2022 LSBC 10
Hearing File No.: HE20190008
Decision Issued: March 10, 2022
Credentials Hearing ordered: January 24, 2019

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

NIDA CHAUDHRY

APPLICANT

DECISION OF THE HEARING PANEL ON AN APPLICATION TO ADMIT EVIDENCE

Hearing dates:	June 21, 22 and 23, 2021
Panel:	Chelsea D. Wilson, Chair Carol Gibson, Public representative Shannon Salter, Lawyer
Counsel for the Law Society:	J. Jaia Rai
Counsel for the Applicant:	David Donohoe
Written reasons of the Panel by:	Chelsea D. Wilson

OVERVIEW

[1] Nida Chaudhry (the "Applicant") was called and admitted as a member of the Law Society of British Columbia - on July 25, 2011.

[2] On October 5, 2017, the Law Society issued a citation against the Applicant, in which it alleged that the Applicant committed professional misconduct in seven different ways, each of which was related to the withdrawal of funds from her trust account or record-keeping in relation to her trust and general accounts while she was practising law as a sole practitioner. The allegations included misappropriation of client trust funds.

[3] The hearing of the citation proceeded pursuant to what was then Rule 4-30 of the Law Society Rules (the "Rules") on the written record and without an oral hearing. The written record included a letter of admission under Rule 4-30 (the Admission Letter") signed by the Applicant, to which was attached a Notice to Admit previously sent to the Applicant by the Law Society and a letter of apology dated May 30, 2018 (the "Apology Letter"). The Admission Letter states, in part:

> I admit that I have professionally misconducted myself by committing the disciplinary violations set out in allegations 1 through 7 of the Citation issued October 5, 2017 which is at Tab 1 to the attached Notice to Admit dated May 3, 2018. I admit that I *intentionally* misappropriated client funds as set out in allegation 1 of the Citation. The facts and circumstances of my misconduct are more fully set out in the attached Notice to Admit.
>
> In the event this admission is accepted, I consent to specified disciplinary action as follows:
>
> - an order of disbarment.
>
> I hereby consent to the citation hearing proceeding by way of written submissions without the need for an oral hearing and I confirm that I will not be providing any additional written submissions.
>
> …
>
> I confirm that I have been advised to obtain independent legal advice and given an opportunity to do so and that I have executed this document after obtaining such advice as I deem necessary. I further confirm that I have read and understand the whole contents of this document.
>
> [emphasis added]

[4] The hearing panel in the discipline hearing (the "discipline panel") made findings and orders in accordance with the Rule 4-30 consent proposal made by the Applicant and accepted by the Discipline Committee, including an order that the

Applicant be disbarred. In doing so, the discipline panel noted the Applicant's admission that she "intentionally misappropriated" client funds and that some of the withdrawn funds were used "to pay personal or business expenses such as rent, networking group dues, trust administration fees and student loans."

[5] The disbarment order and underlying misconduct findings made by the discipline panel are contained in a written decision issued on November 6, 2018, which is indexed as 2018 LSBC 31 (the "Disbarment Decision").

[6] In December 2018, the Applicant submitted an Application for Reinstatement of Membership together with supporting documents (collectively, the "Reinstatement Application") to the Law Society. One of the supporting documents is a character reference letter dated December 17, 2018 (the "NM Character Reference Letter") from NM, Managing Partner of TWS, who was the Applicant's employer in Dubai at the time.

[7] The Credentials Committee ordered a hearing into the Reinstatement Application at their January 24, 2019 meeting, and the Applicant was given notice of the order. Pursuant to subsection 19(3) of the *Legal Profession Act* and Rule 2-85(11)(a) of the Law Society Rules, a hearing is mandatory because the Applicant was disbarred.

[8] In an email dated October 8, 2019 and a letter dated October 9, 2019, NM informed Law Society counsel that she revokes and retracts the NM Character Reference Letter.

[9] The Applicant received formal notice of matters specified in Rule 2-91(1) of the Rules by letter dated April 28, 2020 from counsel for the Law Society (the "Rule 2-91 Letter"). The Rule 2-91 Letter gives notice to the Applicant that the following circumstances will be inquired into at the Reinstatement Hearing:

(a) circumstances related to the hearing of the citation issued against the Applicant on October 5, 2018, including but not limited to:

(i) the conduct underlying the proven citation;

(ii) the admissions made by the Applicant, including admissions accepted by the Discipline Committee, and tendered in evidence at the hearing;

(iii) The discipline panel's findings and orders made, set out in the panel's written decision issued on November 6, 2018.

(b) the discrepancies between the submission made by the Applicant in the citation hearing that her misappropriation was intentional and her characterization of her conduct in her Reinstatement Application; and

(c) the work and activities the Applicant engaged in since her disbarment, including the work she performed while employed with TWS in Dubai and circumstances that led to NM's retraction of the NM Character Reference Letter.

[10] On May 22, 2020, the Applicant notified counsel for the Law Society that she decided to postpone her Reinstatement Application until at least the following year. On January 4, 2021, the Applicant informed counsel for the Law Society that she would like to move forward with her Reinstatement Application. Given the amount of time that had passed, the Law Society asked the Applicant to update the information contained in her Reinstatement Application. The Applicant was also asked to provide a description of her work and activities in Dubai, including her employment at TSW and the circumstances related to NM's retraction of the NM Character Reference Letter, and any further work performed in British Columbia since her return to the province. The Applicant responded in emails dated January 14, 2021 and February 1, 2021.

[11] This Hearing Panel was convened to determine whether the Applicant should be reinstated as a member of the Law Society. The criteria for reinstatement are set out in subsection 19(1) of the Act, which provides:

> **19**(1) No person may be enrolled as an articled student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

[12] Pursuant to section 22(3) of the Act, following a reinstatement hearing, the hearing panel must either grant the application, grant the application subject to conditions or limitations that the hearing panel considers appropriate, or reject the application.

The May 24, 2021 application

[13] The Applicant brought an application dated May 24, 2021 (the "May 24 Application") in which she sought to testify about her state of mind during the following times (collectively referred to as the "Times in Question"):

(a) at the time she signed the Rule 4-30 Admission Letter and drafted the Apology Letter, both of which she submitted to the Discipline Committee as part of her Rule 4-30 proposal;

(b) at the time she signed the Notice to Admit; and

(c) at the time she engaged in the actions described in the citation.

[14] The Law Society submitted a written response to the May 24 Application, which is dated June 10, 2021.

[15] At the start of the Reinstatement Hearing, the parties jointly proposed, and the Hearing Panel determined, that the hearing would proceed as follows:

(a) the Applicant would testify and give the entirety of her evidence in chief;

(b) the Applicant's evidence in chief, as it relates to her state of mind, would be given in *voir dire*, with the Hearing Panel determining in its ruling on the May 24 Application whether such testimony is admissible in determining whether the Applicant will be reinstated pursuant to subsection 19(1) of the Act;

(c) Law Society counsel would restrict her cross-examination of the Applicant to the facts and hearing process, reserving the right to cross-examine the Applicant on her testimony relating to her state of mind until after the Hearing Panel issues its determination regarding the May 24 Application;

(d) the Hearing Panel would determine the May 24 Application, recognizing that it may be necessary for the Hearing Panel to reserve its decision and for the Reinstatement Hearing to be continued on a later date; and

(e) the Hearing Panel would determine the May 24 Application, recognizing that it may be necessary for the Hearing Panel to reserve its decision and for the Reinstatement Hearing to be continued on a later date.

[16] The Reinstatement Hearing proceeded in accordance with the above procedure. As the Applicant testified, counsel indicated to the Hearing Panel when portions of the Applicant's testimony were being given in *voir dire.* On the third day of the Reinstatement Hearing, the Hearing Panel reserved its decision on the May 24 Application.

ISSUES

[17] The issue in the May 24 Application is whether to admit the Applicant's testimony regarding her state of mind at the Times in Question. The parties and the Hearing Panel agreed that, to determine whether that testimony should be admitted, the Hearing Panel needed to determine the following sub-issues:

1. What did the Applicant admit, and what did the discipline panel find in the Disbarment Decision regarding the Applicant's state of mind at the Times in Question?

2. Is the Applicant's testimony at the Reinstatement Hearing regarding her state of mind at the Times in Question at odds with what the Applicant admitted and the discipline panel found in the Disbarment Decision?

3. If the answer to sub-issue 2 is yes, is the Applicant precluded from testifying at the Reinstatement Hearing that she had no dishonest intent when she committed misappropriation?

THE APPLICANT'S POSITION

[18] The Applicant's position, as set out in para. 3 of her application, is that she should be permitted to testify at the Reinstatement Hearing as to her state of mind at the Times in Question to "show that it was not [her] intention to dishonestly steal from clients for personal gain, nor to even intentionally steal from clients at all." She submits that her admission to "intentional misappropriation" amounts to an admission that she intended to engage in activity that caused a misappropriation of funds. She submits that an admission of "intentional misappropriation" does not necessarily amount to an admission of having "an outright intention to dishonestly steal from clients" and that such an admission could instead amount to an admission that one's state of mind was reckless or wilfully blind when committing the misappropriation.

[19] The Applicant makes the same argument in relation the discipline panel's finding that she committed "intentional misappropriation". She relies, in part, on the absence of any reference in the Disbarment Decision to whether she had committed misappropriation with dishonest intent or not.

[20] The Applicant also relies on the Rule 2-91 Letter, which indicates that the circumstances to be inquired into at the hearing include the conduct underlying the proven citation and the discrepancies between the submission made by the Applicant in the citation hearing that her misappropriation was intentional and the

Applicant's characterization of her conduct in her Reinstatement Application. She submits that since the Law Society has raised this issue as a point of inquiry, she should be able to address it by testifying as to her state of mind at the Times in Question.

[21] The Applicant submits that testifying at the Reinstatement Hearing as to her state of mind at the Times in Question would not amount to an improper collateral attack on the Disbarment Decision or be an abuse of the Law Society hearing process because her testimony at the Reinstatement Hearing would not be at odds with her admission of "intentional misappropriation" or the discipline panel's finding in the Disbarment Decision that she committed "intentional misappropriation".

[22] As such, it is the Applicant's position that, despite having admitted to "intentional misappropriation" and the discipline panel having found in the Disbarment Decision that the Applicant committed "intentional misappropriation," she should be permitted to testify at the Reinstatement Hearing as to why and how her misappropriation was reckless or wilfully blind, but not dishonest.

THE LAW SOCIETY'S POSITION

[23] The Law Society submits that, in admitting to "intentional misappropriation," the Applicant necessarily admitted to misappropriation with dishonest intent. Regarding the Disbarment Decision, the Law Society says that the discipline panel found that the Applicant committed "intentional misappropriation" and that, subsumed within that finding, is a finding that the Applicant committed misappropriation with dishonest intent. In other words, the Law Society says that a finding of "intentional misappropriation" necessarily includes a finding of dishonest intention regardless of whether the discipline panel specifically stated that the misappropriation was committed with dishonest intent.

[24] The Law Society does not agree with the Applicant's characterization of the facts and circumstances in the Rule 2-91 Letter. The Law Society says that the Rule 2-91 Letter sets out the circumstances to be inquired into at the Reinstatement Hearing but does not open the door to permit the Applicant to relitigate her state of mind because the discipline panel made a finding that the Applicant had committed intentional misappropriation.

[25] The Law Society submits that the Applicant can testify at the Reinstatement Hearing about the circumstances surrounding the conduct underlying the proven citation but any testimony from the Applicant that her state of mind was something other than what the discipline panel found it to be is inadmissible. That, the Law

Society says, would be an improper collateral attack on the Disbarment Decision and be an abuse of the Law Society hearing process.

ANALYSIS

[26] The parties tendered an Agreed Statement of Facts (the "ASF") in the Reinstatement Hearing. The Hearing Panel accepts the ASF unless otherwise noted.

Sub-issue 1: What did the Applicant admit, and what did the discipline panel find in the Disbarment Decision regarding the Applicant's state of mind at the Times in Question?

Events and communications prior to the citation hearing

[27] On March 1, 2018, there was a phone call between the Applicant and Law Society counsel. During that phone call, the participants discussed the process for resolving the citation by consent under Rule 4-30. Counsel for the Law Society advised the Applicant that she would prepare and deliver to the Applicant a Notice to Admit containing admissions sought by the Law Society based on the evidence contained in the disclosure that was delivered to the Applicant. They discussed that one of the purposes of the Notice to Admit would be to assist the Applicant to decide whether she wished to submit a consent resolution proposal pursuant to Rule 4-30. Counsel for the Law Society informed the Applicant that the citation concerned intentional misappropriation and that the case law supported disbarment for intentional misappropriation absent exceptional circumstances. She also provided the Applicant with names of discipline cases involving misappropriation that did not result in disbarment.

[28] The Applicant was briefly represented by counsel, Michael Warsh, in April of 2018. After being informed that Mr. Warsh was no longer representing the Applicant, Law Society counsel strongly recommended to the Applicant that she retain new counsel. The Applicant chose to represent herself.

[29] Law Society counsel delivered the Notice to Admit to the Applicant. In a May 14, 2018 phone call with counsel for the Law Society, the Applicant confirmed receipt of the Notice to Admit and advised that she wanted to admit the underlying facts and resolve the citation pursuant to the Rule 4-30 consent resolution process. Law Society counsel informed the Applicant that the Law Society was seeking disbarment and that, if the sanction proposed in her Rule 4-30 proposal included consent disbarment, the Law Society was agreeable to a hearing on written

materials. The participants discussed misappropriation cases in which lengthy suspensions, rather than disbarment, were ordered. Law Society counsel told the Applicant that, based on the evidence, it was unlikely the Law Society would agree to her receiving a sanction less than disbarment. The Applicant asked questions regarding the reinstatement process, in response to which Law Society counsel informed the Applicant that she must go through a credentials hearing process at which the onus would be on her to prove her good character and fitness. Law Society counsel also stated that the length of time that passed since her conduct would be a fact considered in the reinstatement process, but that there was no guarantee that she would be reinstated. Further discussion of suspension versus disbarment occurred in email communications between the Applicant and Law Society counsel.

Applicant's Rule 4-30 consent resolution proposal and consideration by Discipline Committee

[30] The Applicant informed Law Society counsel that she had decided to submit a consent resolution proposal in an email dated May 24, 2018. Law Society counsel responded by email that same day and provided the Applicant with a draft of the Admission Letter containing her admission of professional misconduct and consent to disbarment.

[31] The Applicant reviewed, signed and returned the Admission Letter on May 30, 2018. She attached the Notice to Admit as well the Apology Letter addressed to the Chair of the Discipline Committee.

[32] In the Apology Letter, the Applicant states, in part:

> I write this letter as part of my Notice to Admit, as an apology regarding the actions relating to the misconduct leading to the current circumstances. … At no time did I have an intention to ever create any harm or inconvenience to any person or organization. … [I]t is clear that I did not exercise the same rigor when it came to my accounting practices. My lack of attention to the same resulted in various oversights. … In hindsight, I wish I had paid more attention to the accounting side of things, and studied the materials more carefully such as the practice management course and the trust accounting handbook. I also wish I had employed an experienced accountant at the same time that I had opened the practice. … [W]hen it came to accounting, this was something I should have paid more attention [sic] to and did not. …

[33] The Notice to Admit includes admissions that the Applicant knew that she was personally responsible to ensure that client trust funds were dealt with in accordance with the Rules and that she knew of her obligation to prepare and deliver bills prior to withdrawing funds from trust in payment of her fees. The Notice to Admit did not seek express admissions pertaining to the Applicant's state of mind in relation to the misappropriations. The Notice to Admit is a process under the Rules by which the Law Society may seek admission of facts with a view to eliminating the need to call witnesses to give evidence. The Law Society submits that, had the Applicant not submitted the Rule 4-30 consent resolution proposal, the Law Society would have been at liberty to cross-examine the Applicant and tender any additional evidence relevant to establishing her state of mind.

[34] The Notice to Admit states that the documents attached to it were admitted into evidence before the discipline panel for proof that the statements contained in those documents were made but not as proof of the truth of the matters recorded in those documents. None of the following documents that were created during the course of the Law Society investigation were admitted for the truth of their contents: letter from Applicant dated May 11, 2015, letter from the Applicant dated January 15, 2016, transcript of interview of the Applicant on February 29, 2016, email from the Applicant dated November 21, 2016, letter from the Applicant dated April 8, 2017 and transcript of interview of the Applicant on July 11, 2017. This is important because during the Applicant's *voir dire* testimony in the Reinstatement Hearing the Applicant relied on statements she made to the Law Society in these documents as evidence that her conduct was not intentional.

[35] On June 7, 2018, the Discipline Committee resolved to accept the Applicant's Rule 4-30 proposal, including her admissions and consent to disbarment. The Committee instructed Law Society counsel to recommend to the discipline panel that they accept the Rule 4-30 proposal and order disbarment in accordance with the proposal.

Rule 4-30 citation hearing

[36] On June 8, 2018, the Law Society applied to adjourn generally the hearing scheduled for June 19 to 20, 2018 based on the Discipline Committee's acceptance of the Rule 4-30 proposal and the Applicant's consent that the matter proceed on the written record without the need for an oral hearing. On June 12, 2018, both the adjournment application and the Law Society's application to conduct the hearing on the written record were granted. All of the application materials were delivered to and received by the Applicant.

[37] The hearing of the citation proceeded pursuant to Rule 4-30 of the Rules on the written record and without an oral hearing. The discipline panel made findings and orders in accordance with the Rule 4-30 proposal made by the Applicant and accepted by the Discipline Committee.

[38] Correspondence related to the Rule 4-30 proposal and evidence supporting the citation allegations were provided to the discipline panel and tendered as exhibits at the citation hearing.

[39] In the ASF, the parties agreed that certain evidence that was tendered as exhibits at the citation hearing, be admitted for the purposes of the hearing of the Applicant's Reinstatement Application, including the following:

1. The signed Admission Letter, which is admitted for the truth of its contents, subject to any rulings and directions made by this Hearing Panel on the May 24 Application.

2. The Apology Letter, which is not admitted for the truth of its contents at the Reinstatement Hearing.

3. The Notice to Admit dated May 3, 2018, which is admitted for the truth of its contents and as proof of the admissions made by the Applicant in the citation hearing, subject to any rulings and directions to be made by this Hearing Panel on the May 24 Application.

4. Select documentary evidence attached to the Notice of Admit as described in the ASF. This select documentary evidence includes correspondence and other documents from the Law Society investigation. Portions of some of these documents are admitted at the Reinstatement Hearing for the truth of their contents.

[40] In addition to the evidence, Law Society counsel delivered written submissions to the discipline panel. These written submissions were provided to and received by the Applicant by email on June 12, 2018. The Applicant did not provide any written submissions to the discipline panel.

[41] On August 22, 2018, the discipline panel issued a memorandum to both parties inviting submissions on amendments to the citation to accord with the Rules as they were at the time of the allegations and on the review board's decision in *Law Society of BC v. Sahota*, 2018 LSBC 20 ("*Sahota* (Review)"). In response, the Law Society provided further written submissions to the discipline panel and the Applicant on August 23, 2018. The Law Society's further written submissions

submit that the review board's decision was distinguishable from the Applicant's case because *Sahota* (Review) involved misappropriation arising from gross negligence or an incompetent approach to trust accounting responsibilities, whereas the Applicant's case included instances of intentional misappropriation of client funds. The Applicant did not provide any written submissions to the discipline panel in response to the discipline panel's invitation.

[42] On November 6, 2018, the discipline panel issued the Disbarment Decision. In this Reinstatement Application, the Disbarment Decision is admitted as proof of the positions taken by the parties, findings and orders made by the discipline panel and reasons given by the discipline panel.

[43] In the ASF, the Applicant agrees that she does not seek to challenge the Disbarment Decision that her actions, as described in the citation, constituted professional misconduct, subject to this Hearing Panel's ruling on the May 24 Application. The findings made in the Disbarment Decision, including findings of fact, are admitted for their truth subject to any rulings and directions made by this Hearing Panel concerning the Applicant's admission that her misappropriation was intentional and subject to any ruling or directions to be made by this Hearing Panel that she be allowed to testify about her state of mind at the time of engaging in the actions described in the citation.

[44] The Applicant agrees, in the ASF, that she knew, prior to making any admissions in the hearing of the citation, that the Law Society's position was that, if her actions alleged in the citation were proven, the Law Society would seek disbarment. Further, the Applicant agrees in the ASF that she made admissions in the citation hearing and consented to disbarment voluntarily and with full knowledge of the evidence relied on by the Law Society.

The Disbarment Decision

[45] In paras. 17 and 18 of the Disbarment Decision, the discipline panel found that the Applicant admitted to the facts recounted in the Notice to Admit and found that in the Admission Letter the Applicant admitted that she intentionally misappropriated client funds as set out in allegation 1 of the citation and that she committed professional misconduct by committing the disciplinary violations alleged in allegations 1 to 7 of the citation.

[46] The discipline panel began its review of allegation 1 in the citation, being the misappropriation of trust funds, at para. 35 of the Disbarment Decision. The discipline panel quoted the following passage from para. 71 of *Law Society of BC v. Gellert*, 2013 LSBC 22 ("*Gellert* (F & D)"):

> Misappropriation of a client's funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in criminal law. See *Law Society of BC v. Ali*, 2007 LSBC 18 ("*Ali* (F & D)"), at paras. 79-80, 105; *Law Society of BC v. Harder*, 2005 LSBC 48, ("*Harder* (F & D)") at para. 56.

[47] After referencing *Gellert* (F & D) and paras. 60 and 61 of *Law Society of BC v. Sahota*, 2016 LSBC 29 ("*Sahota* (F & D)"), the hearing panel found, at para. 38, that the Applicant had admitted that she intentionally misappropriated client funds and committed professional misconduct by making 13 withdrawals from her trust account when she was not entitled to the funds.

[48] After canvassing the facts surrounding those withdrawals, including eight withdrawals that were made to pay personal or business expenses, the discipline panel concluded at para. 47 that, given the admitted facts, the Applicant's proposed admission to the professional misconduct described in allegation 1 of the citation, namely misappropriation of client trust funds and breach of Rule 3-56, was appropriate and that the Law Society had met its onus of proving misconduct regarding this allegation.

[49] In considering the nature and gravity of the Applicant's conduct for the purposes of determining whether disbarment should be ordered, the discipline panel concluded, at paras. 105 and 106:

> The most serious aspect of the Respondent's misconduct is her intentional misappropriation of $6,154.97 in client funds (allegation 1). Misappropriation is an egregious betrayal of the trust that clients place in their lawyers. The public's confidence in the legal profession requires that the sanction for misappropriation be significant. A significant sanction is also necessary to promote general deterrence and protect the public from similar breaches in the future. The fact that the respondent has been rehabilitated and presents little or no risk of committing further misconduct is usually of little moment. Accordingly, absent rare and extraordinary circumstances, the appropriate disciplinary action for the intentional misappropriation of client funds will usually be disbarment, in particular where a substantial sum has been misappropriated. See *Law Society of BC v. McGuire*, 2006 LSBC 20, at paras. 21-30; *Law Society of*

> *BC v. Goulding*, 2007 LSBC 39, at para. 4, *Law Society of BC v. Harder*, 2006 LSBC 48 ("*Harder* (DA)"), at paras. 55-64; *Law Society of BC v. Ali*, 2007 LSBC 57, at paras. 7-24 ("*Ali* (DA)"); *Law Society of BC v. Gellert*, 2014 LSBC 05 ("*Gellert* (DA)"), at paras. 42-46; *Law Society v. BC v. Tak*, 2014 LSBC 57, at paras. 35, 45, 70-71.
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> The Respondent's misappropriation of $6,154.97 in client funds was intentional. It was carried out by means of multiple improper withdrawals made over a 17-month period, and a substantial part of the funds were used to cover the Respondent's personal expenses. The amount in question – over $6,000 – is not insubstantial. As noted in *Gellert* (DA), at para. 48, disbarment has been imposed in other cases where similar or even lesser amounts of money have been intentionally misappropriated from clients. In this respect, see also *Goulding*, at para. 7, and *Ali* (DA), at para. 16.

[50] At paras. 125 to 129 of the Disbarment Decision, the discipline panel distinguished a number of cases on the basis that in those cases the misappropriation was not intentional. *Sahota* was distinguished on the basis that, in that case, the misappropriation of trust funds was not intentional but rather arose through gross negligence. The discipline panel distinguished the review board's decision in *Law Society of BC v. Sas*, 2017 LSBC 08 on the basis that, unlike the respondent in *Sas*, the Applicant intentionally misappropriated funds for her personal use.

The meaning of "intentional misappropriation"

[51] It is undisputed that the Applicant admitted, and the discipline panel found, that the Applicant committed "intentional misappropriation." The question is: What does "intentional misappropriation" mean? Counsel for the parties were unable to direct us to any authority supporting the Applicant's argument that "intentional misappropriation" can include situations involving reckless or wilfully blind misappropriation in addition to dishonesty. This Hearing Panel must consider what "intentional" adds to the term "misappropriation".

[52] We will start with what constitutes misappropriation. In *Sahota* (F & D), the panel summarized the nature of misappropriation in paras. 60 through 65:

> We begin with an attempt to understand the nature of misappropriation. In the decision of a hearing panel on facts and verdict in the matter of *Ali* (F & D), at para. 79, the following appears in the context of describing the meaning of misappropriation:

Misappropriation is defined in *Black's Law Dictionary*, 6th Edition as follows:

> The unauthorized, improper, or unlawful use of funds or other property for purposes other than that for which intended. Misappropriation of a client's funds is any unauthorized use of client's funds entrusted to an attorney, including not only stealing but also unauthorized temporary use for lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom ...

These are important clarifications. Any unauthorized use qualifies. It does not need to amount to stealing, as long as there is an unauthorized temporary use for the lawyer's own purpose. Personal gain or benefit to the lawyer is not required.

Further, the panel in *Harder* (F & D) provided at para. 56 the following helpful language to the quest for clarity on this issue:

> A useful further clarification of the meaning of misappropriation is found in an American authority, in the matter of *Charles W. Summers* 114 NJ 209 @ 221 [SC 1989] where the Court stated:
>
> > Misappropriation is "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." [. . .] As we stated in re Noonan [. .], knowing misappropriation consists simply of a lawyer taking a client's money entrusted to him, knowing that it is the client's money and knowing that the client has not authorized the taking. [. . .].
> >
> > The lawyer's subjective intent to borrow or steal, the pressures on the lawyer leading him to take the money, the presence of the attorney's good character and fitness and absence of "dishonesty, venality, or immorality" are all irrelevant.

Thus, all that is required is for the lawyer to take the money entrusted to the lawyer knowing that it is the client's money and that the taking is not authorized.

In *Gellert* (F & D), the panel stated at para. 71:

> Misappropriation of a client's trust funds occurs where the lawyer takes those funds for a purpose unauthorized by the client, whether knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing. As this definition indicates, there must be a mental element of wrongdoing or fault, yet this mental element need not rise to the level of dishonesty as that term is used in the criminal law. See *Ali* (F & D), paras. 79-80, 105; *Harder* (F & D), para. 56.

It may not be possible to reconcile the various statements cited, but we are primarily seeking to determine where the conduct of the Respondent fits within the range of these diverse observations. Among legal professionals, "misappropriation" is an emotionally charged word. It connotes substantial financial misbehaviour. It is intuitively connected to wrongdoing and fault, and despite the language of the various cases cited, it is difficult to imagine a finding of "inadvertent" misappropriation. *Gellert* says that there must be "a mental element of wrongdoing or fault."

[53] In *Ali* (DA), the hearing panel commented that the most serious of misappropriation cases will involve proven dishonesty. At paras. 7 and 21, the hearing panel wrote:

> [7] There is strong authority that in cases of misappropriation, disbarment is the appropriate remedy. *Bolton v. Law Society*, [1994] 2 All ER 486 (CA) set out this general principle at 491:
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> > Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. … The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases, the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.
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> …
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> [21] In most cases where disbarment is not imposed, there is a significant mitigating factor, usually either an absence of any dishonest intent or an underlying medical problem (for example, *Ranspot*, 1999 LSBC 09, where there was depression, substance abuse and marital break-up).

[54] The jurisprudence establishes that something less than dishonesty can be sufficient to establish the mental element of wrongdoing or fault that is required for a finding of misappropriation. In *Sahota* (F & D), the hearing panel concluded, at para. 73:

> All required elements of the definition of misappropriation are made out in these circumstances. The use of the client's funds (to cover a shortage in another sub-ledger) was not authorized. The unauthorized use must occur either knowingly or with gross negligence or incompetence. We are clear that this test has been satisfied.

[55] Similarly, in *Law Society of BC v. Ahuja*, 2019 LSBC 31, the hearing panel commented, at paragraph 124:

> We agree that some hearing panels have used different language to describe serious professional misconduct without reference to "misappropriation" where the lawyer's mental element in relation to the conduct does not rise to the level of active dishonesty or wilful blindness. In the case before us, no one suggests, and we do not find, that the Respondent was reckless, nor do we suggest that he had no awareness that what he was doing was wrong. He did.

[56] The review board in *Sahota* Review noted that misappropriation committed through recklessness has been distinguished from misappropriation that was intentional or dishonest. At para. 45 the review board commented:

> In *Law Society of Saskatchewan v. Angus*, 2010 LSS 6, [2010] LSDD No. 232, the lawyer, through recklessness, misappropriated client funds, prepared false accounts, breached an undertaking that he provided to the Law Society and failed to respond substantively or at all to various inquiries from the Law Society. The lawyer did not maintain proper books and records. The hearing panel found that the lawyer's failure to follow the basic protocol in the handling of his trust account was reckless. The panel also found that the misappropriation was not intentional or dishonest. The lawyer was suspended for 12 months. In reaching its decision, the hearing panel referred to *Law Society of Upper Canada v. Kazman*, 2008 ONLSAP 7, [2008] LSDD No. 46, where recklessness in the context of professional discipline was discussed. In *Kazman*, at para. 48 (para. 30 in *Angus*) the panel stated:
>
> > It is said that maintaining public confidence in the integrity of the legal profession is the responsibility of the Law Society. In reality, it is the responsibility of every licensee of the Law Society. The

> Law Society is merely the primary agency by which the licensees at large achieve that goal. The integrity of the legal profession must be vigilantly guarded so that the public's reliance on, and confidence in, the legal profession remain at the highest level. Where a licensee is either willfully blind or reckless, then, to protect the public and maintain their faith, we may impute to the wrongdoer the knowledge requisite for culpability. Willful blindness and recklessness are merely the conduits for the imputation, *i.e.*, once knowledge of either the risk or possible consequence of the risk or both is imputed to the wrongdoer by whatever conduit, culpability will follow.

[57] In *Law Society of BC v. Sas*, 2015 LSBC 19, the hearing panel adopted the Supreme Court of Canada's decision in *Sansregret v. The Queen*, [1985] 1 SCR 570, as to what constitutes wilful blindness. The hearing panel commented at paras. 153 to 155 :

> The issues of wilful blindness and recklessness in the context of criminal proceedings were considered by the Supreme Court of Canada in *Sansregret v. The Queen*, [1985] 1 SCR 570, 1985 CanLII 79. Writing for the Court, McIntyre, J. stated the following commencing at para. 21:
>
> 21. … where wilful blindness is shown, the law presumes knowledge on the part of the accused …
>
> 22. Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
>
> …
>
> 24. … Where the accused is deliberately ignorant as a result of blinding himself to reality the law presumes knowledge …

> 25. … Having wilfully blinded himself to the facts before him, the fact that an accused may be enabled to preserve what could be called an honest belief, in the sense that he has no specific knowledge to the contrary, will not afford a defence because, where the accused becomes deliberately blind to the existing facts, he is fixed by law with actual knowledge and his belief in another state of facts is irrelevant.

In *Sansregret* at para. 22, McIntyre, J. also quoted the following statements by Glanville Williams (*Criminal Law: The General Part*, 2d ed., 1961) at p. 157 and p. 159:

> … the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge.
>
> …
>
> … A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.

In our opinion, although *Sansregret* involves a criminal charge, the decision as to what constitutes wilful blindness and its effect apply equally to a civil proceeding such as this matter.

[58] *Black's Law Dictionary*, 11th edition, defines and describes "intention" and "intentional" as follows:

> intention, *n.* The willingness to bring about something planned or foreseen; the state of being set to do something. – intentional, *adj*.
>
> > "Intention is the purpose or design with which an act is done. It is the foreknowledge of the act, coupled with the desire of it, such foreknowledge and desire being the cause of the act, inasmuch as they fulfill themselves through the operation of the will. An act is intentional if, and in so far as, it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied." John Salmond, *Jurisprudence* 378 (Glanville L. Williams et., 10th ed. 1947).

> "*Intention.* –This signifies full advertence in the mind of the defendant to his conduct, which is in question, and to its consequences, together with a desire for those consequences." P.H. Winfield, *A Textbook of the Law of Tort* 10 at 19 (5th ed. 1950).

intentional, *adj*. Done with the aim of carrying out the act.

[59] Contrast these definitions with this dictionary's definitions of "recklessness" and "willful blindness", which are as follows:

> recklessness, *n.* 1. Conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk. Recklessness involves a greater degree of fault than negligence but a lesser degree of fault than intentional wrongdoing …
>
> Willful blindness. Deliberate avoidance of knowledge of a crime, esp. by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable…Willful blindness creates an inference of knowledge of the crime in question.

[60] The dictionary definitions of "intention" and "intentional" require actual knowledge as opposed to imputed knowledge. They also require that the act be carried out deliberately. In our view, these definitions are consistent with meanings given to these terms in the authorities that discuss misappropriation.

[61] This Hearing Panel finds that "intentional misappropriation" connotes a greater degree of mental wrongdoing or fault than misappropriation committed with recklessness or wilful blindness. It is clear from the authorities reviewed above that the term "misappropriation" is broad and includes any unauthorized taking of client funds, regardless of whether this is done deliberately, inadvertently, recklessly or otherwise. Considering the relevant authorities, the context in which the term "intentional misappropriation" is used in the Admission Letter and the Disbarment Decision, and the ordinary meaning of "intention" and "intentional", we find that the adjective "intentional" was used to specify misappropriation that is dishonest.

[62] We find that the "intentional misappropriation" of client trust funds occurs when lawyers have actual knowledge that they are taking client trust funds for a purpose unauthorized by the client and do so deliberately. In that sense, the intention associated with "intentional misappropriation" is dishonest. We do not accept the Applicant's submission that dishonest intent requires that a lawyer personally

benefit from the misappropriation, although the discipline panel found the Applicant did so in this case. The dishonesty occurs in the deliberate, unauthorized taking of client funds. The nature of the unauthorized purpose is irrelevant.

[63] We find that, in admitting to "intentional misappropriation," the Applicant admitted she had actual knowledge that she was taking client trust funds for a purpose unauthorized by the client and that she did so deliberately. Further, in finding that the Applicant committed "intentional misappropriation," the discipline panel found that the Applicant knew she was taking client trust funds for a purpose unauthorized by the client and that she did so deliberately.

Sub-issue 2: Is the Applicant's testimony at the Reinstatement Hearing regarding her state of mind at the Times in Question at odds with what the Applicant admitted and the discipline panel found in the Disbarment Decision regarding the Applicant's state of mind at the Times in Question?

The Applicant's testimony in *voir dire*

[64] The following is a summary of the Applicant's testimony in *voir dire.* It is not meant to be an exhaustive list of the Applicant's testimony but rather a general description of the testimony she wishes to have admitted in the Reinstatement Hearing despite her admission and the discipline panel's finding that she committed intentional misappropriation:

(a) She had a "severe lack of attention to things that are really important."

(b) She made inadvertent mistakes on client bills in failing to ensure they had the proper dates.

(c) She made a lot of unintentional and accidental mistakes, which are the result of having not properly educated herself on all of the rules of operating a trust account and having a sloppy approach to doing the accounting.

(d) She did not intend to steal from any client. At no point did she attempt to disguise transactions or hide funds or do anything intentional to undermine the interests of a client.

(e) There was never any intention on her part to misconstrue accounts, launder funds or "deceit" anyone in any way. The number of errors in her accounting are the result of her mistake in "sloppy" record-keeping and do not go beyond that.

(f) She engaged in messy record-keeping and made mistakes but there was no intentional wrongdoing regarding her accounts.

(g) In an interview by the Law Society, she stated "I don't want this it to be perceived that anything was done intentionally here" and this reflected her state of mind regarding whether her conduct was intentional or deliberate.

(h) In another interview by the Law Society, she stated that "the issues that have come up here were, like, really a result of whatever accidental and perhaps sloppy bookkeeping or – but nothing was intentional," and this reflected her state of mind at the time.

(i) She believed, when she consented to disbarment, that she was acknowledging the terrible job that she had done in managing her practice, that she did not delegate properly and that she did not manage the accounts properly, but not that she was saying she was a thief or a liar.

(j) She did not believe she was admitting to dishonest behaviour when she admitted to intentional misappropriation.

(k) She did not believe that her conduct was deserving of disbarment when she consented to disbarment.

[65] This summary indicates that much of the Applicant's testimony regarding her state of mind at the Times in Question is directed at establishing that she did not have actual knowledge that she was taking client trust funds, that she did not deliberately take client trust funds and that she did not take client trust funds dishonestly. Such testimony is directly at odds with her admission and the discipline panel's finding that she committed intentional misappropriation.

Sub-issue 3: Is the Applicant precluded from testifying at the Reinstatement Hearing that she had no dishonest intent when she committed the misappropriation?

The Law regarding Abuse of Process and Collateral Attack

[66] A judgment in a civil or criminal case is admissible in evidence as proof of its findings and conclusions on similar or related issues and the party against whom the judgment is submitted as evidence may lead evidence to contradict it, or lessen its weight, unless precluded from doing so by the doctrines of *res judicata*, abuse of

process or collateral attack. See *British Columbia (AG) v. Malik*, 2011 SCC 18, cited by the review board in *Law Society of BC v. Perrick*, 2018 LSBC 07 (upheld on appeal, 2018 BCCA 169) ("*Perrick* (2018 Review)").

[67] The relevant legal principles and policy objectives are described in *Perrick* (2018 Review), paras. 94 to 102 as follows:

> The doctrines of abuse of process and *res judicata* (which includes issue estoppel, cause of action estoppel and collateral attack) arise from the broader policy objective of avoiding multiplicity of proceedings and relitigation of matters that are the subject of a final and binding order: *Malik* at paragraph 37 and *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 SCR 77 at paragraphs 23, 33, and 38.
>
> As concisely and provocatively stated by Binnie J. for the court in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 SCR 460 at paragraphs 18-19, while addressing issue estoppel:
>
> > The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be relitigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.
> >
> > Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of justice. Where, as here, its application bars the courthouse door against the appellant's $300,000 claim because of an administrative decision taken in a manner which was manifestly improper and unfair (as found by the Court of Appeal itself), a re-examination of some basic principles is warranted.
>
> The primary focus of these doctrines is avoiding harm to the integrity of the judicial function of the courts. Integrity of the judicial function is endangered when different findings of fact or legal conclusions are

reached on the same matters and issues. Multiplicity of proceedings are to be avoided for reasons of judicial economy, avoiding the embarrassment of inconsistent findings of fact or conclusions of law based on identical facts, avoiding collateral attack on judicial orders, finality and the integrity of the administration of justice: *Danyluk* at paragraphs 18-21 and *Toronto (City)* at paragraphs 37, 43 and 51.

This case concerns the application of the doctrine of abuse of process, which exists to address the same concerns about avoiding multiplicity of proceedings, but does not require the same parties (or their privies) to the dispute, unlike issue estoppel, which does require mutuality of parties: *Toronto (City)* at paragraphs 29, 38. In this case, the Law Society was not a party to the proceedings before Madam Justice Allan.

Abuse of process was addressed by the Supreme Court of Canada in *Toronto (City).* There, the court explained that the doctrine is used in a variety of circumstances. It seeks to avoid oppressive or vexatious proceedings that violate the fundamental principles of justice. Its use to avoid multiplicity of proceedings was explained at paragraph 37:

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 OR (3d) 481 (CA) at para. 55, per Goudge JA, dissenting (approved [2002] 3 SCR 307, 2002 SCC 63)). Goudge JA expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel*. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 WLR 347 at p. 358, [1990] 2 All ER 990 (CA).
> >
> > *One circumstance in which abuse of process has been applied is where the litigation before the court is found to*

> *be in essence an attempt to relitigate a claim which the court has already determined.*
>
> [emphasis added by SCC]

Because abuse of process does not require mutuality or privity of parties, it is appropriate in circumstances where there are no concerns that prompt the requirement for mutuality, such as the "wait and see" or "free rider" party that could have joined in the original litigation, but instead allows someone else to carry the burden and then comes along to reap the benefits: *Toronto (City)* at paragraphs 29-30.

Application of the abuse of process doctrine is not automatic. Avoiding relitigation must be balanced against fairness and any other circumstances the case presents that serve to establish that evidence on matters that are already the subject of findings of fact or law ought to be allowed. Before applying the doctrine, the court or tribunal must stand back and ask whether to do so would create an injustice: *Danyluk* at paragraph 80 and *Toronto (City)* at paragraph 53. See also *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 BCLR (3d) 1 (CA) at paragraph 32.

In *Toronto (City)*, the court said at paragraph 52 that permitting relitigation would serve the integrity of the judicial system where:

(a) the first proceeding is tainted by fraud or dishonesty;

(b) fresh, new evidence, previously unavailable, conclusively impeaches the original results; or

(c) fairness dictates that the original result should not be binding in the new context.

In summary, the doctrine of abuse of process comes into play when a court or tribunal has previously considered, in full or in part, the evidence and issues to be determined in a new proceeding and its decision is final. The findings of the previous court are admissible as *prima facie* evidence, which may be rebutted by the party against whom they are led. However, the ability to lead evidence to rebut them may also be circumscribed where the integrity of judicial decision-making balanced against fairness to the party so circumscribed mandates the limitation: *Toronto (City)* at paragraphs 43 and 45.

[68] The rule against collateral attack of a hearing panel's decision was explained in *Law Society of BC v. Pyper*, 2016 LSBC 01, paras. 10 to 12, as follows:

> … Generally speaking, that rule prevents a party from attacking the validity of an order when that party has not used the available appeal and/or review procedures.
>
> The Supreme Court of Canada in *Wilson v. The Queen*, [1983] 2 SCR 594 at 599-600 described a collateral attack as follows:
>
> > ... It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. *It is also well settled in the authorities that such an order may not be attacked collaterally — and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.* Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.
> >
> > [emphasis added]
>
> In *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62 at para. 61, the Court affirmed this description of collateral attack and reviewed the principles underpinning the rule:
>
> > The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co*., 2004 SCC 25, [2004] 1 SCR 629, at para. 72:
> >
> > > The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 SCR 333, at p. 349). The idea is that if a party

> could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, *the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it*.
>
> [emphasis added by Binnie, J.]

The Law regarding Withdrawal of Admissions

[69] The discipline panel's finding that the Applicant committed intentional misappropriation was based on evidence tendered as part of a Rule 4-30 consent resolution proposal and the Applicant's express written admission that she committed intentional misappropriation.

[70] In *Law Society of BC v. Perrick*, 2016 LSBC 43 ("*Perrick* (2016 Review)"), a review board dismissed an application to withdraw admissions that the applicant had made at the hearing. The applicant submitted that he would not have made those admissions if he had known the hearing would result in a suspension and that the admissions were not consistent with the evidence. The review board held, at paras. 25-26:

> Admissions cannot be simply retracted at will. As is the case with pre-hearing admissions pursuant to Rule 4-28, the unilateral withdrawal of admissions made by a party during a hearing would require leave of the hearing panel. We accept that there may be circumstances where the interests of justice require that a hearing panel permit the withdrawal of admissions. A hearing panel is empowered to control its own process to protect the fairness of the proceedings. It is our view, however, that the discretion to permit the withdrawal of admissions would be exercised only in limited circumstances. This may include circumstances where there has been a genuine mistake or where the factual record is clearly contrary to the admissions. As set out in our analysis of the second ground of appeal below, we do not accept that the evidence in this case is contrary to the admissions. It is our view that the evidence in this case firmly supports the admissions.
>
> Further, an application to withdraw admissions made after the initial hearing has concluded or in the context of a section 47 review hearing would require exceptional circumstances that are simply not present here. Regrets about tactical decisions made at the initial hearing do not qualify as appropriate circumstances that would support an application to

> withdraw admissions. There has been no information put before the Review Board that would support the extraordinary result of permitting the withdrawal of admissions at this stage of the proceedings.

[71] In *Law Society of BC v. Tungohan*, 2016 LSBC 45, a review board confirmed the hearing panel's decision to refuse to allow the applicant to withdraw admissions made in response to a Notice to Admit after the Law Society closed its case, noting that the Law Society, as a party to the hearing, was, like the applicant, entitled to a fair hearing. The British Columbia Court of Appeal upheld the review board's decision to refuse to allow the applicant to withdraw those admissions (*Law Society of British Columbia v. Tungohan*, 2017 BCCA 423 at paras. 32-33).

[72] In *Law Society of BC v. Welder*, 2007 LSBC 29, a bencher review panel dismissed an application made at the beginning of the review to withdraw an admission of professional conduct made at the hearing. The applicant sought to withdraw his admission on the basis that it was uninformed because he misapprehended the consequences of his admission in terms of the sanction that would follow. He did not submit that he was misled into believing that a particular sanction would be the result of his admission. The review panel determined that an admission of professional misconduct may be set aside if it can be shown "on credible and competent evidence" that the admission was not voluntary, unequivocal, and informed. At paragraphs 25-26, the review panel held:

> In our view, the real question is whether, at the time he made his admission, the Applicant understood that the question of penalty remained one for the exercise of discretion by the Hearing Panel, having regard to whatever view of the facts it chose to take. That the Applicant may have admitted "guilt" on the basis of a misapprehension of the likely extent of the disciplinary risk that his admission created, although perhaps unfortunate, seems to us neither here nor there.
>
> Our conclusion, therefore, is that the Applicant has not demonstrated by credible and competent evidence that he was uninformed as to the effect and consequences of his plea.

DECISION REGARDING ABUSE OF PROCESS, COLLATERAL ATTACK AND WITHDRAWAL OF ADMISSION

[73] The Applicant could have testified at the citation hearing but chose instead to admit the allegations in the citation, expressly admitting to intentional misappropriation

and consent to disbarment. This resulted in the evidence presented to the discipline panel being tendered by agreement and informed by the Applicant's admission.

[74] The arguments the Applicant seeks to make before this Hearing Panel about her state of mind at the Times in Question could have been made to the discipline panel, but the Applicant made a deliberate, voluntary and informed decision not to testify and make these arguments at that time. Had the Applicant chosen to testify and make these arguments to the discipline panel, the Law Society might have cross-examined the Applicant and tendered additional evidence regarding the Applicant's state of mind.

[75] The Applicant does not suggest that the discipline hearing process was procedurally unfair. She admits that Law Society counsel strongly recommended she retain counsel and that she had the opportunity to do so, but that she chose to represent herself for all but a short period when Mr. Warsh was her lawyer. She also admits that Law Society counsel drew to her attention potentially relevant case law, such as the *Sahota* and *Sas* cases. She agrees that Law Society counsel did not tell her that the discipline panel would be bound by the Law Society's position.

[76] It is evident that the Applicant made a tactical decision to admit to intentional misappropriation of client trust funds and to consent to disbarment in the hope that a reinstatement hearing would be a faster way for her to return to practice than a suspension. It is unclear why the Applicant believed disbarment would be a quicker way to return to practice, but the Applicant admits that Law Society counsel did not mislead her in any way. She agrees that Law Society counsel did not tell her how long a reinstatement application would take to process or comment on whether her reinstatement application would be successful.

[77] The Applicant consented to the Rule 4-30 process, and she provided the Admission Letter in which she admitted to intentional misappropriation. There is no evidence the Applicant's participation in this process was anything other than voluntary and informed. The discipline panel considered the evidence about the Applicant's conduct, including her admissions, and found that she had engaged in intentional misappropriation, as defined above.

[78] Given the foregoing, we find that admitting in the Reinstatement Hearing the Applicant's evidence that she did not have actual knowledge that she was taking client trust funds, that she did not mean to do so, and that she did not act dishonestly would amount to an abuse of process, contrary to *Perrick* (2018 Review) and the authorities cited therein. Admitting this evidence would be contrary to the interest of justice, as it would be unfair and prejudicial to the Law

Society and would allow the Applicant to relitigate matters that have already been conclusively determined in a final decision by a previous panel.

[79] We also find that admitting this evidence at this Reinstatement Hearing would amount to a collateral attack on the Disbarment Decision. This is because, while the Applicant says she does not seek to reverse the Disbarment Decision, the object of the Applicant's evidence is to persuade the Hearing Panel that her misconduct is something other than "intentional misappropriation" as defined above. This would be an attempt to reverse or vary the discipline panel's determination, which is prohibited by the doctrine of collateral attack.

[80] Finally, to the extent that the May 24 Application constitutes a request by the Applicant to withdraw her express written admission that she committed intentional misappropriation, we dismiss that request. The Applicant has not demonstrated that her admission of intentional misappropriation was other than voluntary, unequivocal and informed. She agrees that she was not misled by the Law Society. Any regrets the Applicant may have about making the tactical decision to proceed in this manner do not qualify as appropriate circumstances for her to withdraw her admission of intentional misappropriation. The Law Society, like the Applicant, is entitled to a fair hearing.

CONCLUSION

[81] The Hearing Panel will admit the Applicant's testimony regarding her state of mind at the Times in Question but only to the extent that her testimony does not contradict her earlier admissions and the findings in the Disbarment Decision. The Applicant admitted to intentional misappropriation and the discipline panel found that she committed intentional misappropriation, and so this Hearing Panel will not admit any testimony from the Applicant regarding her state of mind at the Times in Question that suggests she did not know she was misappropriating client trust funds, that she did not mean to misappropriate client trust funds or that she lacked dishonest intent when she committed the misappropriation.

ORDER

[82] The Hearing Panel makes the following order:

1. The Applicant's testimony regarding her state of mind at the following times is admitted only to the extent that her testimony does not suggest that she did not know she was misappropriating client trust funds, that she

did not mean to misappropriate client trust funds or that she lacked dishonest intent when she committed the misappropriation:

(a) At the time she signed the Admission Letter and drafted the Apology Letter;

(b) At the time she signed the Notice to Admit; and

(c) At the time she engaged in the actions described in the citation.