2022 LSBC 18
Hearing File No.: HE20200096
Decision Issued: June 14, 2022
Citation Issued: December 1, 2020

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

ANDREW YAT-CHEUNG LAU

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Written materials:	February 2, 2022
Panel:	Steven McKoen, QC, Chair Nicole Byres, QC, Lawyer Warren Funt, Public representative
Discipline Counsel:	Ilana Teicher
No one appearing on behalf of the Respondent:	
Written reasons of the Panel by:	Nicole Byres, QC

INTRODUCTION AND OVERVIEW

[1] On May 22, 2008, Andrew Yat-Cheung Lau (the "Respondent") was called and admitted as a member of the Law Society of British Columbia.

[2] Since approximately February 2011, the Respondent practised as a sole practitioner in the name of Andrew Lau Law Corporation in Vancouver, British Columbia (the "Firm"). The Respondent practised in the areas of residential real estate, civil litigation, corporate and commercial law, and wills and estates.

[3] The issues dealt with in this matter came to the attention of the Law Society after a compliance audit of the Firm, conducted by the Law Society pursuant to Rule 3-85 of the Law Society Rules. The audit was conducted from April 1, 2019 to April 5, 2019, for an audit period of October 1, 2017 to March 31, 2019.

[4] The audit included the following formal comments:

(a) Goods and Services Tax ("GST") and British Columbia Provincial Sales Tax ("PST") remittances were not filed or remitted by the Firm on time;

(b) PST and GST amounts owed by the Firm were not paid at the time of the audit;

(c) the Trust Administration Fee ("TAF") for the period October 1, 2017 to December 31, 2018 had not been remitted on 33 client matters;

(d) funds were withdrawn from trust while the trust records were not current; and

(e) funds were withdrawn from trust without first preparing a bill for fees and delivering the bill to the client.

[5] Between September 22, 2020 and January 1, 2021, the Respondent was administratively suspended pursuant to Rule 3-81 of the Rules for failing to file a trust report.

[6] On January 1, 2021, the Respondent became a former member of the Law Society for non-payment of fees.

[7] On December 1, 2020, the Law Society issued a citation against the Respondent that contained the following six allegations:

Allegation 1

Between approximately March 2016 and November 2019, you collected GST from your clients but failed to remit the funds and interest due to the Canada Revenue Agency in payment of the GST in a timely way, contrary

to rule 7.1-2 of the *Code of Professional Conduct for British Columbia* (the "*BC Code*").

Allegation 2

Between approximately April 2018 and August 2019, you collected PST from your clients but failed to remit funds and interest due to the British Columbia Ministry of Finance (the "Ministry") in payment of the PST in a timely way, contrary to rule 7.1-2 of the *BC Code.*

Allegation 3

You failed to remit TAF to the Law Society within 30 days of the end of some or all of the quarters ending December 2017, March 2017, June 2018, September 2018, December 2018, June 2019, September 2019 and December 2019, contrary to one or more of Rules 2-110 and 3-49(e) of the Rules and rule 7.1-2 of the *BC Code.*

Allegation 4

You failed to meet the minimum standard of financial responsibility required of lawyers in British Columbia by failing to notify the Executive Director of the Law Society in writing of the circumstances of an unsatisfied monetary judgment, filed against your law corporation in the Supreme Court of British Columbia on July 8, 2019 (Court File [Number] Victoria Registry), and your proposal for satisfying the judgment, contrary to one or both of Rules 3-49(a) and 3-50 of the Rules.

Allegation 5

Between approximately March 2018 and November 2018, in the course of acting for one or more of your clients JS, YH, VH and KL, you misappropriated or improperly withdrew some or all of $14,336 held in trust on behalf of your clients, by withdrawing funds from trust for the payment of your fees when you had not rendered any or sufficient legal services to justify the withdrawal, contrary to Rule 3-64 of the Rules, in one or more of the following instances:

(a) in November 2018, you withdrew or authorized the withdrawal of $2,016 from trust in connection with your client JS;

(b) in March 2018, you withdrew or authorized the withdrawal of $3,920 from trust in connection with your clients YH and VH;

(c) in April 2018, you withdrew or authorized the withdrawal of $3,920 from trust in connection with your client KL; and

(d) in February 2019, you withdrew or authorized the withdrawal of $4,480 from trust in connection with your client KL.

Allegation 6

In the course of acting for your clients YH and VH, you withdrew or authorized the withdrawal of funds from trust without first signing and delivering a bill to your clients, contrary to one or both of Rule 3-65 of the Rules and section 69 of the *Legal Profession Act*, SBC c. 9 (the "*Act*"), on one or more of the following occasions:

(a) $3,920 withdrawn from trust on March 1, 2018; and

(b) $1,077 withdrawn from trust between August 2018 and February 2019.

DECISION TO PROCEED WITH A HEARING IN WRITING AND IN THE ABSENCE OF A RESPONSE FROM THE RESPONDENT

[8] The Hearing Panel was provided with a memorandum dated January 20, 2022 from Michael F. Welsh, QC who was acting in the capacity of presiding Bencher. The memorandum was prepared following the Law Society's pre-hearing application for an order that the facts and determination phase of the citation be dealt with by written submissions only.

[9] The memorandum noted the following:

(a) by way of an initial pre-hearing conference, of which the Respondent had notice but did not attend, it was ordered that:

(i) the application was to be served on the Respondent, who would then have 14 days to respond; and

(ii) the hearing of the citation was set for a one-day hearing on February 8, 2022, if it did not proceed by written materials;

(b) the Respondent did not provide a response to the application; and

(c) Mr. Welsh, QC ordered that, subject to any direction of the panel, the Facts and Determination phase of the citation would proceed with written submissions only (the "January 20, 2022 Order").

[10] The January 20, 2022 Order also provided that:

(a) the Respondent deliver his response, if any, to the Law Society's written submissions within 14 business days of service of the Law Society's submissions; and

(b) the Law Society deliver its reply submissions, if any, within seven business days of service of any submissions by the Respondent.

[11] The Panel was provided with an affidavit of service of Julie Erskine dated February 2, 2022, which confirmed that on January 31, 2022, the Respondent was served with the Law Society's written submissions pursuant to Rule 10-1(1)(b).

[12] The Respondent did not file any responding materials with respect to this hearing.

[13] Section 42(2) of the *Act* states that a panel may proceed, in the absence of a respondent, if the panel is satisfied that the respondent has been served with notice of the hearing.

[14] In applying section 42(2) of the *Act*, hearing panels have considered certain factors, including the following[1]:

(a) whether the respondent has been properly served;

(b) whether the respondent has been cautioned that the hearing may proceed in their absence;

(c) whether the respondent is a former member of the Law Society; and

(d) whether the respondent has admitted the underlying misconduct.

[15] The Respondent admitted service of the citation on December 1, 2020. The citation includes the statement that if he does not appear at the hearing, the hearing panel may proceed with the hearing in his absence and make any order that it could have made had he been present.

[1] *Law Society of BC v. McKinley*, 2019 LSBC 20

[16] The Respondent did not respond to the Law Society's Notice to Admit dated August 20, 2021 ("NTA"), nor the initial pre-hearing conference and the application referred to above.

[17] On January 1, 2021, the Respondent ceased to be a member of the Law Society for non-payment of fees.

[18] Considering the above, and upon reviewing the written materials submitted by the Law Society, the Panel decided:

(a) to proceed with the Facts and Determination hearing in the absence of the Respondent; and

(b) that the materials filed by the Law Society provided the Panel with a comprehensive record, sufficient to allow the Panel to make its determinations.

ISSUES

[19] The issues before the Panel are as follows:

1. Did the Respondent commit the acts as alleged in allegations 1 to 6 in the Citation?

2. If the Respondent committed the acts alleged, did his actions amount to professional misconduct and/or a breach of the *Act* or Rules?

Notice to Admit

[20] The Respondent was served with the NTA on August 23, 2021 pursuant to Rule 5-4.8 by sending it to the Respondent's last known email address and by posting it on the Law Society member portal. Accordingly, service was deemed to have taken place on August 24, 2021.

[21] The Respondent did not respond to the NTA. Pursuant to Rule 5-4.8 (7), the Respondent is deemed to have admitted to the truth of the facts described in the NTA, and to the authenticity of the documents attached to the NTA, because he did not respond to the NTA within 21 days of service.

[22] The Law Society's evidence for the Facts and Determination hearing of the citation is formed entirely of the facts and documents contained in the NTA.

SUMMARY OF FACTS AND EVIDENCE

Background facts

[23] As noted earlier, the audit was conducted from April 1, 2019 to April 5, 2019, for an audit period of October 1, 2017 to March 31, 2019. The audit revealed various concerns, including the following:

(a) GST and PST returns were not filed on time;

(b) PST and GST owed were not paid on time;

(c) TAF for the period October 1, 2017 to December 31, 2018 had not been remitted to the Law Society for 33 client matters;

(d) the Respondent withdrew funds from the Firm's trust account while the trust records were not current; and

(e) the Respondent withdrew funds from the Firm's trust account without first preparing a bill for fees and/or delivering the bill to the client.

[24] As a result of the audit findings, the Law Society appointed investigator Ally Wang to conduct an investigation. After Ms. Wang's investigation, it was also found that the Respondent did not report a judgment relating to unpaid PST, which was not satisfied within seven days, to the Executive Director.

[25] The material facts for each of the allegations, which are admitted pursuant to the NTA, are summarized below.

Allegation 1: failure to remit GST

[26] The Respondent was required to file and remit GST on behalf of the Firm on an annual basis by March 31 of the year following the year in question.

[27] The Respondent filed the Firm's GST returns late for the following years:

Period end	Due date	Filing date	Delay (days)
31-Dec-15	31-Mar-16	03-Nov-17	582
31-Dec-16	31-Mar-17	03-Feb-18	309
31-Dec-17	31-Mar-18	05-Apr-19	370
31-Dec-18	31-Mar-19	05-Apr-19	5

[28] On April 26, 2019, the Respondent owed $12,907.44 in GST arrears for the years 2015 to 2018. The Respondent paid $13,200 to the CRA towards the outstanding GST, interest and penalties on September 9, 2019.

[29] On September 27, 2019, the Respondent owed a remaining $18.80 in GST arrears, which he paid on November 20, 2019.

[30] The Respondent reported in the Firm's trust reports filed with the Law Society that GST was not paid in full and on time for the periods ending February 28, 2015, February 29, 2016, February 28, 2017, February 28, 2018 and February 28, 2019, due to cash flow issues.

[31] The Respondent admitted that between approximately March 2016 and November 2019, he collected GST from his clients, but did not remit the funds and interest due to the CRA in payment of the GST on time.

Allegation 2: failure to remit PST

[32] The Respondent was required to file a PST return and remit PST on behalf of the Firm to the Ministry on a quarterly basis.

[33] The Respondent filed the return and remitted PST late for the March 2018 quarter-end. As a result of this late filing, the Ministry charged a $155.37 penalty.

[34] Between May 7, 2018 and July 23, 2018, the Ministry sent at least five notices to the Respondent requesting payment of the $155.37 penalty and interest.

[35] The Respondent did not file PST returns (nor remit PST) for the remaining quarters of 2018. Due to this non-filing and non-payment of PST, the Ministry estimated the PST owed for 2018 and then charged this amount, plus penalties and interest.

[36] Between August 23, 2018 and January 23, 2019, the Ministry sent at least seven notices to the Respondent requesting payment for the outstanding PST, penalties, and interest owed.

[37] On January 30, 2019, the Ministry sent a letter to the Respondent informing him that he owed $3,652.30 in outstanding PST, penalties and interest, and that a certificate would be filed with the Supreme Court of British Columbia if payment was not received within ten days of the date of the letter. The letter also said that a certificate had the same force and effect as a judgment of the court. On this same date, the Ministry also served a Demand Notice pursuant to section 220 of the *Provincial Sales Tax Act* on the Bank of Montreal ("BMO"), requiring BMO to pay $3,652.30 from the Respondent's bank accounts.

[38] On February 13, 2019, BMO sent a letter to the Respondent informing him that BMO had remitted $796.59 to the Ministry pursuant to the Demand Notice. This payment reduced the Firm's general account balance to $0.

[39] On February 20, 2019, after not receiving the balance of PST owed by the Respondent for the period ending December 31, 2018, the Ministry sent a Notice of Assessment for the estimated tax collected during the quarter, including penalties and interest, for a total of $2,649.14.

[40] On February 25, 2019, the Firm owed $6,323.02 in PST, including penalties and interest. By May 7, 2019, the Firm owed $7,106.47 in PST arrears for the period of April 1, 2018 to March 31, 2019. On August 16, 2019, the Respondent paid $8,696.89 to the Ministry towards PST arrears.

[41] The Respondent reported that PST was not paid in full and on time due to cash flow issues in the Firm's trust reports submitted for the periods ending February 28, 2015, February 29, 2016, February 28, 2017 and February 28, 2019.

[42] The Respondent admits that between approximately April 2018 and August 2019, he collected PST from his clients, but did not remit the PST and interest due to the Ministry on time.

Allegation 3: failure to remit TAF

[43] At all material times, the Respondent was required to remit TAF within 30 days of each quarter ending on the last day of March, June, September and December.

[44] The Respondent failed to remit TAF on 33 matters for the period between October 1, 2017 to December 31, 2018 when due.

[45] On August 8, 2019, the Respondent paid the outstanding TAF for the October 1, 2017 to December 31, 2018 period, plus a late penalty, for a total of $545.74. The Respondent first reported that TAF was not remitted when due for this period as part of the trust report he filed for the period ending February 28, 2019.

[46] The Respondent failed to remit TAF for the quarters ending June 30, 2019, September 30, 2019 and December 31, 2019, on a total of five matters. A total of $82.69, including late penalties, was owing by the Respondent for these matters.

[47] The Respondent admits that he did not remit TAF due to the Law Society within 30 days of the end of the quarters ending December 2017, March 2017, June 2018, September 2018, December 2018, June 2019, September 2019 and December 2019.

Allegation 4: failing to notify the Executive Director of an unsatisfied monetary judgment

[48] On July 8, 2019, the Ministry filed a Certificate against the Firm in the Supreme Court of British Columbia for PST arrears of $7,170.24 (the "Judgment"). Also on July 8, 2019, the Ministry filed a Writ of Seizure and Sale against the Firm.

[49] The Judgment was not fully satisfied until August 16, 2019 when the Respondent paid $8,696.89 to the Ministry.

[50] The Respondent admits that he did not notify the Executive Director of the unsatisfied Judgment, including the circumstances of the Judgment and his proposal for satisfying the Judgment, within seven days after the date of entry as required under Rule 3-50 of the Rules, or at all.

[51] During the investigation the Respondent said that:

(a) he was not able to pay the Judgment amount within seven days due to cash flow reasons, but that he paid the Judgment as soon as he was able; and

(b) he was not aware of Rule 3-50 and his obligation to report the Judgment to the Law Society.

Allegation 5: misappropriation/improper withdrawal of trust funds

Allegation 5(a) – client JS

[52] The Respondent acted on various matters for JS since 2016. On October 1, 2018, the Respondent sent an email to JS recommending a shareholders' agreement and including an estimate of $1,800 fees plus taxes as his fees to prepare this agreement.

[53] On October 3, 2018, the Respondent received $2,016 into his trust account from JS as a retainer for fees plus taxes for the shareholders' agreement. On October 18, 2018, the Respondent requested further information from JS to prepare the shareholders' agreement.

[54] On October 21, 2018, JS informed the Respondent that she was still working on the information requested and asked the Respondent to put the matter on hold for another two weeks.

[55] On November 16, 2018, the Respondent issued a trust cheque to himself for $2,016 purportedly in payment of his fees on JS's matter; this trust cheque cleared the account on November 19, 2018.

[56] The Respondent produced an invoice during the Law Society's investigation dated November 16, 2018 in the amount of $2,016 to support the above withdrawal of fees from trust. The invoice states "to all services pertaining to shareholder agreement including: communication with client; analysis of matter to assess client's legal interests; analysis of relevant provisions; commence preparation of agreement." The Respondent did not remember when the invoice was delivered to JS, nor was he able to provide evidence that the invoice was delivered to JS.

[57] On November 28, 2018, JS sent an email to the Respondent again informing him that she was still working on the information requests and that she may require another two weeks or so. Also, in this email JS said that she would update the Respondent once she was ready to go ahead with the agreement.

[58] On February 25, 2019, JS sent an email to the Respondent informing him that she no longer required a shareholders' agreement and requesting a refund of the trust fees she had paid, less any fees for any work done.

[59] The transcript of Ms. Wang's August 20, 2020 interview of the Respondent, prepared by United Reporting, is attached to the NTA (the "Interview"). When the Respondent was asked why he thought he was entitled to bill JS for the full amount

of fees quoted for the shareholders' agreement, despite the fact that he did not prepare a shareholders' agreement for the client, the Respondent replied as follows:

> Because by that point in time I had already put in a substantial amount of time communicating with the client, analyzing the provisions of the agreements ….
>
> But by that point in time I had already put in a lot of time, and the thing is if the agreement is never prepared because the client doesn't want to pursue it or whatever, then that would mean I would never get paid for the amount of time that I put in. So if the only way that I could get paid is, you know, once the agreement was finalized, that would mean that events could arise such as they did such that I would never get paid even though I put in a substantial amount of work.

[60] When questioned by Ms. Wang as to whether he had prepared the shareholders' agreement, the Respondent said he did not complete the agreement and would have to check his files to see if he had started drafting it, but claimed he had done the groundwork (i.e. analysis and selecting relevant provisions) for the agreement.

[61] The Respondent's client file for JS did not contain a draft shareholders' agreement.

[62] During the Interview, Ms. Wang asked the Respondent to provide records (if any) that showed the work he did on the shareholders' agreement prior to November 16, 2018. However, while the NTA includes some responses from the Respondent to other requests made during the Interview, there is no response to this request.

[63] The Respondent explained his fee structure during the Interview. The Respondent does not charge an hourly rate but works on a fixed fee basis. The Respondent said he explains to the client how much a service is going to cost and then the client pays this amount up front. The Respondent also said that if a matter becomes more complex, he will usually notify the client of the additional steps taken and the additional charge for those steps.

[64] The Respondent did not issue a refund of the retainer to JS pursuant to her request of February 25, 2019. When asked by Ms. Wang why he did not issue a refund, the Respondent said he did not provide a refund because:

(a) he had "commenced" work on the shareholders' agreement;

(b) the client indicated she had further matters requiring his services; and

(c) he applied JS's funds to payment for those further services.

[65] It is not clear from the evidence if JS requested further services and when, or whether the Respondent actually performed further services, however, it is clear that such services would have been performed a number of months after November 18, 2018 and were not related to the reason the retainer funds were requested and deposited in the first place.

Allegation 5(b) – clients: YH and VH

[66] The Respondent was retained by YH and VH for a committeeship application.

[67] On February 19, 2018, the Respondent requested a retainer of $3,500 plus tax for a total retainer of $3,920. This amount was paid into the Respondent's trust account on February 21, 2018.

[68] On March 1, 2018, the Respondent transferred the $3,920 retainer from his trust account to his general account. During the audit, the Law Society's auditor was unable to locate an invoice to support the withdrawal of this amount from the Respondent's trust account.

[69] On April 5, 2019, but after completion of the audit, the Respondent produced an invoice dated March 1, 2018 to the clients for $3,500 plus taxes, for a total of $3,920. However, the Respondent was not able to provide evidence that the invoice was delivered to the clients.

[70] The clients informed the Law Society that they did not receive an invoice for this amount, nor did they sign a retainer agreement.

[71] The Respondent admitted during the Interview that he withdrew the $3,920 from his trust account without first signing and delivering a bill to the clients.

[72] Between August 2018 and December 2018, the Respondent received $1,173.50 into his trust account for disbursements for the committee application, of which $1,077 was withdrawn from trust by the Respondent between August 2018 and February 2019 without issuing a bill to the clients.

[73] The Respondent admitted during the Interview that he withdrew the $1,077 from his trust account without first signing and delivering a bill to the clients.

[74] Even though the Petition to the Court regarding the committeeship application was not filed until November 23, 2018, and the matter was heard on December 21, 2018, during the Law Society's investigation, the Respondent took the position that he was entitled to the full amount of the retainer on March 1, 2018 because by that date, he had spent a substantial amount of time working on the matter.

Allegations 5(c) and 5(d) – client KL

[75] The Respondent was retained by KL to represent her in litigation with her former landlord.

[76] On April 19, 2018, KL entered into a retainer agreement with the Respondent whereby KL agreed to pay a total fee of $8,500 plus taxes. The $8,500 in fees was allocated to the following services:

(a) $3,500 (to be paid on the signing of the retainer agreement) for the preparation of the Reply and Third Party Notice;

(b) $1,000 for the preparation and attendance at the Settlement Conference;

(c) $3,000 for services to prepare for trial, which amount includes the fees for the first day of trial; and

(d) $1,000 per day for each day of trial after the first day of trial.

[77] On April 19, 2018, KL paid $3,920 for the $3,500 fees plus taxes for the first payment required under the above noted retainer agreement.

[78] On April 23, 2018, the Respondent issued an invoice to KL for $9,545. The Respondent said that while he billed KL for the full amount of fees, he did not ask her to pay the full amount right away.

[79] During the Interview, the Respondent said that he did not remember when the invoice was delivered to KL or how the invoice was delivered, and he was unable to provide evidence that the invoice was delivered to KL.

[80] On April 26, 2018, the Respondent sent KL a copy of a draft reply.

[81] On April 30, 2018, the Respondent transferred $3,920 from his trust account to his general account, purportedly for his fees on this matter.

[82] The Reply was filed with the court on May 10, 2018. The Third Party Notice was filed on September 4, 2018.

[83] The Respondent admitted that at the time he transferred the $3,920 from his trust account to his general account, he had not completed the Third Party Notice. The Respondent justified his actions by claiming that he had put in a substantial amount of time into the matter, however, he admitted that this was not in accordance with the terms of the retainer agreement.

[84] On February 20, 2019, the Respondent deposited into his trust account KL's second retainer of $4,480. According to the retainer agreement, this amount was for preparation and attendance at trial, plus an additional day of trial.

[85] On the same day these funds were deposited, the Respondent withdrew $4,480 from his trust account.

[86] The trial for the matter did not occur until March 22, 2019. The trial was for one day.

[87] In the Interview, the Respondent justified the timing of the withdrawal of the retainer funds on the basis that he had done a substantial amount of preparation work for the trial. The Respondent justified charging KL the full amount even though the trial lasted only one day, on the basis of the amount of work he put into the matter and because he later did an application for an order on costs which he did not bill KL for.

Allegation 6: failure to deliver bills to clients YH and VH

[88] The material facts relating to this allegation have been summarized in paragraphs 78 to 86 above.

ANALYSIS

[89] Section 38(4) of the *Act* sets out the four adverse determinations available to a hearing panel: professional misconduct; conduct unbecoming the profession; breach of the *Act* or Rules; and incompetent performance of duties undertaken in the capacity of a lawyer.

[90] It is the Law Society's position that the Respondent committed the acts as alleged in the citation and seeks a finding of professional misconduct against the Respondent for each of the six allegations in the citation.

[91] Despite the deemed admissions of the Respondent in the NTA, this Hearing Panel must still determine whether the facts meet the test for "professional misconduct".

[92] The term "professional misconduct" is not defined in the *Act*, the Rules or the *BC Code*.

[93] In *Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171, the panel defined the test for professional misconduct as "… whether the facts as made out

disclose a marked departure from that conduct the Law Society expects of its members." In *Martin*, at paras. 151 to 154, the panel observed that a finding of professional misconduct did not require behaviour that was disgraceful or dishonourable.

[94] The hearing panel in *Law Society of BC v. Kim*, 2019 LSBC 43, at para. 45, stated that the test for professional misconduct is objective:

> The *Martin* test is not a subjective test. A panel must consider the appropriate standard of conduct expected of a lawyer, and then determine if the lawyer falls markedly below that standard. In determining the appropriate standard, a panel must bear in mind the requirements of the *Act*, the Rules and the *Code*, and then consider the duties and obligations that a lawyer owes to a client, to the court, to other lawyers and to the public in the administration of justice. Each case will turn on its particular facts.

[95] It is also important to note that finding that a breach of the *Act*, Rules or the *BC Code* has occurred does not, in of itself, constitute a finding of professional misconduct. Rather, the behaviour must also meet the test for professional misconduct as articulated above.

Allegations 1 and 2

[96] The Respondent has admitted that between March 2016 and November 2019, he collected GST and PST funds from clients, but failed to make payment of those funds and interest due to the CRA and the Ministry in a timely way.

[97] The Respondent stated in his Interview that his failure to remit PST in a timely way was due to "cash flow" issues, and that the PST and GST he had collected was used to financially support his Firm and family, despite the fact that these funds were collected from his clients and were not his to use. The Respondent also blamed serious personal issues, including the death of his father in 2017 and his mother's illness in 2019, for his failure to make GST, PST and TAF remittances.

[98] The Respondent's failure to pay his remittances in full and on time is contrary to rule 7.1-2 of the *BC Code*, which requires lawyers to promptly meet financial obligations in relation to their practices.

[99] When lawyers collect money from clients for GST and PST, those funds do not belong to the lawyer and therefore are not to be used for their own purposes. In

Law Society of BC v. Medd, 2004 LSBC 15, at para. 7, the panel stated that the obligation to remit collected GST and PST is "a trust obligation that cannot be avoided in any circumstance."

[100] Further, in *Law Society of BC v. Donaldson*, 2003 LSBC 27, para. 13, the hearing panel found that "collecting tax and failing to remit it is, moreover, a breach of a duty to a client" because "a client does not pay the required taxes on a lawyer's bill in the expectation that the lawyer will use the money to prop up a marginal practice."

[101] Previous hearing panels have found that a lawyer's failure to pay remittances to government agencies for taxes collected from clients when due is conduct that amounts to professional misconduct.

[102] While the Panel recognizes that the Respondent had a number of serious family issues to deal with between 2017 and 2019, the Respondent's failure to remit collected GST and PST was not a one-time mistake or slip, but rather occurred over protracted periods of time between 2016 and 2019. Further, the Respondent received at least five notices from the Ministry regarding the outstanding PST, and it is noted that some of his failures to remit occurred in 2016 before the start of such personal problems.

[103] In considering the circumstances as a whole, including the gravity of using funds that the Respondent had no right to retain for his own purposes, the duration of the issues and the number of breaches, the Panel finds that the Respondent's failure to pay his GST and PST in full and on time amounted to a marked departure from that conduct the Law Society expects of lawyers.

[104] Accordingly, the Panel finds that the Respondent engaged in professional misconduct in relation to allegations 1 and 2 in the citation.

Allegation 3

[105] The Respondent admitted that he did not remit TAF to the Law Society within the prescribed periods for two quarters in 2017, and three quarters in 2018, on a total of 33 matters. The Respondent also admitted that he did not remit TAF for three quarters in 2019, on a total of five matters.

[106] In August 2019, the Respondent finally made the TAF payments (plus a late penalty) for 2017 and 2018. TAF for three quarters in 2019 is still unpaid.

[107] The Respondent's failure to remit TAF to the Law Society is contrary to section 7.1-2 of the *BC Code*, which requires lawyers to promptly meet financial obligations in relation to their practices.

[108] The Respondent's failure to remit TAF to the Law Society is also contrary to Rule 2-110, which requires lawyers to pay TAF for each client matter where a lawyer receives money in trust, and Rule 3-49(e), which says that a lawyer has failed to meet a minimum standard of financial responsibility if they fail to remit TAF.

[109] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the distinction between a breach of the *Act* or the Rules that constituted a mere "Rules breach" under section 38(4)(b)(iii) of the *Act* and one that constituted professional misconduct under section 38(4)(b)(i). The panel found at paras. 32 and 35:

> A breach of the Rules does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is <u>not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice</u> (*Law Society of BC v. Smith*, 2004 LSBC 29).
>
> …
>
> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the *Act* or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, *its duration, the number of breaches*, the presence or absence of *mala fides*, and the harm caused by the respondent's conduct.
>
> [emphasis added]

[110] The Panel finds that the Respondent's multiple failures to pay TAF on time in 2017 and 2018, as well as the failure to pay TAF for 2019, was not an "insignificant breach of the Rules" and demonstrates that the Respondent was not attending to the necessary and important administrative part of his law practice.

[111] During his Interview, the Respondent attributed the failure to remit TAF to the same serious personal problems between 2017 to 2019, however, given the duration of the issues and number of breaches, and the fact that the 2019 TAF remains unpaid, the Panel finds that the Respondent's failure to remit TAF on time, or at all, is a marked departure from that conduct the Law Society expects of lawyers and rises to the level of professional misconduct.

Allegation 4

[112] On July 8, 2019, the Ministry filed the Judgment and a Writ of Seizure and Sale against the Firm. The Judgment was not fully satisfied until August 16, 2019, when the Respondent paid $8,696.89 to the Ministry.

[113] Failure to satisfy a monetary judgment within seven days is deemed to be a failure to meet the minimum standard of financial responsibility pursuant to Rule 3-49(a), and Rule 3-50 requires lawyers to immediately report to the Law Society any judgments issued against them that are not paid within seven days.

[114] The Respondent admitted in correspondence to the Law Society that he was aware of the Judgment but that he was not able to pay it within seven days due to cash flow issues. The Respondent did not deny that he failed to report the unsatisfied Judgment as required by Rule 3-50, however, he was not familiar with the Rule 3-50 reporting requirement. The Law Society only learned of the unsatisfied Judgment as part of its investigation in 2019 arising from the audit.

[115] Rule 3-50 is not merely an administrative regulation to be complied with at a lawyer's leisure. Unpaid judgments may be a sign that a lawyer is in financial distress, which in turn may negatively affect clients. Rule 3-50 is rooted in the Law Society's obligation to protect the public. Rule 3-50 requires the lawyer to submit their proposal for payment of the judgment to the Law Society for review. Notice of unsatisfied judgments and review of proposals for payment allows the Law Society to determine if any steps need to be taken for the protection of the public. This principle is stated in *Law Society of BC v. Lessing*, 2012 LSBC 19, at para. 60:

> … The fact that a lawyer has not paid debts when due does not necessarily mean that the lawyer cannot properly perform his or her duties or that such failure poses a risk to the public, but it might. Often, unsatisfied monetary judgments are a sign of more severe underlying problems that will pose a danger to the public. In order to protect the public, the Law Society must be made aware of any

> unsatisfied monetary judgment and be provided with information about it and the lawyer's proposed course of action for dealing with it.

[116] As the facts demonstrate, the Respondent and his Firm were in financial distress; the Respondent said that his "cash flow" issues were why he used PST and GST for his own needs rather than remit them on time.

[117] As previously noted, the test for professional misconduct is objective. The Respondent's lack of familiarity with the requirements of Rule 3-50 does not justify non-compliance. The Respondent had a judgment entered against him with respect to taxes he collected from his clients, taxes that he not only failed to remit, but instead then used for his business purposes. Failure to familiarize himself with the requirements of the applicable rules once he became aware of a judgment against him for this kind of behaviour is a marked departure from that conduct expected of lawyers.

[118] In light of the above, the Panel finds that the Respondent's failure to comply with Rule 3-50 was a marked departure from that conduct expected of lawyers, and as such, constitutes professional misconduct.

Allegations 5 and 6

[119] Allegation 5 relates to the Respondent's actions in withdrawing funds from trust for the payment of fees before the Respondent had rendered any or sufficient legal services to justify the withdrawal, contrary to Rule 3-64. Allegation 6 relates to the Respondent's actions in withdrawing funds from trust for the payment of fees before the Respondent had rendered an invoice to the client, contrary to Rule 3-65 and section 69 of the *Act.*

[120] The public relies on members of the legal profession to properly handle trust funds. This is one of the core elements of a lawyer's fiduciary duty to clients, and why there are specific rules in place governing withdrawal of clients' trust funds. In *Law Society of BC v. Gellert*, 2013 LSBC 22, the hearing panel at para. 73 commented on the importance of properly handling trust funds:

> … An unauthorized use of trust funds harms or risks harming the client, undermines the client's confidence in counsel, and has a seriously deleterious impact on the legal profession's reputation in the eyes of the public. Because of the sacrosanct nature of trust funds, removing a client's trust funds is and should always be a memorable, conscious and deliberate act that a lawyer carefully considers before carrying out (*Ali*, para. 104, 106).

[121] Unauthorized use of trust funds has also been deemed "misappropriation", regardless of whether the lawyer derives personal gain or benefit, or if the legal work, for which the funds were withdrawn prematurely, was later provided to the client.

[122] The hearing panel in *Law Society of BC v. Sahota,* 2016 LSBC 29, articulates this principle at paras. 60 and 61:

> 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 *Law Society of BC v. Ali*, 2007 LSBC 18, 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 clients [*sic*] 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.

[123] *Sahota,* at para. 62, also affirmed the hearing panel's findings in *Law Society of BC v. Harder,* 2005 LSBC 48 that a lawyer's subjective intent, the presence or absence of good character, and/or dishonesty are not relevant.

Allegation 5(a) – client JS

[124] The Respondent admitted that he did not complete the shareholders' agreement at the time he withdrew all JS's retainer funds for the agreement from his trust account.

[125] The Respondent initially justified billing JS the full amount of the shareholders' agreement retainer based on the amount of work he had already

done on the shareholders' agreement, however, there was no evidence of notes, a completed agreement, or any evidence to support the billing of the full amount of the fee quoted at that time.

[126] Further, billing the full amount of the fee if the work was going to take more time and fees, was contrary to the Respondent's statement that his practice was to quote a fixed fee and if the matter became more complex and would require further fees, he would inform the client.

[127] The Respondent later said that he did not refund the balance of the retainer funds because JS indicated she would be requiring future services, however, as of November 16, 2018 (the date he withdrew all the retainer funds from his trust account), the Respondent could not have known that there would be "future services" because:

(a) as of November 16, 2018, the Respondent was still waiting for information he requested for the shareholders' agreement as evidenced by the October 21, 2018 and November 28, 2018 emails from JS to say that she required more time to collect the information requested; and

(b) on January 25, 2019, JS informed the Respondent she no longer required the shareholders' agreement and requested a refund of the retainer fee, less any work done by the Respondent, and there was no mention at that time of "future services" or the additional work that the Respondent said he later did for her at reduced fees and/or a no fee basis.

[128] The Respondent's after-the-fact justification for billing JS the full amount of fees paid for services, which were not rendered, is troubling. As at November 16, 2018, the Respondent knew that he had not performed the services for which the retainer had been paid, and in that sense, even if services were later rendered to justify the Respondent earning the fees, the fact remains that his taking of the funds on November 16, 2018 was unauthorized.

[129] Following the reasoning in *Sahota* and *Harder*, the Panel finds that the Respondent's actions constituted misappropriation of client funds.

Allegations 5(b) and 6 – clients YH and VH

[130] The Respondent admitted that he transferred the full amount of the fee retainer paid by these clients for a committee application on March 1, 2018 from his

trust account to his general account. The NTA establishes that the majority of the work on this application was done between March to December 2018; the actual Petition was filed on November 23, 2018 and heard on December 21, 2018.

[131] It was the Respondent's position that he was entitled to withdraw the full fee merely ten days after these clients paid the retainer on the basis that he had performed a "substantial amount" of work on the committee application by that date.

[132] As with client JS, it is clear that the Respondent transferred these clients' retainer fees to himself in advance of when the services were actually performed. The fact the services billed for were actually performed is irrelevant to the analysis of whether the Respondent misappropriated client funds. Following the reasoning in *Sahota* and *Harder*, the Panel finds that the Respondent's actions constituted misappropriation of client funds.

[133] Rules 3-64 and 3-65 set out requirements for lawyers' withdrawals of trust funds and payment of fees from trust, including the accounting and bookkeeping steps that must be taken. Section 69 of the *Act* also clearly stipulates that a lawyer must deliver a bill to the person charged, before they may withdraw funds from trust.

[134] The Respondent admitted that he did not deliver an invoice to these clients before transferring these clients' funds from trust to his general account as follows:

(a) $3,950 on March 1, 2018; and

(b) $1,077 between August 2018 and February 2019.

[135] Rules 3-64 and 3-65 and section 69 of the *Act* form an important part of the regulatory regime by which the Law Society regulates trust accounts and ensures that the public's trust and confidence in the legal profession is maintained. In other words, these are not mere technical breaches, but go to the core of a lawyer's professional obligations. Accordingly, the Panel finds that by withdrawing funds without rendering invoices, the Respondent's actions constituted misappropriation of client funds.

Allegations 5(c) and 5(d) – client KL

[136] The facts regarding KL are slightly different in that the Respondent and KL had a retainer agreement which clearly set out "milestones" for when KL was to pay for certain services.

[137] The Respondent admitted that on two occasions he withdrew retainer fees from his trust account before completing the services agreed to by KL.

[138] Even though the Respondent eventually completed the work for which KL had provided the retainer funds, the Panel finds that the Respondent's actions in transferring KL's retainer before completing the work agreed to in the retainer agreement for payment, constituted misappropriation of client funds.

Summary of allegations 5 and 6

[139] The Panel finds that the evidence demonstrates a repeated pattern of unauthorized taking of client trust funds for each of the Respondent's clients JS, YH, VH and KL. The Panel also finds that the Respondent's actions, combined with his explanations for unauthorized and/or premature transfers of funds from his trust account, demonstrate an alarming and blatant disregard for the Respondent's obligations regarding trust funds, the fiduciary relationship between the Respondent and his clients, and his ethical obligations under the *BC Code*. Taking payment for services that are not rendered from funds that were to be held in trust is akin to theft.

[140] Accordingly, the Panel finds that the Respondent's actions regarding allegations 5 and 6 rise to the level of professional misconduct.

CONCLUSION

[141] The Panel finds that each of allegations 1 to 6 in the citation have been admitted to by the Respondent and/or proven by the Law Society. The Panel also finds that the Respondent's behaviour for each of the allegations meets the test of a marked departure from that standard the Law Society expects of lawyers.

[142] For the reasons set out in this decision, we find that the Respondent's conduct set out in relation to each of the allegations constitutes professional misconduct.