2008 LSBC 19
Report issued: July 3, 2008
Citation issued: February 15, 2005

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

Donald Wayne Skogstad

Respondent

Decision of the Hearing Panel
on Facts and Verdict

Hearing dates: October 23, 24, 25, 26 and November 1 and 2, 2006, December 18, 19, 20, 21, 2007 and March 13, 2008

Panel: Robert W. McDiarmid, QC, Chair, Thelma O'Grady, Ralston S. Alexander, QC

Counsel for the Law Society: Jean P. Whittow, QC and Efrem Swartz
Counsel for the Respondent: Bryan G. Baynham, QC and W. Jay Havelaar

Background

[1] On February 15, 2005, a citation was issued against the Respondent pursuant to the *Legal Profession Act* and Rule 4-13 of the Law Society Rules by the Executive Director of the Law Society of British Columbia pursuant to the direction of the Chair of the Discipline Committee. The citation, as amended, directed that this Panel inquire into the Respondent' s conduct as follows:

Between January 1997 and June 2000, you received in total over $1,000,000 for investment purposes from numerous persons (the " Investors"). These funds were placed in your trust account to the credit of V. Purporting to act for V, you disbursed the funds according to the instructions of persons associated with V. Funds were disbursed in connection with investments which were fraudulent.

1. You assisted V and persons associated with V in the perpetration of an investment scheme which you knew or ought to have known was a deception or betrayal upon the public.

2. You engaged or assisted others to engage in trades in securities, contrary to the *Securities Act*.

3. You failed to advise Investors that you were not protecting their interests, contrary to Chapter 4, Ruling 1 of the *Professional Conduct Handbook*.

4. By a Trust Indenture dated December 31, 1997, the interest in all of the shares of V was transferred to the V Charitable Trust, the beneficiaries of which were certain charities. You were named the " Protector" of the Trust. Thereafter you continued to purport to act for V, despite the conflict between your duties as Protector to the beneficiaries of the Trust and the interests of V.

5. During the time you were named the " Protector" and, or in the alternative, while purporting to act for V, you also purported to provide advice concerning investment matters to certain Investors (the " Client Investors"). You did so despite the conflict

a) between the interests of the Client Investors and the interests of V; and/or

b) between your duties as Protector and the interests of the Client Investors.

6. In receiving and disbursing funds in connection with V, you breached the accounting provisions of the Law Society Rules:

a) in failing to record the source of all funds received contrary to Rule 3-60 (formerly Rule 842); and

b) in disbursement of funds by wire transfer contrary to Rule 3-56 (formerly Rule 836).

(count 6(b) of the citation was withdrawn by the Law Society)

7. In the course of an investigation conducted by the Law Society pursuant to Rule 4-43, you failed to provide all books and records promptly, contrary to Rule 4-43(2)(b).

[2] The facts giving rise to this citation took place in 1997 and 1998, at a time when the provisions in Canada' s *Income Tax Act* permitted Canadians who held beneficial interests in offshore trusts to shelter income earned by those trusts from the effects of income tax in Canada. Briefly put, these income tax avoidance schemes required the establishment of an offshore " vehicle" , usually a corporation registered in a jurisdiction that did not have an income tax or that had an income tax at very low rates, in combination with some sort of trust agreement. The effect was to permit Canadian residents, who would otherwise be taxed on worldwide income, to lawfully escape the reach of the Minister of National Revenue.

[3] The Respondent, a lawyer practising in Nelson, was seeking to expand his practice areas by developing expertise in offshore investing and sheltering income from Canadian tax on the returns earned on the offshore investments. To that end, he attended several courses from recognized experts in the field to educate himself on this area of the law. He ultimately assisted clients in setting up approximately 13 offshore trusts. It appears from the evidence that the cost of setting up one of these trusts, including the incorporation of companies in the tax havens, was in the range of $15,000.

[4] From January of 1997 through December of 1998, the Respondent acted for V, an offshore company that was owned and directed by another client of the Respondent, one F. On the instructions of F, the Respondent directed the establishment of V in the Turks & Caicos Islands with the assistance of a law firm situated there named [law firm]. The main contact of the Respondent with that law firm was AM, one of the lawyers in the firm. The Respondent also took the opportunity presented by his relationship with AM to develop an understanding as to how he might utilize the Turks & Caicos tax haven as a starting point for this new area of practice.

[5] The business of V was to identify and participate in high-risk, high yield investments with the expectation that any returns on the investments would be sheltered from Canadian income taxation.

[6] F knew friends and associates who found prospective investors for V, several of whom had attended seminars put on by a group called Investors International. The methods by which these promoters identified prospects and persuaded them to invest in V were not before the Panel. We do know that, over the relevant period of time, nearly $2,000,000 in investment funds were collected for V.

[7] At the heart of this matter is the method by which F and his associates arranged for the

investment proceeds from the individual investors to be available for use by V. The Respondent provided to F, who in turn provided to others, the banking coordinates of his trust account. The program in place provided a method that individual investors could make direct deposits to the trust account of the Respondent and this happened in multiple instances. In addition, the program permitted individual investors to make cheques and money orders payable to the Respondent, and in some instances those bank instruments were received into the trust account of the Respondent for the benefit of V .

[8] These " small investors" deposited their investment money into the Respondent' s trust account so that between January of 1997 and April of 1999, approximately $2,000,000 was deposited. All of the deposits were recorded to the account of V but, while the Respondent identified an amount somewhat in excess of $1,000,000 to individual investors, approximately $990,000 (168 deposits) were not identified with an investor name.

[9] In most instances, at the time of the investment, there was little or no direct contact between the individual investors and the Respondent. Occasionally, when the individual investor happened to be in Nelson at the time of the investment, a face to face meeting between the investor and the Respondent would occur. In those instances, there is some evidence before us to support the suggestion that the Respondent was clear with the individual investors that he was not providing investment advice to them.

[10] V gave instructions (always through F) to the Respondent with respect to the " investments" he was to make for V. Monies were transmitted by the Respondent to [law firm]. V made a number of acquisitions during the two-year term of the Respondent' s involvement. In each instance, the Respondent was directed by F to direct funds from the trust account to either the offshore account of V or directly to the supplier of the investment.

[11] There were a total of six separate acquisitions made over the course of the two year period of time. They are briefly described as follows:

March 4, 1997: V entered a joint venture agreement with others to purchase an interest in some " Bank Debentures" . This bank debenture trading program, also referred to as a " mortgage forfaiting" program, will be referred to hereafter as the " Bank Debenture Program" .

June 20, 1997: V sent $125,000 to S Management on account of the purchase of further " Bank Debentures" .

September 25, 1997: V concluded a share purchase agreement for the acquisition of shares in BR Mineral Corporation.

October 24, 1997: V invested $232,000 in a joint venture with J Financial to acquire " historical Railway Bonds" more particularly described in the evidence as a " US gold-backed railway bond trading program" and hereinafter referred to as the " Bond Program" .

January 21, 1998: V invested $120,000 in the direct acquisition of further " historical Railway Bonds" .

May 26, 1998: V made an initial payment of $100,000 on account of an agreement to purchase the shares of M Mining.

[12] The investments in BR Mineral Corp. and in M Mining were to mature after the retainer of the Respondent was terminated. Accordingly, the Panel has no information as to the outcome of

those investments.

[13] Some detail about the nature of the Bank Debenture Program and the Bond Program will assist in understanding the view of the Panel on these two “ investment" programs.

[14] The Bank Debenture Program is described in a multi-page brochure filled with jargon and insider specific references. It refers to the overarching involvement of the International Chamber of Commerce (the “ ICC"). The brochure advises that this entity has nothing to do with “ your local Chamber of Commerce." The Panel notes that the ICC is a legitimate international entity, but also observes that it has no involvement with this or any other Bank Debenture Program. It appears that the reference in the brochure to the ICC is intended to improperly add the cachet of the ICC to the program. In the brochure there is language advising any reader that everyone involved in this Bank Debenture Program is subject to a five-year confidentiality and non-disclosure obligation so that no one can acknowledge that these “ trading programs" exist

[15] The Bank Debenture Program brochure suggests that the investor will deposit money that will be leveraged into a high yield, many cycle program, with each cycle producing a small percentage return but, since the program is trading in tens of millions of dollars at one time, the small percentage return yields extraordinary profits, and this outcome is enhanced by the possibility of up to 40 cycles per year. Since the funds are not placed in the cycle until there is an ultimate purchaser for the debt obligation, there is no risk. The instruments to be “ transacted" are:

fully negotiable Bank Instruments, delivered unencumbered, free and clear of any liens, claims or restrictions. The instruments are debt obligation [sic] of the Top One Hundred (100) World Banks in the form of Medium Term Bank Debentures of 10 years in length, usually offering 7 & 1/2% interest… etc.

[16] Under the heading of the question, “ What is the Investors [sic] Risk in this Program?," the reader is advised that the investment fund’ s principal is fully secured by a “ BANK ENDORSED GUARANTEE (or safekeeping receipt) which is issued by the trading bank at the time the funds are deposited." (emphasis in original)

[17] The detail of one of the specific transactions that V was invested in provided that V was a joint venture partner ($105,000) in a total joint venture investment of $300,000 (the “ minimum subscription amount") and the stated results were to be a 100 percent return per month for each of 10 months, or a $3,000,000 return on the initial investment of $300,000.

[18] The descriptive literature on Bank Debenture Trading Programs asks the question “ Too Good To Be True?" It then provides an array of answers, some of which are reproduced here:

The skeptical investor (the one asking – “ too good to be true?") is:

· Not familiar with the profit opportunities that qualified European Investors have enjoyed for the past 50 years.

· Not at all familiar with the type of program proposed, and not able to ask the right questions.

· Thinking he is being offered something for nothing, which as we all know is absolutely impossible.

· Not really understanding the procedures involved, and the important safeguards which

are in place to protect his invested capital at all times, against loss.

[19] The Railway Bond Program is very different. This “ program" depends for its efficacy on the existence of very old “ gold-backed" railway bonds (issued circa 1866) and allegedly guaranteed by the Government of the United States of America. Each bond is issued with a face amount of $1,000 with interest at 8% per annum. With interest compounded from the date of issue to the present, each bond was said to represent a value of approximately $610,926,592. The “ traders" in these bonds, once their authenticity has been verified, expect to recover a percentage of the accumulated value over a 24 month period at the rate of $3,125,000 monthly, per bond, or approximately $75,000,000 in total for each bond.

[20] Since the individual bonds can be acquired by a program participant for $40,000 each, the opportunity for an exponential return on investment is presented. The V group made several acquisitions of this nature and did not realize any profit from any of them in addition to losing the entire capital investment.

[21] As to the Bank Debenture Program and Bond Program investments, there is sufficient evidence before the Panel to allow the Panel to determine that all of those investments were fraudulent. It is clear, in addition, that they did not produce a return to V. In determining that the investments were fraudulent, we do not suggest that V was a participant in the fraudulent nature of the schemes. We find that V was itself a victim of the frauds although, as noted above, there were many indications with respect to the investments that should have alerted the parties to the deficient nature of the programs. The evidence confirms that all monies placed in the Respondent’ s trust account were accounted for in the sense that receipts balanced disbursements, and that, apart from legal fees and disbursements billed to V, the Respondent did not receive any part of the investors'funds.

[22] One of the Bank Debenture programs actually returned some monies to V, in the guise of earnings on the initial investment. However, by the time the Respondent’ s involvement ceased, all of the investors'money in the Railway Bonds Program and the Bank Debenture Program had been lost. Apart from payment for legal accounts he rendered, there is no evidence to suggest the Respondent, nor anyone connected with his client V, received any of the investors'monies.

[23] The Respondent participated as a presenter in several investment seminars over the course of his involvement with V. The seminars took place in Grande Prairie, AB on June 19, 1998, in Kelowna, BC on July 17, 1998 and in Prince George, BC on November 27, 1998. He was paid for his involvement in the seminars, and he also hoped that he would attract additional clients in the process. He spoke on such topics as “ de-residencing from Canada" and “ The offshore option for Canadian investors" . It is clear that the Grande Prairie and the Prince George seminars were sponsored, in part at least, by individuals associated with Investors International. The significance of this sponsorship will appear later in these reasons.

[24] In July of 2001, following a complaint to the Law Society from one of the investors, the Law Society retained Roseanne Terhart, CA, a forensic auditor, who attended at the offices of the Respondent. On that visit Ms. Terhart spent a week reviewing the files of the Respondent. During this initial visit her audit was hampered by the absence of the V file, it having been delivered to the client when the Respondent resigned the retainer in January of 1999.

[25] Ms. Terhart followed up with a series of written questions to the Respondent wherein she sought information on a number of issues identified during her first visit.

Credibility

[26] On March 19, 2001, the Law Society received a complaint letter dated March 14, 2001 from DW, who in his complaint letter advised that, in August of 1998, he had issued a $5,000 money order payable to the Respondent but sent to one TM, who, as it subsequently unfolded, was an individual involved with Investors International. Margaret Currie, then a Law Society staff lawyer, notified the Respondent of the complaint by way of letter of April 4, 2001, and also requested further information from the complainant, DW. After DW provided the information, Ms. Currie, by letter of May 10, 2001, sent the Respondent a summary of DW' s information, copies of some documents, and in the body of the letter stated:

I would now appreciate receiving your response to DW' s complaint. Without limiting your response, please explain your involvement with Investors International. In addition, please advise whether you received the money order DW apparently sent to TM but which was made out in your name. If so, please explain what steps you took once you received the money order.

[27] The letter went on to note that it appeared that the complainant was not the Respondent' s client and cited Chapter 5, Rule 1 of the *Professional Conduct Handbook*, which described the duty of confidentiality owed by the lawyer to his or her client. With the letter of May 10, 2001, Ms. Currie provided approximately 134 pages of documentation that she had received from the complainant. This included a copy of the purchaser' s receipt for a Royal Bank of Canada money order in the amount of $5,000 payable to the Respondent dated August 7, 1998, a nine-page paper entitled " A Turks & Caicos Islands Trust" written by AM, the lawyer at [law firm] referred to above, and a copy of a paper entitled " How to Minimize Income Tax Through the Use of a Domestic or Foreign Trust" authored by the Respondent. The complaint letter made it clear that there had been no contact between the complainant and the Respondent apart from the money order issued in the Respondent' s name and a phone call to the Respondent' s office made in March of 2001.

[28] The Respondent responded by letter dated May 16, 2001. His response letter was entered as an Exhibit. It is brief and we will reprint the entire body of it:

Thank you for your letter of recent date.

1. I have had no involvement with Investors International.

2. I did not run, manage or have any involvement in any investment pool of any kind.

3. With respect to the funds allegedly sent by DW it is possible, but cannot be determined until archived records are checked.

Yours very truly,

It is signed by the Respondent.

[29] It is apparent that the statements in 1 and 2 were false. When the Respondent wrote that letter, he was intending to mislead the Law Society as to his involvement in the matters that form the subject matter of the complaint of DW.

[30] As indicated above, the Respondent had participated in " Offshore Asset Protection" seminars in Prince George, BC and in Grand Prairie, AB, which were sponsored in part by people associated with Investors International. Exhibit 56 consists of a hard copy of several power point slides used in the Seminars; the third slide confirms that the presenters at the seminar on offshore

finance and trusts and Canadian income tax include “ MG represents Investors International, Donald Skogstad, Barrister and Solicitor, Nelson, BC, AM, Barrister and Solicitor, Turks & Caicos Islands."

[31] In a letter dated May 14, 2003 from the Respondent to the Law Society, entered as Exhibit 30, the Respondent goes into significant detail with respect to what he knows about his client F and also MG, who were the two individuals responsible for soliciting the majority of funds deposited to the Respondent’ s trust account. In evidence given in chief he confirmed that he went on an Investors International “ level one cruise" .

[32] The evidence is overwhelming and uncontradicted that the Respondent had “ involvement" with Investors International on at least these three occasions.

[33] Similarly, the Respondent’ s statement that he did not “ have any involvement in any investment pool of any kind" is false and intended to mislead. He allowed his trust account to be used by V, and he knew that this was for the purpose of pooling money so that small investors could utilize the offshore tax benefits of investing through V.

[34] The Respondent testified on December 18, 2007 that he stopped acting in 1998 “ with respect to the money." He was being asked about whether funds were paid to any beneficiaries of the V Trust (this is not the same as repaying money to the investors) and, when asked about whether funds were paid to any of the beneficiaries, answered:

I don’ t know. I stopped acting in 1998 with respect to the money.

[35] But the printout of his trust account client ledger for V (Exhibit 27, tab 2) shows money coming in to the trust account and, on January 21, 1999, shows $10,000 being paid out to one of the individuals who participated in the Railway Bond Program. Further trust account activity takes place in February, March and April of 1999.

[36] Accordingly, the Panel is not satisfied that the Respondent is a credible witness.

Burden of Proof

[37] In analyzing the evidence, the Panel is mindful of the onus of proof, which is with the Law Society throughout, and is also mindful of the standard of proof. Counsel for the Respondent sums up the law in paragraph 17, 18 and 19 of his written submissions, as follows:

17. In disciplinary hearings, the Law Society bears the onus of proving the allegations set out in its citation against a member. The allegations must be proven on a standard higher than a balance of probabilities but lower than the criminal law standard. See *Law Society of BC v. Ewachniuk*, [2003] B.C.J. No. 823 (CA).

18. The hearing panel in *Law Society of BC v. Martin*, 2005 LSBC 16, adopted Madam Justice McLachlin’ s interpretation of the burden of proof in *Jory v. College of Physicians and Surgeons of B.C.*, [1985] B.C.J. No. 320 (SC):

The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt, but is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence… The evidence must be sufficiently cogent as to make it safe to uphold the findings with all the consequences for the professional person’ s career and status in the community.

19. On the basis of the above quotation the panel in *Martin* (*supra*), instructed itself as follows:

(a) The onus of proof throughout these proceedings rests on the Law Society to prove the facts necessary to support a finding of professional misconduct.

(b) The standard of proof is higher than the balance of probabilities but less than reasonable doubt. The standard is a civil standard but rises in direct proportion to the gravity of the allegation and the seriousness of the consequences.

Professional Misconduct

[38] With respect to what constitutes professional misconduct, the test was succinctly set out by counsel for the Law Society in her submissions in paragraphs 187 and 188.

187. In *Martin* (*supra*), the Panel extensively reviewed the authorities concerning the test for a finding of professional misconduct. The Panel noted that it is well established that it is for the Benchers, as the guardians of proper standards of ethical conduct, to determine what behaviour constitutes professional misconduct. The Panel referred to the case of *Law Society of BC* v. *Hops*, [1999] LSBC 29:

[150] " Professional Misconduct" is not defined in the *Legal Profession Act*. The leading case concerning the test to be met to support such a finding is found in *Hops*, a decision of the Benchers on review, where it was held:
From the legislated development, the definitions set out above from Oxford and the decisions of the Benchers, it can only be concluded that the Benchers have recently determined it to be appropriate to broaden the scope of professional misconduct in order to more closely regulate the activities of its members. These developments also allow less draconian punishments from those which were available when the standard of disgraceful or dishonourable conduct was required for a finding of professional misconduct. If the standard for professional misconduct still requires " disgraceful" or " dishonourable" conduct, the Benchers have lowered the level of impropriety to attract the descriptions.
And later:

It is clear that conduct matching these descriptive adjectives is no longer required for a finding of misconduct.

[151] It is clear that lawyers can be found guilty of professional misconduct even if behavior cannot be said to be " disgraceful or dishonorable" .

[152] This Panel finds that it is not helpful to get bogged down in whether the conduct complained of was " dishonourable" or " disgraceful" . The Panel agrees with Counsel for the Respondent who pointed out that the Black' s Law Dictionary definition of " dishonourable" , which includes " bad management, mismanagement, malfeasance or culpability, neglect of an official in regard to his affairs, improper conduct, wrong behaviour" could apply to a wide variety of behaviours.

188. In conclusion, the Panel stated the test as follows: " Did the Respondent act in a manner that was a marked departure from the standard expected of a competent solicitor acting in the course of his profession?" (paras. 140, 171).

Citation - Count 1

[39] The evidence establishes (see Exhibit 27, page 9) that amounts of $1,993,205 Canadian and $112.886 US were deposited into the Respondent' s Canadian and US trust accounts between January 29, 1997 and April 15, 1999 regarding V. These funds were disbursed to various investments as detailed on pages 10 and 11 of Exhibit 27 and as set out above. These funds were disbursed according to the instructions of persons associated with V. Approximately $517,000 Canadian and $184,000 US appear to have been " invested" in the Railway Bond Program and another $774,000 Canadian was sent either to [law firm's] trust account or to V' s corporate account in the Turks & Caicos Islands, and " invested" in the Bank Debenture Program.

[40] Both of these " investments" were fraudulent.

[41] Count 1 in the amended Schedule to the citation alleges that the Respondent assisted V and persons associated with V in the perpetration of an investment scheme that the Respondent knew or ought to have known was a deception or betrayal upon the public. It was clarified in argument that the " persons associated with V" consisted of F, MG and others who had solicited the various small investors. There is no evidence before us that links these " persons associated with V" to the scams, in the sense that persons associated with V somehow benefited from the fraudulent schemes. There is no evidence to suggest that any of these persons associated with V ever received any money. The totality of the evidence leads to the conclusion that they were dupes of the frauds, not perpetrators.

[42] It is apparent, as was demonstrated on cross-examination of the witnesses who testified on behalf of the Law Society, that these investors were looking for extraordinarily high returns from investments that were claimed to have no risk and, when viewed objectively, were hoping to profit from a " get rich quick" scheme that would have the added benefit of not being taxable by Revenue Canada.

[43] The Respondent rendered 18 fee accounts for professional services provided to V (17 accounts plus an amendment to the initial account) and billed $43,219.99 in fees plus disbursements and taxes, which, taken together, totaled just under $70,000. These accounts were rendered between February 28, 1997 and August 29, 2000. Apart from the fees billed and disbursements recovered, no monies from the investors went to the Respondent.

[44] The essence of count 1 is that the Respondent assisted his client V in the perpetration of a fraud. The implication is that the client, V, was the perpetrator of the fraud. The propriety of the Respondent allowing his trust account to be used in the manner it was used by client V is the subject of other counts in the citation. The essence of count 1 is extremely serious, and requires a standard of proof commensurate with the seriousness of the allegation. Counsel for the Respondent, in his submissions on page 5 (paragraph 22(c)) states:

Even if the Panel disbelieves the testimony of the member in its entirety, the Panel must ask themselves, on the basis of the evidence they do accept, and disregarding the member' s evidence, whether the facts substantiating the particular were made out by clear and convincing proof, based on cogent evidence. If not, the particular also must be dismissed.

[45] The Panel is troubled by what occurred here. The Panel finds it especially troubling that on two occasions the Respondent received warnings from AM with respect to the Debenture Trading Program. Exhibit 43 is a copy of an article from *Business World* magazine faxed by AM to the Respondent on May 25, 1997. The article states:

Yet there is something totally clear: There exists no market of buying or selling guarantees! Banks

are not handing out letters for the purpose of investing or fund procurement. The main goal of primebank frauds are [sic] to collect money from wealthy investors or to collect fees from smaller investors. The most famous victim, about 3 years ago was the British Salvation Army; it lost in good faith, 20 million German Marks of major yields.

[46] Then on June 17, 1997 (see Exhibit 9, document 13-4-389), AM wrote to the Respondent:

Dear Donald:

I have spoken to several people regarding the Debenture Trading Program. I must caution both you and your client that it has been suggested to me that this is not a legitimate business venture and that your client faces a significant risk of losing all of their funds.

I have very serious reservations about transferring US$125,000.00 for use in this program with C.

Once you have reviewed this letter, kindly confirm your instructions in transferring the funds to S.

I do not mean to be difficult with this transfer but I must insist that after reading this letter you re-instruct me to transfer these funds.

Please feel free to call me if you want to discuss the matter in more detail.

[47] The Respondent wrote to F and to another investor, referred to the article referenced in the preceding paragraph of these reasons, and cautioned F and the other investor. He also spoke with the other investor and documented his telephone conversation with a memo. He was instructed to proceed, and did so.

[48] Although permitting his trust account to be used as a place to pool these investment dollars is not appropriate, the evidence does not support an allegation that he assisted V and persons associated with V in the perpetration of an investment scheme that he knew or ought to have known was a deception or betrayal of the public. The investment scheme he assisted with does not appear to have been fraudulent; the investments he was directed to make by V and by F on behalf of V turned out in two instances to be frauds, but that does not make him, nor V, nor persons associated with V, part of the scam, and accordingly count 1 must be dismissed.

Citation - Count 2

[49] Count 2 alleges that the Respondent professionally misconducted himself by engaging or assisting others to engage in trades in securities, contrary to the *Securities Act*. Counsel for the Law Society were unable to provide any authority for the proposition that a Law Society Hearing Panel could find a breach of the *Securities Act*.

[50] Exhibits 28 and 29 were filed to show that the Respondent has never been registered in any capacity under the *Securities Act* of British Columbia, and that neither he nor any of the other persons named in Exhibit 29 were registered with the Executive Director of the Alberta Securities Commission pursuant to the *Securities Act* of Alberta between 1997 and 2000.

[51] Counsel for the Law Society in her submissions, paragraphs 217 to 248, sets out a detailed argument that invites this Panel to interpret the *Securities Act*. Perhaps tellingly, in paragraph 238, counsel states:

In at least three separate decisions, the B.C. Securities Commission has found that the sale of investments in bank debenture trading programs constitutes the unregistered trading in securities by

those offering the investments.

That statement succinctly sums up the view of this Panel with respect to the count – namely that it is up to the B.C. Securities Commission and not the Law Society of British Columbia to regulate trade in securities. The Securities Commission has its own scheme of regulation, consisting of tribunals with expertise in the area. Courts grant deference on administrative law principles to those tribunals. This Panel has no such expertise. It has no authority to regulate pursuant to the *Securities Act*.

[52] While it is true that breaches of statutes other than the *Legal Profession Act* can result in findings of professional misconduct, that finding generally occurs after the breach has been established. To use an obvious example, a lawyer who is convicted of an indictable offence under the *Criminal Code* would almost certainly face disciplinary sanctions from the Law Society, and if the criminal conduct was linked to the practice of law (such as, for example, theft by conversion of trust funds) the fact of a criminal conviction could be admissible as probative evidence of professional misconduct. Similarly, a breach of the provisions of the *Income Tax Act* may give rise to a citation for professional misconduct or conduct unbecoming. But what the Law Society is asking this Panel to do is to find that the Respondent has breached the *Securities Act*; that is analogous to asking this Panel in appropriate circumstances to find that a lawyer has, for example, committed a criminal act or breached a provision of the *Income Tax Act*. In our opinion, what the Panel is being asked to do is beyond the purview of this Panel. Absent strong authority confirming that we can do what we are asked to do, we are not prepared to undertake an analysis of the *Securities Act*. We do not think we have the jurisdiction to do so. Accordingly, we dismiss Count 2.

Citation - Count 3

[53] Count 3 of the Citation provides: " You failed to advise Investors that you were not protecting their interests, contrary to Chapter 4, Ruling 1 of the *Professional Conduct Handbook*."

Chapter 4, Ruling 1 of the Professional Conduct Handbook provides:

Dealing with unrepresented persons

1. A lawyer acting for a client in a matter in which there is an unrepresented person must advise that client and unrepresented person that the latter' s interests are not being protected by the lawyer.

[54] The evil to which that provision in the *Handbook* is directed is the fear that an unsophisticated and unrepresented party in his or her dealings with a lawyer will develop the impression that the lawyer is representing them in circumstances where that impression is not accurate. On the facts of this case we have a large number of individuals, at least some of whom are likely to be unsophisticated, making trust deposits to the account of a lawyer who has been represented to them as the " lawyer for the pool" .

[55] The evidence is not clear on the extent to which the Respondent was aware that this " lawyer for the pool" representation was being made, but his evidence is that he did not consider himself to be the lawyer for the pool. He was, however, the lawyer for V and for F, and it is clear that some combination of V and F was the " pool" . Virtually all of the V investment funds from whatever sources ultimately made their way to the trust account of the Respondent. It follows therefore that, despite the Respondent' s protests to the contrary, he was indeed the " lawyer for the

pool" , and we find accordingly.

[56] It is likely that the Respondent' s reluctance to adopt that characterization of his role is a result of the responsibilities that are engaged by that finding. In particular, we find that the provisions of Chapter 4, Ruling 1 are applicable. If he is the lawyer for the pool and at the same time is not the lawyer for the individual investors, then he must tell them that he is not their lawyer. The evidence on this point is uncontroverted. He not only did not advise the individual investors that he was not protecting their interests, in the case of at least 183 of those individual investors, he was not able to tell them that he was not protecting their interests because he did not know who they were. That deficiency is the subject of another count in the citation in this matter.

[57] The extent to which the various investors were expecting the Respondent to represent their interests is a matter where the Panel must draw inferences from known facts. The Panel did hear evidence from four individual investors, all of whom stated that the fact that their investment was going to the trust account of a lawyer provided them with some assurance of the legitimacy of the investment proposal. This is intuitive. For an investor in a highly risky and speculative venture with promises of astronomic returns, some natural apprehensions will be assuaged by the involvement of a member of the Law Society of British Columbia.

[58] One of the witnesses testified that he had had his wife check on the Respondent by looking in the Nelson Yellow Pages to ensure that he appeared there as a member of the Law Society. Counsel for the Respondent made the point at the time that an appearance in the Yellow Pages is not proof of good standing in the Law Society. This is true, but it is not unexpected that an unsophisticated member of the public will seek validation of Law Society membership in that way. In any event, the Respondent was a member of the Law Society at all material times.

[59] The count does not require that unrepresented members of the public actually rely on the belief that the Respondent is representing their interests. It is sufficient for the circumstances to be such that their interests were not being protected by the Respondent, although, in the circumstances of this case, in our view, it was reasonable for the investors to expect that the Respondent' s involvement represented some level of protection for their individual interests.

[60] The Panel wonders what role the Respondent was playing in these transactions if not to provide an air of legitimacy to an otherwise risk-filled and purportedly extraordinarily high yield investment program that drew in hundreds of individual investors. Once the V offshore trust had been established, there was very little in the nature of legal services provided to that client. The flow of funds from investors could as easily have been accomplished by a direct deposit to an account in the name of V in any bank in Nelson or elsewhere.

[61] It is the view of this Panel that this use of a trust account by the Respondent is entirely inappropriate. Trust accounts must only be used for the legitimate commercial purposes for which they are established, namely to aid in the completion of a transaction in which the lawyer or law firm plays a role as legal advisor and facilitator. The Respondent had no such role in either the Railway Bond Program or the Bank Debenture Program – he was merely a convenient and apparently legitimate conduit for funds from the individual investors to the various schemes decided upon by F for V. The trust account served no legitimate role in these events and should not have been so employed.

[62] We are satisfied that the Respondent had an obligation to the individual investors to advise them of the fact that their interests were not being protected by him and that he failed in this

obligation. He knew he had an obligation to his client to pass on those concerns, which is outlined in paragraphs 45 and to 47 above. Given the reasonably foreseeable outcomes from the Railway Bond Program and from the Bank Debenture Program (i.e., that they were scams) and in view of the extent to which the failure of the Respondent to discharge his obligations under this count must have had a singularly negative impact on the reputation of the legal profession generally in the minds of the investors, we find that the failure of the Respondent to advise individual investors that he was not protecting their interests constitutes professional misconduct.

Citation - Count 4

[63] Count 4 of the citation alleges that, by a trust indenture dated December 31, 1997, the interest in all the shares of V was transferred to the V Charitable Trust, the beneficiaries of which were certain charities. The Respondent was named as the " Protector" of the Trust, and thereafter he continued to purport to act for V, despite the conflict between his duties as Protector to the beneficiaries of the Trust and the interests of V.

[64] The Charitable Trust was created on December 31, 1997 by way of a Trust Deed and Transfer of Property to Trust. This document is a trust instrument used in the Turks & Caicos Islands, and was governed by the laws of that jurisdiction. It provides for a " Protector" , which is not a role required by Canadian trust law. The instrument describes the role of " Protector" as someone who is appointed by the settlor (Mr. F), and who has the power to remove the Trustee (a trust company licensed in the Turks & Caicos Islands). The role was suggested by [law firm] to enable the Protector to remove the trustee, and move the trust to a different jurisdiction if the laws change, or if there was a desire to change from the local trust company.

[65] The Law Society argued that the instrument gave additional powers to the Protector resulting in a sharing in the Trustee' s duties to protect the financial interests of the beneficiaries of the trust, by ensuring that V Corporation managed its funds wisely, and for the benefit of the beneficiaries.

[66] In his evidence, the Respondent denied this wider role and stated " … I had one power and one power only and that was to remove the trustee." The Respondent was introduced to the concept of the Protector by way of a letter from AM. AM stated:

… the protector is one or more persons who have the authority to appoint a new trustee or beneficiary and who must also consent to the disbursement of any trust funds or any amendment to the trust deed. The protector or protectors should be someone whom the settlor trusts, such as a professional advisor or business partner, who would insure that the trust assets were eventually dealt with in accordance with the settlor' s wishes.

[67] The Law Society submitted no evidence to the contrary, nor did it establish any duty by the Protector towards the beneficiaries of the trust. Accordingly, there is no basis for a finding that there was a conflict between the Respondent' s duties as " Protector" of the Trust, the interests of his client and the interests of the beneficiaries of the Trust. Accordingly we dismiss count 4 of the citation.

Citation - Count 5

[68] Count 5 of the citation states:

During the time you were named the " Protector" and, or in the alternative, while purporting to act for V, you also purported to provide advice concerning investment matters to certain Investors (the " Client Investors"). You did so despite the conflict;

(a) between the interests of the Client Investors and the interests of V; and/or

(b) between your duties as Protector and the interests of the Client Investors.

[69] It is clear that some of the individuals who supplied funds to V also retained the Respondent for advice regarding the establishment of offshore trusts. There is no evidence before the Panel to permit it to draw the inference that the Respondent gave investment advice to these same clients.

[70] In his testimony, the Respondent denied having given investment advice to clients or to anyone else. None of the Law Society' s witnesses claimed to have acted on the Respondent' s advice, and the auditor was unable to point to any instances of him giving investment advice. The evidence does not support a finding that the Respondent, at any time, gave investment advice.

[71] The Law Society argued that the key element of Count 5 of the citation is that the Respondent acted despite conflicting interests by:

(a) acting for Client Investors who invested in V, while acting for V;

(b) acting for Client Investors who provided funds to V while acting as Protector.

The issue of the role of the Respondent as Protector was discussed in count 4. We found there that the Respondent did not act for the beneficiaries of the trust. We find also that the evidence does not establish that the Respondent was acting for Client Investors regarding their investments while acting for V. Indeed, it is the Panel' s finding that the Respondent was not only not acting for the Client Investors, but also, as established in count 3, we found that he failed to advise them that he was not protecting their interests.

[72] We find therefore that count 5 of the citation is not made out and must accordingly be dismissed.

Citation - Count 6(a)

[73] Count 6 of the citation provides:

6. In receiving and disbursing funds in connection with V, you breached the accounting provisions of the Law Society Rules:

a) in failing to record the source of all funds received contrary to Rule 3-60 (formerly Rule 842);

[74] At the time that the citation was issued, Rule 3-60 (formerly Rule 842) provided as follows:

Trust account records

3-60 A lawyer must maintain at least the following trust account records:

(a) a book of entry or data source showing all trust transactions, including the following:

(i) the date and amount of receipt or disbursements of all funds;
(ii) the source of the funds received;

(iii) the identity of the client on whose behalf trust funds are received or disbursed;
(iv) the cheque or voucher number for each payment out of trust;
(v) the name of each recipient of money out of trust;

(b) a trust ledger, or other suitable system, showing separately for each client on whose behalf trust funds have been received, all trust funds received and disbursed, and the unexpended balance;
(c) records

(i) showing each transfer of funds between clients' trust ledgers, including the name and number of both the source file and the destination file,
(ii) containing an explanation of the purpose for which each transfer is made, and
(iii) containing the lawyer's written approval of the transfer;

(d) the monthly trust reconciliations required under Rule 3-65, and any documents prepared in support of the reconciliations;

(e) and (f) rescinded, December, 2003
(g) a current listing of all valuables held in trust for each client.

[75] It is clear that the specific deficiency alleged in respect of these transactions by the Respondent is his failure to comply with Rule 3-60(a)(ii) in that he did not record the " source" of all trust deposits made for his client V. We have noted earlier in these reasons that there were 168 deposits to the trust account of the Respondent where no record of the identity of the depositor was provided.

[76] We note from the evidence that the Respondent was aware, or became aware of this deficiency in his practice at some point in the course of his representing F and V because he advised both F and his staff that there were to be no more " anonymous" deposits accepted to the trust account for credit to the V file.

[77] On December 4, 1997 the Respondent advised F that subsequent deposits to trust must be accompanied by a " certificate" (Exhibit 50) that was prepared by the Respondent and provided to F and others. The Respondent advised F that if there was no " certificate" , the deposit would not be accepted and the funds would have to be returned. The " certificate" identified the name of the investor and provided (paraphrased) as follows:

1. That the funds provided to the Respondent were not proceeds of crime.

2. That the funds provided to the Respondent were not done so in an effort to delay or defeat creditors.

3. That the investor was not relying upon the Respondent for investment advice and would not hold the Respondent responsible with respect to investment decisions.

4. That the funds had not been solicited by the Respondent, that they are not part of a public offering or private placement, and they are not for the purchase of a security.

5. That the investor had been advised that a Canadian resident must report and pay Canadian income tax anywhere in the world.

[78] The evidence of Ms. Terhart established that, following this memorandum to F, there continued to be deposits to the trust account for V where the identity of the depositor was unknown.

[79] In a further attempt to deal with the problem, on March 23, 1998 the Respondent wrote to F and advised

After April 10, 1998 I will no longer be able to accept unsolicited funds from persons I do not have a client relationship with. It will only be possible for funds to be provided to me by approved clients, yourself and MG. I am not to be identified as acting on behalf of any individuals who may have submitted funds to yourself, MG or others who ultimately send these funds which are ultimately sent to me. I can only act for people I am family [sic] with.

[80] The Respondent clarified in his evidence that the final sentence was intended to read " I can only act for people I am familiar with."

[81] We note that there is some conflict in the evidence given on this point in that Ms. Terhart testified that there were 168 deposits where the identity of the depositor was unknown while the Respondent testified that he was of the view that there were " less than a dozen people that we didn' t identify… ." No specific evidence was provided by the Respondent in support of this assertion, and as indicated earlier in these reasons, in most instances where the evidence of the Respondent conflicts with that of other witnesses, we have accepted the evidence of the other witness.

[82] The Respondent' s evidence in chief on this issue suggests that he was either unaware of the Law Society requirement or alternatively, that he was indifferent to it. He was asked by his counsel to comment on a reference in Ms. Terhart' s report that stated " Skogstad' s trust books and records do not record the source and identity of client funds received." He replied:

We made out the receipts for V, it was V' s money and, I mean, you have to identify the funds and you have to allocate them in your pooled trust account to a client, you can' t just put money in a trust account without allocating them and it was always allocated to V. Now for my own reasons of the money laundering issues I wanted to know the source of the funds too, *not for the Law Society purposes* but for proceeds of crime and due diligence issues… . (emphasis added)

[83] Later he was asked " In terms of recording for purposes of your trust account, did you record the source of your funds?" He answered:

Absolutely. It' s V, it' s provided to V, it' s from V, it' s for V and, you know, my accountants who audit me every year had no problem with that aspect of my audit. Every single transaction is recorded to V.

[84] The " source" of the various deposits was the various individual investors who provided the money for deposit to the trust account by direct deposit or otherwise. The " source" of these deposits was never V. In his response to these questions, the Respondent did not acknowledge or address the deficiency in his record keeping that is the basis for this count in the citation. That he understands the requirement, however, is evidenced by his actions described above in his attempts to ensure that the flow of anonymous deposits to his trust account was stopped.

[85] The evidence is clear that there are many instances where deposits were made to the V trust account without the source of the deposit being known and recorded.

[86] The purpose of the Rule is clear. In order to properly discharge a trust obligation, a lawyer must be aware of the expectations of the depositor. It follows that if the identity of the depositor is not known, the expectations of the depositor cannot be known, and the lawyer must look to another source for information as to the expectations of the trust depositor. A relationship that is fraught with danger is created where a lawyer must seek information from the beneficiary of a trust deposit (the client) to be certain that the expectations of the depositor are met. For this reason, among others, Rule3-60 requires a record of the source of the trust deposit.

[87] Without the ability to verify the expectations of the depositor to the trust account it will not be possible for the lawyer to know that a proposed payment from the trust account meets the requirements for a withdrawal from the account, namely that the payment is " properly required for payment to or on behalf of a client or to satisfy a court order" as required by Rule 3-56(1)(a).

[88] The evidence on this count is overwhelming, and we find that, by his repeated violation of Rule 3-60 of the Law Society Rules, the Respondent is guilty of professional misconduct.

Citation - Count 7

[89] Count 7 of the citation alleges that, in the course of an investigation conducted by the Law Society pursuant to Rule 4-43, the Respondent failed to provide all books and records promptly, contrary to Rule 4-43(2)(b).

[90] There appears to be no case law that defines either the term " promptly" or the term " immediately" . In this matter, the auditor arrived unannounced at the Respondent' s office in July. The Respondent provided all records pertaining to V that he had in his possession at that time.

[91] As indicated above, the Respondent had returned the original file to his client, and in order to respond to the requests of the Law Society, it was necessary for him to retrieve the file. He did retrieve the file and he provided it to the Law Society on November 23, 2001. There was some delay in this process, but the Respondent cannot be held responsible for any delay that is attributable to his client.

[92] While awaiting the return of the file from his client, correspondence about the case continued between the Law Society and the Respondent. The Panel does not find the approximate three-month period of time between the original request and the ultimate delivery of the file to be an unreasonable period of time in all of the circumstances, and this count therefore fails.

Summary

[93] In summary then, we find as follows:

Count 1 - Dismissed

Count 2 - Dismissed

Count 3 - Proven – Professional Misconduct

Count 4 - Dismissed

Count 5 - Dismissed

Count 6(a) - Proven – Professional Misconduct

Count 6(b) - Withdrawn by Law Society

Count 7 - Dismissed