Respondent relies on the Client Reference Letters in support of the submission that she has a good reputation in the community. In this regard, the Client Reference Letters suffer from the same frailties described regarding the other eight letters, described at paragraphs 38 to 40 above. For this reason, we give them reduced weight regarding the Respondent's character as a lawyer and, in particular, whether she is likely to be compliant with Law Society regulations in the future.

[44] As a final point, in her written submissions, the Respondent alleges that the Law Society acted in a "completely unprecedented" fashion by: (i) contacting the writers of four of the Client Reference Letters and asking them questions without telling them that their answers might be used in evidence at the disciplinary action stage in this matter; and (ii) introducing their answers into evidence by means of an affidavit without giving them a chance to verify or clarify their supposed statements. She says that the writers were caught "off guard" and were unaware of "their interlocutor's hostile intent."

[45] Given our conclusions set out at paragraphs 41 to 43 above, we have not found it necessary to consider the Law Society's affidavit evidence in determining the appropriate weight to give to the Client Reference Letters. But this does not render the Respondent's complaint moot, because she submits that the conduct of the Law Society's prosecutorial arm in her case, including in contacting the writers of the Client Reference Letters, "does not inspire confidence in the [discipline] process," thereby justifying a lesser penalty than would otherwise be warranted.

[46] Based on our review of the materials filed, we find that the Law Society did not act inappropriately in contacting the writers of the Client Reference Letters. It was

reasonable for the Law Society to conclude that the nature and content of the letters justified making these inquiries. We further conclude that the manner in which the Law Society communicated with the letter writers was appropriate and that it was not improper for the Law Society to file affidavit evidence setting out those communications. Indeed, the affidavit evidence arguably supports the Law Society's submission that some of the letters may be deserving of reduced weight, although as noted, we have not found it necessary to make such a determination.

Acknowledgment of misconduct and remedial action

[47] The Respondent has informed us that she has appealed our findings of professional misconduct in the F&D Decision. She has a right to launch such an appeal, and in assessing the appropriate disciplinary action, we do not view it as aggravating that she has not acknowledged her misconduct.

[48] With respect to remedial action, the Respondent asks us to find that, each time a criticism has been made regarding her practice, she has made good faith attempts to adapt her practices to Law Society norms. In this regard, the Respondent relies on a July 9, 2021 report from an April 19, 2021 conduct review, which states that she has completed the following Law Society courses: (i) the Small Firm Practice Course; (ii) Parts 1 and 2 of a course designed to educate lawyers about the "new" *BC Code*, which replaced its predecessor on January 1, 2013; (iii) Parts 1 to 3 of a course on running a law firm like a business; and (iv) an anti-money laundering course.

[49] The Respondent says that her completion of these courses shows that she is not a scofflaw but rather a sole practitioner who was confronted with catastrophic trust fund theft and, through the ensuing investigations, has "kept her feet" and looked for even small ways to improve herself as a lawyer.

[50] The Law Society notes that the courses described at paragraph 48(i) and (ii) above were taken in December 2016 and November 2017, respectively, and thus prior to the misconduct at issue in this case. The Respondent replies by saying that this does not detract from her main point, which is that she has a history of trying to improve herself as a lawyer.

[51] We accept that the Respondent has tried to improve herself as a lawyer by taking professional education courses focused on areas where she needs improvement. That said, her efforts in taking these courses do not support the conclusion that, each time a criticism has been made regarding her practice, she has taken sufficient steps to adapt her practices to Law Society standards. Had the Respondent's attempts been sufficient, her PCR would not be so lengthy or concerning.

[52] We should add that, as the Law Society notes, the July 9, 2021 report regarding the April 19, 2021 conduct review does not form part of the Respondent's PCR, because, at the time of the hearing before us, the report had not yet been delivered to the Discipline Committee (see definition of "PCR" in Rule 1, at para. (i)). The Respondent asks us to admit the report regardless, as *her* evidence in this proceeding, and in doing so accepts that the Law Society is free to rely on other aspects of the report to support its submissions regarding penalty.

[53] In this respect, we observe that the July 9, 2021 report notes that:

(a) at the April 19, 2021 conduct review, counsel for the Respondent submitted that, on starting her practice in Vancouver, the Respondent "rode" an "investor wave" until "her practice became unmanageable";

(b) the Respondent's practice was "chaotic", "unmanageable" and "in a state of disarray" from 2012 to 2016;

(c) in 2016, the Respondent closed her overseas immigration practice and significantly scaled back her practice and now had only four office staff; prior to these changes, she was supervising 30 office staff and working at times 20 hours per day, which was "too much for a sole practitioner to maintain";

(d) as a result of the theft of her trust funds and the aftermath, the Respondent does not operate a trust account, and since approximately June 13, 2017, three lawyers have acted as her approved practice supervisors under a practice supervision agreement, pursuant to which they monitor her practice every 10 days;

(e) the Respondent admitted that:

(i) she had not kept proper accounting records for her general account or her overseas immigration practice and she had thus been unable to provide full accounting records for the Law Society;

(ii) she had failed to adequately supervise her office staff in this regard; and

(iii) her responses to the Law Society regarding her general account and overseas immigration practice had not always been accurate or complete;

(f) the Respondent's conduct in this regard removed the Law Society's ability to oversee and regulate her practice in the protection of the public interest;

(g) the Respondent has a lengthy and considerable history of similar issues in failing to keep proper or any accounting records, failure to supervise office staff, and providing inaccurate or incomplete responses to the Law Society; and

(h) given the Respondent's acknowledgment of her misconduct and the steps she had taken, including completing the above-mentioned continuing education courses, the Conduct Review Subcommittee recommended that the Discipline Committee accept the conduct review as the appropriate disciplinary action and take no further steps in this regard.

[54] Taken as a whole, the observations in the July 9, 2021 report further support the conclusion that the Respondent has shown a pattern of not complying with the Law Society's regulatory requirements. Ultimately, however, the July 9, 2021 report simply confirms what the Respondent's PCR already reveals, namely, that she has a history of failing to comply with Law Society practice requirements. While we have admitted the report on the basis described at paragraph 52 above, we would have come to the same conclusion as to the appropriate penalty had we considered the report solely for mitigating purpose urged on us by the Respondent.

Range of sanctions in other cases

[55] The Law Society contends that a suspension of four months, plus the imposition of stringent practice conditions, for the Respondent's professional misconduct in this case is supported by the following discipline decisions, all of which involve lawyers who breached either court or Law Society orders, or undertakings to the Law Society.

[56] In *Lessing*, the respondent committed professional misconduct by not reporting two unsatisfied monetary judgments against him, contrary to what is now Rule 3-50, and also by knowingly failing to comply with three court orders made in a family law proceeding between himself and his spouse, which resulted in his being found in contempt. The review panel held that the failure to comply with a court order is a very serious matter (paras. 96, 109), which demands a suspension except in the rarest of circumstances (para. 112). This was especially so in the respondent's case because he had a PCR and had also committed professional misconduct for failing to report the two judgments against him (paras. 104, 118-119). Too light a disciplinary action for breach of an order would not inspire confidence in the legal

profession because of the importance of all litigants obeying court orders. Exceptional circumstances might nonetheless justify something less than a suspension, for instance where the breach was inadvertent (paras. 121(b), 122). The review panel imposed a one-month suspension, but in doing so held that medical evidence indicating that mental health issues contributed to the respondent's breach of the orders was relevant to the length of the suspension (paras. 12, 28-37, 119).

[57] In *Law Society of BC v. Spears*, 2009 LSBC 28, the respondent knowingly breached an undertaking to the Practice Standards Committee not to take on any new files, other than from government clients, by acting for three non-government clients. He also knowingly failed to include these matters on status reports he provided to the Practice Standards Committee or to advise his practice supervisor of these matters, as he had agreed to do under a practice supervision agreement. Finally, the respondent knowingly made untrue statements to Law Society staff regarding his purported compliance with his undertaking. The respondent conditionally admitted this misconduct and, as a disciplinary action, proposed an eight-month suspension and a condition that he practise only as an employee or associate of another lawyer unless released from this condition by the Practice Standards Committee.

[58] In accepting this proposal, the panel noted that anyone who wishes to practise law must accept that their conduct will be governed by the Law Society and that they must respect and abide by the rules that govern their conduct. The panel also stated that if a lawyer is consistently "unwilling or unable to fulfill these basic requirements," they can be characterized as "ungovernable" and should not be permitted to continue to practise. The respondent had not dealt with the Law Society in an honest, open and forthright manner, and this would likely be his last chance to display the sort of conduct required of lawyers (paras. 6-10).

[59] In *Law Society of BC v. Coutlee*, 2010 LSBC 27, the respondent was suspended for one month for a single instance of knowingly failing to comply with a hearing panel order that restricted his practice to criminal defence or personal injury matters. The panel held that the respondent's blatant disregard of the practice restriction was misconduct of a most serious nature that went to the heart of the ability of the Law Society to impose and enforce discipline on lawyers. The respondent had initially attempted to divert the Law Society's investigation by making misleading suggestions, but ultimately cooperated with the investigation. He had a PCR, which while unrelated indicated that more benign penalties imposed in the past were insufficient to modify his behaviour. The panel was nonetheless satisfied that there was no likelihood of a recurrence of the misconduct. However,

the one-month suspension was required to protect the public by promoting general deterrence. The panel further noted that any adverse impact on the client was insufficiently serious to justify a lengthier suspension.

[60] In *Law Society of Upper Canada v. Evans*, 2017 ONLSTH 51, the respondent admitted professional misconduct by: (i) breaching an undertaking to the Law Society and a Law Society order by acting for a non-institutional lender in relation to a mortgage; (ii) breaching a different Law Society order by using an estate trust account when he was restricted to using only a specified trust account; (iii) misrepresenting to the Law Society that he had not acted in breach of the undertaking and the two orders; and (iv) misrepresenting in his Lawyer Annual Report that he did not control funds for any estates in his trust account as a solicitor when he in fact controlled funds for three estates. The respondent had a lengthy disciplinary history that had already resulted in a reprimand, a 45-day suspension, a four-month suspension and an eight-month suspension. He had also been subject to the practice restrictions that were breached in this case. The respondent was winding down his practice, but a significant penalty was necessary to achieve general deterrence. He was therefore suspended for four months and prohibited from holding trust funds without the written consent of the Law Society.

[61] In *Law Society of BC v. Jessacher*, 2016 LSBC 11, the respondent did not attend the hearing of a citation alleging that she had failed to respond to Law Society correspondence. The panel found that she had committed professional misconduct as alleged and ordered that she respond to the Law Society correspondence within two weeks. When she failed to do so, a second citation was issued for failure to comply with the panel's order. The respondent did not attend the hearing of this citation. A second panel found that the respondent committed professional misconduct by breaching the first panel's order and, in doing so, commented on the serious nature of a failure to comply with Law Society orders (paras. 44-46, 49). The respondent had offered no explanation for her misconduct. Rather, when informed of the first panel's order, she sent the Law Society a contemptuous email. She had previously shown a consistent pattern of failing to respond to the Law Society and at one point refused to do so based on an assertion that the process was "contrived". At the time of the disciplinary action decision, the respondent was a former member of the Law Society. The panel ordered that she be suspended until she returned to active practice and complied with the first panel's order by providing the required substantive response.

[62] In *Law Society of BC v. Welder*, 2012 LSBC 18, the respondent was cited for failing to communicate with the Law Society regarding two requirements to pay issued by the Canada Revenue Agency ("CRA") and also for failing to comply with

a Law Society review panel's order requiring him to submit monthly proof that he had remitted taxes due to the CRA. The review panel had also suspended him for three months for failing to remit funds owed to the CRA, this being the second time he had committed professional misconduct in this manner. The respondent's PCR contained five conduct reviews and five citations, and he had gained a financial advantage by reason of his misconduct. The hearing panel was also troubled by the respondent's comment that he was "hopeful" that he would change his behaviour in the future. Furthermore, his misconduct appeared to have been knowingly committed. The majority of the panel accepted the respondent's conditional admission of misconduct and the parties' proposal of a three-month suspension. However, the majority added that, but for the joint submission as to sanction, the suspension would likely have been "substantially longer."

[63] In our view, the Respondent's case is distinguishable from the cases relied on by the Law Society because: (i) she did not knowingly breach the rules governing the handling of trust funds or the Rule 3-10 Order; and/or (ii) in some of the cases cited by the Law Society, the respondent had previously been suspended from practice. In our view, a four-month suspension is not supported by the decisions relied upon by Law Society.

[64] The Respondent has not referred us to any decisions in advancing her position that a suspension of any length would be excessive. Arguably, her position finds some support in *Lessing*, insofar as the review panel suggested that a suspension may be unnecessary where a respondent's breach of an order is inadvertent.

[65] However, we are not inclined to this view in the Respondent's case for two reasons. First, she breached not only the Rule 3-10 Order, but also the rules regarding the proper handling of trust funds. Second, and most importantly, she has an extensive PCR that reveals a pattern of failing to comply with Law Society regulations, including in relation to trust matters. As explained further below, we conclude that a suspension of some length is required to fulfill our mandate of imposing a sanction that protects the public.

Impact of proposed penalty on the respondent

[66] In oral submissions, the Respondent argued that a four-month suspension would "kill" her small practice, which should militate against imposing the disciplinary action sought by the Law Society. She contended that imposing the practice conditions sought by the Law Society would have the same devastating effect, essentially the equivalent of disbarment, because no other lawyer would agree to take her on as an employee.

[67] As noted, we asked the parties for additional written submissions regarding several aspects of the decision in *Guo No. 1* (DA). One issue on which we invited submissions was whether the 12-month suspension imposed in *Guo No. 1* (DA) impacted the Respondent's argument that imposing a four-month suspension in the matter before us would "kill" her practice. Subsequent to us making this request, both parties launched a review of the decision in *Guo No. 1* (DA) under s. 47 of the *Act*, and the 12-month suspension was stayed pending a determination of the review.

[68] In its additional written submissions, the Law Society argued that the 12-month suspension in *Guo No. 1* (DA) should not impact the Respondent's argument that imposing a four-month suspension would "kill" her practice, because the impact of a suspension cannot mitigate what is otherwise an appropriate sanction, and the appropriate sanction here is a four-month suspension. This argument essentially tracks the Law Society's position in the hearing before us. The Respondent did not directly address this issue in her additional submissions.

[69] In our view, the Respondent's argument that a four-month suspension would "kill" her practice is moot, as she has been suspended for 12 months by the panel in *Guo No. 1* (DA). As explained at paragraph 19 above, the fact that the suspension in *Guo No. 1* (DA) is under review and has been stayed does not operate to remove it from the Respondent's PCR pending a determination of that review.

[70] We nonetheless agree with the Law Society that a respondent's position as a sole practitioner should not save them from a suspension that is otherwise appropriate to protect the public. See *Law Society of BC v. McCandless*, 2003 LSBC 44, at para. 11; *Law Society of BC v. Bauder*, 2013 LSBC 07, at para. 19; *Law Society of BC v. Hittrich*, 2013 LSBC 27, at para. 29(f); *Law Society of BC v. Dent*, 2013 LSBC 04, at paras. 29-35; *Law Society of BC v. Siebenga*, 2015 LSBC 44, at para. 67; *Law Society of BC v. Samuels*, 2017 LSBC 25, at paras. 7(g) and 19; *Law Society of BC v. Buchan*, 2020 LSBC 07, at paras. 52-55, 61; *Law Society of BC v. Singh*, 2021 LSBC 12, at para. 58; *Law Society of BC v. Ganapathi*, 2021 LSBC 14, at para. 45.

[71] The same principle should generally apply regarding the imposition of practice conditions, although because such conditions are less concerned with general deterrence, there may be more leeway to fashion them so as to appropriately protect the public while minimizing harm to the respondent's ability to practise in the future. The appropriateness of imposing the practice conditions sought by the Law Society in this case is addressed in more detail below.

The principle of proportionality

[72] The Respondent argues that the principle of proportionality is of central importance in this case. She says its applicability in regulatory proceedings has been confirmed in *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149, at para. 85. And she asks us to apply it as described in the following excerpt from *R. v. Ipeelee*, 2012 SCC 13, at para. 37:

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. *Proportionality is the sine qua non of a just sanction*. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. […]
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.
>
> [Respondent's emphasis]

[73] The Respondent submits that the proportionality principle, applied in her case, justifies a reprimand or, at most, a modest fine. She says the gravity of her offence is low because she mishandled small amounts of money, for only a few days in each instance, and none of her clients suffered any harm. And she says her moral culpability falls at the "less blameworthy" end of the spectrum because her breaches of the rules regulating trust funds and the Rule 3-10 Order were not intentional.

[74] The principle of proportionality is not a stated criterion in the leading cases on disciplinary action against lawyers in this province. However, the proposition that the penalty imposed should be proportionate to the nature and gravity of the respondent's disciplinary violation is consonant with the general approach taken by the leading cases. See, for instance, the list of factors provided in *Ogilvie*, at para.

10. As noted in *Gellert*, at para. 39, many of these factors relate to the nature and gravity of the respondent's misconduct.

[75] Indeed, the factor of parity, expressly mentioned in *Ogilvie*, can be seen as a manifestation of the proportionality principle. As stated in *R. v. Friesen*, 2020 SCC 9, at paras. 32-33:

> Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 78-79).
>
> In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.

[76] The relevance of proportionality in the context of lawyer discipline is also acknowledged by MacKenzie, at p. 26-44:

> Factors frequently weighed in assessing the seriousness of a lawyer's misconduct include the extent of injury, the lawyer's blameworthiness, and the penalties that have been imposed previously for similar misconduct. *In assessing each of these factors, the discipline hearing panel focuses on the offence rather than on the offender and considers the desirability of parity and proportionality in sanctions and the need for deterrence*. The panel also considers an array of aggravating and mitigating factors, many of which are relevant to the likelihood of recurrence. These aggravating and mitigating factors include the lawyer's prior discipline record, the lawyer's reaction to the discipline process, the restitution (if any) made by the lawyer, the length of time the lawyer has been in practice, the lawyer's general character, and the lawyer's mental state.
>
> [emphasis added]

[77] A number of Canadian discipline decisions have quoted the above excerpt with approval. See, for example, *Law Society of Manitoba v. Richert*, 2019 MBLS 3, at para. 31(iii); *Law Society of Manitoba v. Persad*, 2018 MBLS 2, at para. 15; *Ryan v. Law Society of New Brunswick*, 2001 NBCA 37, at para. 23; *Law Society of New Brunswick v. Choukri*, 2017 NBLSB 9, at para. 27; *Law Society of Upper Canada v. Pollack*, 2013 ONLSHP 84, at paras. 52-53; *Law Society of Upper Canada v. Senjule*, 2008 ONLSHP 22, at para. 25; *Nova Scotia Barristers' Society v. Myrtha*, 2007 NSBS 1, at para. 24; *Nova Scotia Barristers' Society v. Steele*, [1995] L.S.D.D. 261; *Re Hutton*, 2006 CanLII 38726 (NL LS), at para. 27.

[78] Other decisions have expressly or implicitly recognized that proportionality is a legitimate consideration in imposing a disciplinary action. See, for example, *Dhindsa*, at para. 100; *Law Society of BC v. O'Neill*, 2013 LSBC 23, at para. 20(m); *Law Society of Alberta v. Peterson*, 2021 ABLS 50, at para. 50; *Law Society of Alberta v. McKen*, 2021 ABLS 17, at para. 33; *Law Society of Saskatchewan v. Hesje*, 2013 SKLS 13, at para. 24; *Law Society of Saskatchewan v. Hardy*, 2012 SKLS 3, at para. 33; *Law Society of Upper Canada v. Igbinosun*, 2006 ONLSHP 81, at para. 28, appeal allowed on other grounds, (2008), 239 OAC 178 (Div. Ct.), affirmed 2009 ONCA 484; *Law Society of Upper Canada v. Clegg*, 2006 ONLSHP 56, at para. 28; *Nova Scotia Barristers' Society v. Morrison*, 2007 NSBS 6.

[79] It is nonetheless worth adding that, while criminal law sentencing principles such as proportionality can sometimes provide helpful guidance in the discipline context (*Ogilvie*, at para. 10), hearing panels must be wary of indiscriminately importing sentencing principles in deciding on an appropriate disciplinary action. See *Law Society of BC v. Singh*, 2021 LSBC 12, at para. 32; *Merchant v. Law Society of Saskatchewan*, 2009 SKCA 33, at para. 98; *Merchant v. Law Society of Saskatchewan*, 2014 SKCA 56, at para. 119; *Law Society of Upper Canada v. Kazman*, 2008 LSDD 46, at para. 74; *Law Society of Ontario v. Wilkins*, 2021 ONLSTA 15, at para. 116.

[80] In particular, the Law Society's statutory mandate in imposing a disciplinary action is not the same as the mandate of a sentencing judge in passing sentence. As noted in *Ipeelee*, at para. 37, the fundamental purpose of criminal law sentencing is "the maintenance of a just, peaceful and safe society through the imposition of just sanctions." By contrast, the fundamental goal of the disciplinary process is not to punish lawyers, but to fulfill the Law Society's statutory obligation under s. 3 of the *Act* to protect the public interest in the administration of justice (*Gellert*, at para. 36; *Law Society of BC v. Fogarty*, 2021 LSBC 25, at para. 6). As stated at paragraph 8 above, this includes maintaining public confidence in the justice system, the legal profession, and the discipline process.

[81] Keeping the objective of the discipline process firmly in mind, in our view the principle of proportionality does not operate to limit the appropriate penalty for the Respondent to a reprimand or at most a modest fine. The Respondent's arguments in favour of such an outcome based on proportionality, set out above, ignore her lengthy PCR. As we have already explained, her past pattern of failing to comply with regulatory requirements raises a real concern regarding the need to protect the public. It also highlights the need for specific deterrence, and to assure the public that lawyers who repeatedly contravene important regulatory requirements will receive penalties that adequately reflect this shortcoming.

[82] In this respect, the Respondent's circumstances are very different from those of the appellant in the case she cites in relying on the proportionality principle. In *Davis*, at paras. 73-89, the court overturned the permanent market ban imposed on the appellant by the British Columbia Securities Commission ("Commission") because the Commission did not consider the appellant's long and unblemished career in the securities industry and had proceeded on the basis that permanent bans are appropriate in fraud cases regardless of the circumstances of the offence or the offender. The court accepted that the outcome reached by the Commission may have been justified by the seriousness of the appellant's misconduct and the need to protect the public, but the Commission's reasoning in reaching this result was defective. The matter was thus remitted to the Commission for reconsideration of the sanction in accordance with the proper principles.

Public confidence in the legal profession

[83] Given our analysis of the factors discussed above, we conclude that a suspension of one month is necessary to fulfill the Law Society's mandate of protecting the public from professional misconduct and maintaining public confidence in the profession and the Law Society's discipline process. The need for a suspension is especially acute given the Respondent's history of failing to comply with Law Society regulation concerning trust matters. A lesser sanction would not adequately further the objectives of specific and general deterrence, and would thus fall short of sufficiently protecting the public.

[84] This one-month suspension should be served consecutively to the 12-month suspension ordered in *Guo No. 1 (DA)*. It would not be appropriate to have this suspension run concurrently with that imposed in *Guo No. 1 (DA)*, because it relates to discrete instances of professional misconduct. For similar reasons, and also given the Respondent's pattern of failing to comply with Law Society regulation as revealed in her PCR, we conclude that imposing a consecutive suspension would not result in a global sanction out of line with the principles of

general and specific deterrence. See *Law Society of BC v. Ahuja*, 2017 BCSC 39, at paras. 38, 52. We therefore reject the Respondent's argument that imposing a consecutive suspension would amount to an improper reliance on the principle of retribution or otherwise be inappropriate.

[85] As for the imposition of practice conditions, as already noted, the Respondent is currently subject to significant practice conditions put in place by the Rule 3-10 Orders made in 2017. These conditions prohibit her from operating a trust account and require her to practise under a practice supervision agreement. We have been told that they will expire once the underlying investigations leading to that Rule 3-10 Order have been resolved. However, we have received no concrete information from the parties as to when a resolution of these investigations may occur. Notably, we have not been told that these investigations will necessarily be resolved once the proceedings in this matter and *Guo No. 1* have concluded.

[86] Based on this record, we ascribe importance to the fact that the Respondent is currently under significant practice conditions and has been for well over four years. There is no suggestion by the Law Society that she has or may have failed in any way to adhere to these conditions subsequent to her committing the professional misconduct that forms the subject of the proceeding before us. Indeed, the Respondent's submissions on penalty implicitly suggest precisely the opposite.

[87] Furthermore, the Respondent has been suspended for 12 months in *Guo No. 1* (DA). As explained at paragraph 19 above, we must assume that this suspension will be upheld on review. Accordingly, there is good reason to believe that the Respondent will be subject to significant practice conditions and/or will be suspended for a substantial length of time in the future. Specifically, the practice conditions will continue at least until the 12-month suspension in *Guo No. 1* (DA) commences, and that suspension will presumably not start until the parties' review under s. 47 of the *Act* has been completed. It may also be that the practice conditions will continue for some unknown period beyond the end of the 12-month suspension.

[88] Finally, the panel in *Guo No. 1* (DA) was aware that the Respondent was subject to practice supervision under the Rule 3-10 Order (*Guo No. 1* (DA), at para. 84), yet did not include practice conditions as part of the disciplinary action imposed. That no practice conditions were ordered in *Guo No. 1* (DA) provides some support for our not doing so in this case.

[89] The Law Society disagrees with this latter point, stating in its further written submissions that the panel in *Guo No. 1* (DA) did not consider the need for practice conditions because the parties made no submissions on this issue, having focused

only on whether disbarment was the appropriate disciplinary action. We do not know why the Law Society did not address this issue in *Guo No. 1* (DA) as part of an alternative submission. Also, we do not know whether the Law Society will seek the imposition of practice conditions as part of its review of the decision in *Guo No. 1* (DA). But as the record currently stands, it is our view that, if the panel in *Guo No. 1* (DA) was of the view that additional practice conditions were required, it likely would have asked for further submissions on this point.

[90] In its additional written submissions, the Law Society also says the panel in *Guo No. 1* "appears to have erroneously assumed that [the Respondent's] existing conditions would continue after her period of suspension." We do not know what the panel in *Guo No. 1* was told about when the Respondent's current practice conditions would expire. However, as already noted, the Law Society has not provided *us* with any concrete information as to when this may happen. The implication in the Law Society's additional written submissions seems to be that it would be wrong for us to assume that the Respondent's practice conditions will continue after her suspension in *Guo No. 1* (DA) has ended. And yet, in these same written submissions, the Law Society says that those practice conditions will "*arguably* end at the conclusion of her suspension." [emphasis added]

[91] Ultimately, when the investigations leading to the Rule 3-10 Order will or may be resolved so as to end the Respondent's current practice conditions remains a mystery to us. The Law Society could have provided us with information on this point, or alternatively explained why it is difficult to give any estimate in this regard. But it did not do so.

[92] To recap, the Respondent has been under significant practice conditions since 2017, and we have been provided with no information to suggest she has breached any of these conditions subsequent to committing the professional misconduct in this case. Importantly, she will continue to be under these practice conditions and/or suspended for at least another year and perhaps much longer. Plus, the panel in *Guo No. 1* (DA) appears to have believed that further practice conditions were unnecessary. In these circumstances, we conclude that the practice conditions sought by the Law Society are not needed to ensure the protection of the public and to maintain its confidence in the profession and the disciplinary process. Imposing a one-month suspension so as to further specific and general deterrence is sufficient in this respect.

Allegations of systemic racial bias

[93] The Respondent argues that the usual approach to determining the appropriate disciplinary action must be modified in her case because the Law Society's discipline process is systemically biased against her as a female lawyer of Asian ethnicity. As evidence in support of this proposition, she relies primarily on her counsel's statistical analysis of discipline decisions available on the Law Society's website, combined with: (i) the fact of historical discrimination by the Law Society and the legal system more generally against Asian-Canadians; (ii) current news reports about what appears to be COVID-driven and/or anti-immigrant opprobrium directed at individuals of Asian or in particular Chinese heritage in British Columbia; and (iii) statements by the Law Society about the challenges that racialized lawyers face as a result of subconscious biases and stereotypes.

[94] The Respondent submits that, while she cannot identify racial bias or resulting harm in her particular case, these sources, and most especially her counsel's statistical analysis, establish on a balance of probabilities that, within the Law Society's discipline process,

> subconscious biases can be expected to result in negative competence assumptions, over-enthusiastic prosecutions, over-charging, over-conviction and harsher penalties, through a cascading series of individual decisions where the bias is imperceptible, probably even to the person making the decision. (Respondent's Written Submission on Bias, ("Bias Submission") at para. 8)

[95] Relying on the approach taken in *Doré v. Barreau du Québec*, 2021 SCC 12, the Respondent argues that this systemic racial bias infringes her equality rights as protected by s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and that, as a result, the penalty imposed on her must be "no more than is absolutely necessary to protect the public" (Bias Submission, at para. 11). She says that this means she should only be suspended if the Law Society can establish that otherwise "harm to the public will result" and that the Law Society has failed to do so because it has "presented no evidence speaking to the prospect of future harm or any assessment of future risk" (Bias Submission, at para. 63).

[96] Even were we to accept the Respondent's argument that this special test should apply in her case because of systemic racial bias, we would impose the same one-month suspension because, having considered all of the circumstances, we conclude that this sanction is necessary to protect the public. The record before us establishes that the Respondent has repeatedly failed to comply with Law Society

regulation regarding trust matters in the past. The one-month suspension is needed to protect the public, including by furthering the principle of specific deterrence.

[97] This conclusion alone is sufficient to reject the Respondent's argument that she should not be suspended because the Law Society's disciplinary process is biased against her as a racialized lawyer, and in particular a female lawyer of Asian heritage.

[98] We nonetheless further conclude that the Respondent has failed to establish that the application of the principles set out in *Doré* require us to apply a special test in arriving at the appropriate disciplinary action in the circumstances of her case. While the Law Society has advanced a number of arguments that it says support a finding that the *Doré* principles are not engaged, in concluding as we do it is enough for us to hold that the Respondent has failed to establish that the discipline process is biased against Asian-Canadian lawyers like her so as to increase the likelihood of either the prosecution of a citation or the imposition of a more significant penalty at the penalty phase of a proceeding.

[99] In explaining our decision in this regard, we will start by examining the test that an administrative tribunal must apply where the application of its statutory objectives in a particular case interfere with a *Charter* value. Next, we will review the evidence the Respondent relies on to support her argument that the Law Society's disciplinary process is biased against racialized lawyers like her, with a particular emphasis on her counsel's statistical analysis. We will then explain why that evidence, and especially this statistical analysis, does not support the conclusion that the disciplinary process is likely biased against the Respondent as a lawyer of Asian heritage.

The *Doré* test

[100] In exercising the discretion to make decisions, administrative tribunals must take account of *Charter* values (*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817, at para. 56; *Doré*, at paras. 28-29). If a decision limits the protection of a *Charter* value, the tribunal must balance the severity of the limit with the tribunal's statutory objectives. This balancing must be carried out in the context of the nature of the decision to be made and the particular facts of the case. Provided the decision reflects a proportionate balancing of the *Charter* value with the tribunal's statutory objectives, it will not be interfered with by a court on review (*Doré*, at paras. 55-58, 67; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at paras. 35-40; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, at paras. 58-59, 79).

[101] A proportionate balancing is one that "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" or, to put it another way, one that operates so that the *Charter* protection is "affected as little as reasonably possible" (*Loyola*, at paras. 39-40; *Trinity Western University*, at para. 80). As stated in *Trinity Western University*, at para. 81:

> The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. This does not mean that the administrative decision-maker must choose the option that limits the *Charter* protection *least*. The question for the reviewing court is always whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160). However, if there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. This is a highly contextual inquiry.
>
> [emphasis in original]

Evidence relied on by the Respondent

[102] The Respondent argues that she has established that the Law Society's disciplinary process more likely than not discriminates against lawyers who belong to visible minority groups, and in particular Asian female lawyers like her, for two reasons.

[103] First, she points to: a history of anti-Asian bias by the Law Society and the legal system; current signs of anti-Asian bias in British Columbia at large; the Law Society's present recognition that steps must be taken to counter systemic racial bias in the profession and society generally; case law commenting on systemic racial bias in the legal profession and more generally in this province; and a report and three articles that describe racial bias in the legal profession in the United Kingdom and the United States.

[104] Second, and of particular importance, the Respondent posits that her counsel's analysis of discipline decisions from 2016 to 2020 reported on the Law Society's website establishes systemic bias against racialized and, in particular, Asian-Canadian lawyers, because they make up a disproportionate number of the respondents and, if found to have committed professional misconduct, are more

likely to be disbarred or suspended from practice, as opposed to merely being fined or reprimanded.

[105] Turning first to the points mentioned at paragraph 103 above regarding historical bias on the part of the Law Society and the legal system more generally, the Respondent relies on an article by Professor W. Wesley Pue that describes how Asian and South Asian individuals were not permitted to apply for membership in the Law Society until after the Second World War ("A History of British Columbia Legal Education" (March 2000), University of British Columbia Working Paper WP 2000-1, at p. 200). She notes that no other Canadian law society denied admission to individuals based solely on race.

[106] As for bias against Asian-Canadians in contemporary British Columbia, the Respondent relies on an article by the English newspaper *The Guardian*, which on May 23, 2021 reported that: Vancouver police received more reports of anti-Asian hate crimes than did the 10 most populous United States cities combined; and almost one out of every two residents of Asian descent in British Columbia had experienced a hate incident in the last year.

[107] The Respondent also points to a public statement by the President of the Law Society on June 1, 2021, which noted a disturbing rise in anti-Asian racism stemming from the COVID-19 pandemic and condemned such acts, stating that racism has no place in British Columbia or the legal system.

[108] The Respondent further relies on a 2012 report by the Law Society's Equity and Diversity Advisory Committee, which acknowledged that, while overt discrimination based on race and gender is arguably less prevalent than 30 years ago, visible minority and Indigenous lawyers face systemic barriers in the profession created by unconscious bias (*Towards a More Representative Legal Profession: Better Practices, Better Workplaces, Better Results*, June 2021, at p. 4). This report noted that unconscious bias is reinforced and exacerbated by the tendency of people to notice and remember incidents that correspond with their biases, which would inure to the detriment of visible minority and Indigenous lawyers who may face stereotypes and negative competence assumptions (at p. 5). The Respondent also notes that, more recently, the same committee called for the continuation of programs to ensure that its representatives are trained regarding intercultural competence, subconscious biases, micro-aggressions, and various types of racism (*Diversity Action Plan,* August 28, 2020, p. 1, footnote 4).

[109] In addition, the Respondent references *R. v. Cho*, 1998 CanLII 6357 (BCSC), in which Justice Romilly relied on historical evidence and contemporary studies presented by an expert on race relations in Canada to conclude that anti-Chinese

racism exists in British Columbia so as to justify challenging prospective jurors for cause in a murder case involving gang-related activity. The Respondent also relies on Canadian law society discipline decisions recognizing that systemic bias exists broadly in the profession (*Law Society of Upper Canada v. McSween*, 2012 ONLSAP 3; *Law Society of Upper Canada v. Bahimanga*, 2018 ONLSTH 60; *Howe v. Nova Scotia Barrister's Society*, 2019 NSCA 81; *Law Society of Upper Canada v. Wilkins*, 2021 ONLSTA 15, at para. 145). She also points to decisions recognizing that visible minorities are over-represented in the criminal justice system (*R. v. Wilson* (1996), 107 CCC (3d) 86 (Ont. CA); *R. v. Koh* (1998), 131 CCC (3d) 257 (Ont. CA); *R. v. Gladue*, [1999] 1 SCR 688; *R. v. Wells*, 2000 SCC 10; *R. v. Hamilton* (2004), 107 CCC (3d) 86 (Ont. CA); *R. v. Nasogaluak*, 2010 SCC 6; *R. v. Le*, 2019 SCC 34, at paras. 89-97).

[110] Finally, the Respondent relies on the following studies or articles regarding systemic racial bias in other countries:

(a) a review in the United Kingdom that found that BAME (Black, Asian and Minority Ethnic) individuals are criminally prosecuted more often and sentenced more harshly than are their non-racialized peers (Rt. Hon. David Lammy, MP, *An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System* (September 8, 2017));

(b) a report by the Law Society of England and Wales finding that members of visible minority groups were disbarred at a rate that was three to six times that of non-racialized lawyers (Herman Ouseley, *Independent Review into Disproportionate Regulatory Outcomes for Black and Minority Ethnic Solicitors* (The Solicitors Regulation Authority: London, 2008));

(c) a 2014 *ABA Journal* article reporting on an experiment conducted by an American consulting firm in which a memo shown to 53 partners was judged more critically when the assessors were told the author was Black (https://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases); and

(d) a 2019 study by the State Bar of California, which found that Black male lawyers are subject to probation or disbarment at about four times the rate of White male lawyers (*Report on Disparities in the Discipline System*, November 14, 2019, http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf).

[111] As mentioned at paragraph 104 above, however, it is the Respondent's statistical analysis of decisions reported on the Law Society website that forms the linchpin of her submission that the discipline process is more likely than not biased against her as a racialized lawyer. Based on this analysis, which is the work of the Respondent's own counsel, as opposed to an expert, the Respondent asserts as follows:

(a) From 2016 to 2020 there were 108 respondents for whom the Law Society's website showed one or more decisions regarding proceedings relating to a citation. Three of these respondents were unnamed but were nonetheless identified as male. The other 105 respondents were named, of which 80 were men and 25 were women.

(b) There are "about 12,000" lawyers in British Columbia, meaning that the chance of a randomly selected lawyer being among the 108 respondents prosecuted from 2016 to 2020 was one in 111 (0.90 per cent).

(c) A 2016 Law Society report indicates that women constitute about 35 per cent of the profession. Using this 35:65 ratio of female-to-male lawyers, the chance of a randomly selected female lawyer being among the 25 female lawyers prosecuted during this period was one in 168 (0.60 per cent), while the chance of a randomly selected male lawyer being among the 83 male lawyers prosecuted was one in 94 (1.06 per cent).

(d) Of the 105 named respondents, the Respondent says that 21 are "readily-identifiable (*i.e.* by name) as members of minority groups (ten Asian, nine South Asian, one Filipino and one African)." She says that the remaining 84 respondents are "not readily-identifiable as members of visible minority groups".

(e) On the Law Society's website, the Equity and Diversity Centre estimates that the self-reporting, non-Indigenous, visible minority population of lawyers during 2016 to 2019 was between about 14 and 16 per cent of the total number of lawyers. Taking a conservative approach and using the higher percentage, during this period number there were 1,920 racialized lawyers and 10,080 non-racialized lawyers.

(f) Using these figures, during the period under review a racialized lawyer stood a one in 91 chance of being prosecuted for a disciplinary matter (1920/21, or a 1.10 per cent chance), while a non-racialized lawyer stood a one in 120 chance of prosecution (10,080/84, which is a 0.83 per cent chance).

(g) The 2012 Law Society report cited at paragraph 108 above, at p. 14, relies on 2006 census data to conclude that 8.3 per cent of practising lawyers belonged to Asian-Canadian minority communities (comprising Chinese (6.5 per cent), Japanese (0.9 per cent), Korean (0.6 per cent), and Southeast Asian (0.3 per cent), but not South Asian (4.2 per cent) communities). Using the total lawyer population of 12,000 mentioned at subparagraph (b) above, this means that there were 996 Asian lawyers during the 2016 to 2020 period under consideration.

(h) Ten of the 105 identified respondents during this period are "readily identifiable as of Asian descent," of which seven are women and three are men. Accordingly, says the Respondent, an Asian lawyer stood a one in 99.6 chance of being prosecuted for a disciplinary matter (996/10, or a 1.00 per cent chance), which is higher than the already mentioned one in 120 (0.83 per cent) chance of a non-racialized lawyer being prosecuted.

(i) This discrepancy becomes even more concerning, says the Respondent, when gender is also considered. Assuming a 50/50 female-male split in the population of Asian lawyers, during the 2016 to 2020 period, a randomly selected Asian female lawyer had a one in 71 (498/7, or 1.41 per cent) chance of being prosecuted for a disciplinary matter.

(j) Based on this figure, the Respondent argues that the rate of prosecution for Asian women is over twice that of the average female lawyer, which as noted at subparagraph (c) above, she calculates to be one in 168 (0.60 per cent), and almost 90 per cent higher than for lawyers generally, which as noted at subparagraph (b) above, she calculates to be one in 111 (0.90 per cent).

(k) However, the Respondent argues that this number is probably conservative because, as indicated at subparagraph (c) above, only 35 per cent of practising lawyers are female. Using this ratio, she notes that a randomly selected Asian female lawyer would have a one in 50 (2 per cent) chance of being prosecuted during the period in question.

[112] The Respondent also asked us to rely on her counsel's analysis regarding the likelihood of a racialized woman being suspended after a finding of professional misconduct, the key points of which are as follows:

(a) During the 2016 to 2020 period, the Law Society website indicates that 83 decisions imposing disciplinary penalties were released, involving 79

different lawyers. Of these decisions, 59 involved men (58 different lawyers), while 24 involved women (22 different lawyers).

(b) The Respondent says that 13 of the 83 penalty decisions involved lawyers who are readily identifiable as racialized, of which five are women and eight are men. She says that six of these lawyers are Asian, two of whom are male and four of whom are female.

(c) Of these 83 penalty decisions, ten resulted in disbarment, 36 resulted in a suspension, and the remaining 37 resulted in a fine. The Respondent says that, of the disbarred lawyers, five were women, and two were readily identifiable as racialized (one woman and one man). Regarding suspensions, nine were imposed on women, while the other 27 were imposed on men. The Respondent says that eight of the suspended lawyers were readily identifiable as racialized (two women and six men).

(d) Based on these figures, the Respondent notes that a woman found to have committed a disciplinary violation stood a one in 4.8 chance of being disbarred (24/5, or 20.8 per cent), whereas a man in the same position stood only a one in 11.8 chance of receiving this penalty (59/5, or 0.85 per cent), and the overall likelihood of being disbarred was one in 8.3 (83/10, or 12.05 per cent).

(e) The Respondent further notes that racialized lawyers were disbarred at a rate of one in 6.5 (13/2, or 15.38 per cent), compared to a rate of one in 8.75 for non-racialized lawyers (70/8, or 11.43 per cent). She says that a racialized woman had a one in five chance of being disbarred (5/1, or 20 per cent), while a racialized man had a one in eight chance of being disbarred (8/1, or 12.5 per cent) and a non-racialized man had a one in 12.75 chance of being disbarred (51/4, or 7.84 per cent).

(f) Regarding suspensions, the Respondent says that respondents who were not disbarred faced a one in two chance of being suspended instead of receiving a fine (73/36, or 50 per cent), yet racialized lawyers who were not disbarred stood a one in 1.62 chance of receiving a suspension (13/8, or 61.7 per cent).

Respondent has not established that the disciplinary process is likely biased against her

[113] The Law Society takes issue with the statistical analysis relied on by the Respondent in attempting to establish that its disciplinary process discriminates

against her on the basis of race and therefore breaches s. 15 of the *Charter*. We agree with many of the Law Society's submissions in this regard, in particular regarding the following points.

[114] To begin with, the Respondent asks us to take judicial notice of the race of the respondents based on their names. However, as the Respondent recognizes, for us to do so we would need to accept that the race of these individuals is either "(1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy (*R. v. Find*, 2011 SCC 42, at para. 48). This threshold is strict because judicial notice allows for findings of fact without the need to call evidence that can be tested through cross-examination. We doubt whether the test for judicial notice is met with respect to identifying the race of the respondents based on their names, in particular with the specificity urged on us by the Respondent. However, it is not necessary to decide this point definitively in resolving the more general issue as to whether the Respondent has established a breach of her s. 15 *Charter* rights, because we would come to the same conclusion even were we to take judicial notice of the racial background of respondents based on their names.

[115] A much more significant concern relates to the failure of the Respondent's statistical analysis to consider how complaints *received* by the Law Society are distributed in relation to race and gender. The discipline process does not control who is the subject of a complaint. To ascertain whether that process is biased against racialized lawyers, or Asian lawyers, or Asian female lawyers, it would be necessary to know what proportion of complaints made involved lawyers having these attributes. If a higher proportion of lawyers with these attributes ends up being issued a citation, and that difference is statistically significant, a case may be made that the discipline process discriminates based on race and/or gender. This is not to say that the Law Society should be unconcerned if racialized and/or women lawyers are subject to a disproportionate number of complaints, but only to observe that the Respondent's analysis does not establish that the discipline process operates in a discriminatory way.

[116] Another serious flaw in the Respondent's analysis is that it does not control for other factors that may explain the proportion of racialized and/or female lawyers who are the subject of citations, including firm size, practice type, race of the complainant, whether the lawyer under investigation had legal representation, and so on. As noted in the State Bar of California report relied on by the Respondent regarding its comparison of discipline outcomes for Black and White lawyers:

> As with any study of this kind, it is essential to attempt to control for other factors that may account for the different discipline rates between race/ethnicity and gender subgroups. Introducing control variables allows for the analysis to distinguish between different factors that may explain the outcomes.
>
> *Report on Disparities in the Discipline System*, p. 3

[117] Controlling for other factors is important because such factors may correlate with the probability of a citation being issued and the seriousness of the penalty imposed if a violation is established. Again, we are not suggesting that such correlations are necessarily unproblematic, only that they may in whole or part explain the allocation of race and gender amongst the respondents disciplined during the 2016 to 2020 period.

[118] Further detracting from the reliability of the Respondent's statistical analysis on the issue of whether the disciplinary process is biased against her is the fact that some aspects of her analysis run directly contrary to the main thrust of her argument.

[119] For example, a central component of the Respondent's argument is that a significant amount of racism is directed at Asian and in particular Chinese Canadians. Yet applying her analytical method, and assuming a 50:50 gender ratio, a randomly selected male Asian lawyer stood a one in 166 (0.60 per cent) chance of being prosecuted in 2016 to 2020, whereas a non-racialized male lawyer stood a one in 94 (1.06 per cent) chance. If the 35:65 ratio is used, the chance of a randomly selected Asian male lawyer being prosecuted during this period decreases to one in 216 (0.47 per cent). If the Respondent's analysis were reliable, this would mean that the Law Society's discipline process is not biased against Asian male lawyers.

[120] A similar problem arises insofar as the Respondent's analysis indicates that, using the 35:65 ratio of female-to-male lawyers, the chance of a randomly selected female lawyer being prosecuted during the period in question was one in 168 (0.60 per cent), while the chance of a randomly selected male lawyer having been prosecuted was one in 94 (1.06 per cent). In oral submissions, the Respondent's counsel suggested that this discrepancy can be explained on the basis that female lawyers are presumably more law abiding than are male lawyers. Whatever the reason for the discrepancy, and there may be many, the Respondent has provided us with no rational explanation as to why, according to her, a randomly selected Asian female lawyer would stand a one in 71 (50:50 gender ratio) or a one in 50 (35:65 gender ratio) chance of being prosecuted in 2016 to 2020, compared to a one in 111 chance for any randomly selected lawyer, yet the chances of prosecution for a

randomly selected Asian male lawyer, at one in 166 (50:50 ratio) or at one in 215 (35:65 ratio), or a randomly selected female lawyer, at one in 168, would be much lower.

[121] In the same vein, the Respondent's analysis indicates that a randomly selected South Asian male lawyer had a one in 33 chance of being prosecuted in 2016 to 2020. But running the same calculation for a South Asian female lawyer – which the Respondent did not do – shows only a one in 258 chance of being prosecuted. Again, this result runs contrary to the Respondent's overall position that racial bias skews the discipline process against all racialized lawyers. It is also hard to reconcile with her claim that Asian female lawyers face a particularly high level of discrimination because of their race and gender.

[122] A final example of the Respondent's analytical method yielding results that run contrary to her argument concerns the likelihood that an Asian female lawyer who was found to have committed a disciplinary violation would face disbarment or a suspension at a higher rate than would be the case for non-racialized lawyers or the profession at large. The chance of a randomly selected Asian lawyer being disbarred was zero (4/0). The chance of her being suspended was one in two (4/2), which is the same as for all of the non-disbarred lawyers.

[123] Other weaknesses or inconsistencies of varying degrees of significance further undermine the reliability of the Respondent's analysis. For instance:

(a) she assumes that there were 12,000 practising lawyers in 2016 to 2020, and yet in three of those years the Law Society's membership exceeded this number, reaching a high of 13,049 in 2020;

(b) she uses 2006 census figures referenced in a 2012 Law Society report regarding the particular race of British Columbia lawyers as if those figures pertained equally to the period under review, namely, 2016 to 2020;

(c) she relies on information about the percentage of non-Indigenous, visible minority lawyers obtained from the Law Society's website, but this is self-reported information taken from annual practice declarations, and in each of 2016 to 2020, over 20 per cent of lawyers chose not to provide any information regarding this point; and

(d) she uses a 2012 report to arrive at a 35:65 ratio of female-to-male lawyers during 2016 to 2020, instead of using information that

corresponds to those years, and sometimes she uses the 35:65 ratio in her calculations, but other times she employs a 50:50 ratio.

[124] For these reasons, we ascribe no weight to the Respondent's statistical analysis on the issue of whether the Law Society's discipline process discriminates against racialized lawyers and in particular Asian women such as the Respondent.

[125] This finding alone is sufficient to reject the Respondent's argument that the principles from *Doré* are engaged so as to modify the approach taken in assessing the appropriate disciplinary action. It is nonetheless worth pointing to some of the problems that arise in respect of her reliance on historical and scholastic sources, current news reports, and Law Society statements and reports regarding racial discrimination, in an attempt to establish bias in the Law Society's disciplinary process.

[126] To begin with, while evidence regarding the larger social, political, and legal contexts can be relevant in establishing a s. 15(1) *Charter* claim, contextual evidence of this sort does not eliminate the need for a litigant to show that the particular institution in question, in this case the Law Society's disciplinary process, operates against them in a discriminatory fashion based on enumerated or analogous characteristics. See *Begun v. Canada (Citizenship and Immigration),* 2018 FCA 181, at paras. 80-81; *Kahkewistahaw First Nation v. Taypotat,* 2015 SCC 30, at paras. 30-34; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center),* 2015 SCC 39, at para. 88. As explained above, the Respondent's statistical analysis has failed to establish such discrimination.

[127] In a similar vein, none of the historical or scholastic sources relied on by the Respondent provides evidence of bias in the Law Society's disciplinary process resulting in a disparate, negative impact on racialized lawyers and in particular female Asian lawyers. The historical bars that she notes once existed to prevent Asian-Canadians from voting or being admitted to law school and the Law Society, were abolished many years ago. Her reliance on contemporary studies from other jurisdictions is of limited assistance for various reasons. For example, the study from the State Bar of California was focused on discrimination against Black male lawyers, and specifically noted that there was no statistically meaningful difference between Asian and White lawyers (*Report on Disparities in the Discipline System*, p. 2). Plus, unlike the Respondent's own statistical analysis, these studies also addressed a variety of other factors, outside the control of the Law Society's discipline process, which can correlate with the probability of racialized lawyers

being subject to disciplinary measures, such as firm size, practice type, race of complainant and whether the lawyer under investigation had legal representation.

[128] It is also worth noting that the case law cited by the Respondent regarding the regulation of lawyers does not hold that a lawyer's penalty for a discipline violation should be assessed differently merely because they are a member of a disadvantaged racialized group. Rather, it holds that, while a hearing panel can in appropriate circumstances take judicial notice of disadvantage and discrimination that adversely affects the lives of Indigenous people, Black Canadians, and other racialized groups in Canada, and can give mitigating effect to these factors in imposing a penalty, there must be case-specific evidence supporting the conclusion that the factors may have influenced or explain the lawyer's misconduct. See *McSween*, at paras. 54-58; *Law Society of Upper Canada v. Robinson*, 2013 ONLSAP 18, at paras. 20-46, 57-79; *Law Society of Upper Canada v. Batstone*, 2017 ONLSTH 34, at paras. 23-24; *Law Society of Upper Canada v. An*, 2017 ONLSTH 181, at paras. 31-32; *Law Society of Upper Canada v. Hamalengwa*, 2015 ONLSTH 57, at para. 26; *Law Society of Upper Canada v. Okpala*, 2017 ONLSTH 204, at para. 11; *Law Society of Upper Canada v. Bahimanga*, 2018 ONSAP 30, at para. 51; *Law Society of Alberta v. Willier*, 2018 ABLS 22, at paras. 31, 35; *Howe v. Nova Scotia Barristers' Society*, 2019 NSCA 81, at paras. 178-187, leave refused, 2020 CanLII 30825 (SCC); *Wilkins*, at paras. 110-150; *Law Society of BC v. Yen*, 2021 LSBC 30, at para. 51.

[129] A similar approach has been employed in the criminal law with respect to the sentencing of Indigenous offenders. While a direct causal link with the offence is not needed before systemic discrimination and related background factors affecting Indigenous peoples can be treated as mitigating, the sentencing judge must be provided with case-specific information about how these factors have impacted the offender's own life experiences so as to reduce the offender's level of moral blameworthiness (*e.g.*, *R. v. Taylor*, 2021 BCCA 283, at paras. 25-27). See also the case law relating to anti-Black racism and its impact on an offender as a mitigating factor at sentencing (*e.g.*, *R. v. Ferguson*, 2018 BCSC 1523, at paras. 126-127; *R. v. Morris*, 2021 ONCA 680, at para. 97; *R. v. Anderson*, 2021 NSCA 62, at paras. 145-146).

[130] For instance, in *Okpala*, the respondent lawyer committed professional misconduct in part because of a lack of experience, which the panel found to be a mitigating factor because the lack of experience was partially attributable to difficulties in obtaining articles and finding a job as an immigrant from Nigeria, as described by the respondent in his testimony, and the panel held that it was reasonable to conclude that cultural and racial discrimination had played a role in these

difficulties (paras. 19-20, 23, 37). By contrast, in the case before us, the Respondent has not claimed that race or gender-based discrimination may have influenced her conduct in any way. Nor is there any evidence that would allow us to draw this conclusion.

Conclusion regarding Respondent's allegation of systemic bias

[131] We reject the Respondent's arguments regarding systemic bias for two main reasons. First, even if we were to employ the *Doré*-based test she urges upon us to determine whether a suspension is the appropriate sanction in this case, we would have concluded that this test is met and that a one-month suspension is necessary to protect the public. Second, the Respondent has failed to establish that the discipline process is biased against Asian-Canadian lawyers like her so as to increase the likelihood of such lawyers either being the subject of citations or given a more significant penalty for professional misconduct.

[132] In coming to this second conclusion, we wish to stress that we are not finding as a fact that the discipline process is not biased against racialized lawyers, nor are we suggesting that the Law Society need not be concerned about this possibility. To the contrary, the Law Society may decide that the treatment of racialized lawyers under the disciplinary process is a matter worth investigating. Such a decision could be seen as consonant with the Law Society's stated commitment to promoting equity and diversity in the profession.

Costs

[133] The Law Society seeks costs of $16,135.82, based on a draft bill of costs that has been calculated in accordance with Schedule 4 to the Rules, which is entitled Tariff for Discipline Hearing and Review Costs.

[134] Our jurisdiction to award costs is found in s. 46 of the *Act* and Rule 5-11. Rule 5-11(3) and (4) provide that, in making a costs order, we must have regard to the Schedule 4 tariff and may order costs in an amount other than permitted by that tariff if in our judgment it is reasonable and appropriate to do so.

[135] The Respondent argues that the Law Society should obtain no costs, or should obtain costs at a sharply limited amount, because it did not act in good faith in responding to her Notice to Admit served on it at the disciplinary stage of the proceedings. She says the Law Society's response to her Notice to Admit reflects a "scorched earth approach" and "displays no respect for the use of admissions to advance the efficiency of the proceeding." In this respect, she says "the Law

Society pivots, weaves, prevaricates, plays coy and plays dead; *anything* to avoid providing a straight answer to some straight questions." [emphasis in original] Specific answers provided by the Law Society are variously described as "paroxysms of semi-denial," "achingly precious," "particularly abusive," "spin and sleight-of-hand" and "Carrollian."

[136] In making this submission, the Respondent relies on Rule 4-28(8), which provides:

> (8) If a party does not admit the truth of a fact or the authenticity of a document under this rule, and the truth of the fact or authenticity of the document is proven in the hearing, the panel may consider the refusal when exercising its discretion respecting costs under Rule 5-11 *[Costs of Hearings]*.

[137] Having read the Respondent's Notice to Admit and the Law Society's response, and considered the Respondent's detailed submissions, we disagree with her characterization of the Law Society's conduct. A great many of the Law Society's responses were based in whole or part on its position that the sought-after admissions were irrelevant to the material issues at the disciplinary stage of the proceeding. The Law Society's position in this respect was not improper.

[138] The Law Society's concerns about hearsay as expressed in a number of its responses to the Respondent's Notice to Admit were also not misplaced. For example, the Respondent criticizes the Law Society's refusal to admit that UBC law professor Wesley Pue made a factual statement in an article published in 2000 because the statement was hearsay. While the Respondent is correct to say that in this part of the Notice to Admit she was not seeking an admission that the statement was true, it was legitimate for the Law Society to explain that it was not making the admission because the statement constituted hearsay and was therefore inadmissible. Much more importantly, the Law Society further explained its refusal to make the admission by noting that the statement was not relevant to the issue of the appropriate sanction to be imposed on the Respondent. Ultimately, the Law Society's refusal to admit that Professor Pue made this statement in the article had no adverse impact on the Respondent. She filed the article at the hearing before us, which she surely would have done even had the Law Society made the requested admission.

[139] Nor was it improper for the Law Society to decline to make admissions on the basis that they "lacked an evidentiary foundation". It is acceptable for a party to decline to make an admission that it reasonably believes cannot be established by admissible evidence. This is how we interpret the Law Society's answer about the lack of an evidentiary foundation. We do not agree with the Respondent that in

providing this answer the Law Society failed to understand that the purpose of an admission is to obviate the need to call evidence in support of the admitted fact.

[140] In sum, we reject the Respondent's submission that the Law Society's response displayed "no respect for the use of admissions to advance the efficiency of the proceeding."

[141] The Respondent makes no other objection to the Law Society's draft bill of costs, which as noted has been calculated in accordance with Schedule 4. Those costs do not appear to be unreasonable or unfair. And the Respondent presented no evidence and made no submissions suggesting that she would be unable to pay a costs award of this size. Consequently, we order that the Respondent pay costs in the amount set out in the draft bill of costs, namely, $16,135.82, within six months of the release of these reasons.

CONCLUSION AND ORDER

[142] We order that:

(a) pursuant to s. 38(5)(d)(i) of the *Act*, the Respondent is suspended from the practice of law for a period of one month;

(b) this one-month suspension is to commence on the first day of the first month following the release of these reasons unless the Respondent is at that time already serving another suspension(s), in which case the one-month suspension will be served consecutive to the completion of the other suspension(s); and

(c) pursuant to Rule 5-11 of the Rules, the Respondent must pay costs of $16,135.82 on or before July 31, 2022.