2014 LSBC 27
Report issued: June 16, 2014
Citations issued: May 26, 2011 and May 24, 2012

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

BRADLEY DARRYL TAK

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: March 12, 2014
Panel: Lee Ongman, Chair, Anna K. Fung, QC, Lawyer, John Lane, Public representative

Counsel for the Law Society: Carolyn Gulabsingh
No-one appearing on behalf of the Respondent

Background

[1] There are two citations in this matter. The first citation, which was authorized May 12, 2011 and issued May 26, 2011 (the "2011 Citation"), includes four allegations as follows:

(a) the Respondent misappropriated approximately $2,000 cash from his client, KP;

(b) in the alternative to (a), the Respondent received $2,000 cash from his client KP that:

i. he did not deposit into trust;

ii. he did not prepare a receipt in respect of; and

iii. he did not record in his records as being received;

(c) the Respondent failed to respond to communications from another lawyer; and

(d) the Respondent represented to the Law Society that he deposited the funds received from KP in his general account when he knew or ought to have known that was not true.

[2] The second citation was issued May 24, 2012 and amended July 18, 2012 (the"2012 Citation") and involves 22 allegations. The allegations are summarized and grouped into the following categories:

(a) misappropriation of client funds (allegations 1 – 8);

(b) misrepresentation to, or misleading the Law Society (allegations 18 and 19);

(c) failure to respond to the Law Society (allegations 10 – 17);

(d) failure to notify the Law Society of charges laid against the Respondent under the Income Tax Act and the Excise Tax Act (allegation 20);

(e) failure to report a judgment made against the Respondent to the Law Society (allegation 21);

(f) failure to remit funds collected for GST to the Government (allegation 22); and

(g) accounting rule breaches (allegation 9(a) – (f) and (h) – (j)).

[3] The Respondent was served with the 2011 Citation on May 26, 2011 and with the 2012 Citation on May 25, 2011, both through his counsel. He waived the requirements of Rule 4-15 of the Law Society Rules in respect of both citations.

[4] Rule 4-16.1(1) of the Law Society Rules provides that a citation can be amended at any time before the hearing, on written notice to the respondent and the Executive Director. The 2012 Citation was amended on July 18, 2012. An amended copy of the citation was delivered to the Respondent's counsel by courier on July 18, 2012 and the Respondent's counsel acknowledged receipt of it on that same day.

[5] On July 10, 2013, the Respondent was served with a Notice to Admit pursuant to Rule 4-20.1 of the Law Society Rules.

[6] On September 16, 2013, the Respondent was served with the Notice of Hearing as required by Rule 4-24 of the Law Society Rules.

[7] The Notice of Hearing stated the hearing would be held on December 3, 2013.

[8] On December 2, 2013, the Respondent contacted the Law Society and stated that he had been unaware of the December 3, 2013 hearing date until the afternoon of December 2. The Respondent subsequently appeared before the Hearing Panel on December 3, 2013 to seek an adjournment. The adjournment to March 12, 2014 was granted on the condition that the Respondent provide materials to the Law Society in support of his intended proposal under Rule 4-21 and keep the Law Society apprised as to his current email address and mailing address.

[9] The Law Society made inquiries of the Respondent by email on February 11, 2014 and by telephone on February 17, 2014, of his intentions regarding the hearing, but the Respondent did not reply to either of these communications.

[10] The Law Society has not received any materials from the Respondent regarding a proposal pursuant to Rule 4-21, nor has the Respondent communicated with the Law Society after his December 3, 2013 appearance to adjourn the hearing date.

DECISION TO PROCEED IN THE ABSENCE OF THE RESPONDENT

[11] The Respondent did not appear at the hearing of this matter nor did anyone appear on his behalf.

[12] Section 42(2) of the *Legal Profession Act* permits a hearing panel to proceed in the absence of a respondent if the panel is satisfied that the respondent has been served with the notice of the hearing.

[13] The hearing commenced at 9:30 a.m. on March 12, 2014, and given the Respondent's absence, the Panel adjourned for 15 minutes to allow for any unintended delay by the Respondent.

[14] Following the adjournment the Panel concluded that the Respondent had been served with notice of the hearing and had decided not to attend. In *Law Society of BC v. Gellert*, 2013 LSBC 22, the hearing panel decided to proceed in the absence of the respondent. The notice on the front of the 2011 Citation and the 2012 Citation cautions the Respondent that if he fails to appear at the hearing the Hearing Panel may proceed with the hearing in his absence and may make an order that may have been made had the Respondent been present. This Panel is satisfied that written notice of the hearing date was provided to the

Respondent, and the Respondent was present December 3rd, 2013 at the adjournment of the original hearing date and was fully aware of the subsequently rescheduled hearing date. Notwithstanding this, the Respondent did not reply to the Law Society's subsequent attempts at communications by email and telephone.

[15] Given these circumstances, the Panel concluded that the Respondent's failure to attend at this hearing without any explanation justified proceeding in his absence.

NOTICE TO ADMIT

[16] Rule 4-20.1 of the Law Society Rules provides that a party may request the other party to admit the truth of a fact or the authenticity of a document for the purposes of the hearing, if the request is made no less than 45 days before the hearing date. The Rule set out that the request must be made in writing, clearly marked "Notice to Admit", and served in accordance with Rule 10-1. Rule 4-20.1(7) further provides that a party who receives a request under the rule must respond to it within 21 days, and if no response is provided within 21 days, the party is deemed to admit, for the purposes of the hearing, the truth of the facts and the authenticity of the documents set out in the request.

[17] On July 10, 2013, the Respondent was served with a 28-page Notice to Admit document, together with 33 attachments, in accordance with Rule 10-1. The Notice to Admit clearly stated in bold on the front page that the Respondent was requested to admit, for the purposes of this hearing only, the truth of the facts and the authenticity of the documents listed in the notice.

[18] The Law Society has not received any formal reply to the Notice to Admit from the Respondent. In the *Gellert* case the panel referred to *Law Society of BC v Power,* 2009 LCBC 23. In that case, the respondent received notice of the allegations against him and the hearing date, which was set with his approval. The emails from the respondent to the Law Society sent in the month or so prior to the hearing indicated that he admitted the truth of the facts and the authenticity of the documents contained in the Law Society's Notice to Admit. The correspondence also strongly suggested that he did not plan to dispute any issues at the Facts and Determination stage of the proceedings and had little or no intention of resuming the practice of law in the future.

[19] In the present case, the Respondent attended at the prior hearing date and obtained the adjournment he sought for the ostensible purpose of the Respondent's intended proposal under Rule 4-21 procedure for a conditional admission of a discipline violation. The Respondent did not follow through with the conditional admission nor did he make any effort to communicate to the Law Society an intention to dispute all or any part of the allegations and the citations.

[20] The Hearing Panel accepts the facts set out in Exhibit 1 in this hearing, which is the Notice to Admit, as proven facts and authentic documents. These submissions are on the assumption that Rule 4-20.1(7) applies. That section reads as follows:

> 4.20.1(7) If a party that has been served with a request does not respond in accordance with this Rule, the party is deemed, for the purposes of the hearing only, to admit the truth of fact described in the request or the authenticity of the document attached to the request.

[21] The Hearing Panel finds that in the absence of a response from the Respondent to a Notice to Admit, the facts and documents described in the Notice to Admit are deemed to be the Respondent's admissions as to the truth of the fact described in the Notice to Admit and the authenticity of the documents attached thereto.

[22] The Panel also accepts the evidence in the Audit Report as reliable and places reliance on it as well as the Notice to Admit to arrive at the facts as set out in the following section of this decision.

FACTUAL FINDINGS OF THE PANEL

[23] Bradley Darryl Tak was called and admitted as a member of the Law Society of British Columbia on February 15, 1991.

[24] Mr. Tak was employed by Fraser & Beatty after call, and then from July 1992 to August 1996 he was employed by the Criminal Justice Branch of the Ministry of the Attorney General. Mr. Tak became a sole practitioner in August 1996 and since then has practised as a sole practitioner in the Lower Mainland except between October 1, 2006 and August 5, 2008, when he practised with Dickey, Browning, Ray, Soga, Dunne, Tak.

[25] Mr. Tak was suspended from practice from July 16, 2010 to August 30, 2010 as ordered by a discipline hearing panel. He was suspended from December 7, 2010 to January 1, 2011, for failing to file a trust report. His membership in the Law Society ceased between January 1, 2011, and February 17, 2011 for non-payment of fees, and he was suspended from February 17, 2011 to June 16, 2011. Mr. Tak's membership in the Law Society was not reinstated after January 1, 2011, and he has remained a former member since then.

2011 CITATION

[26] A forensic audit ordered by the Chair of the Discipline Committee was conducted and a report dated December 14, 2010 and amended June 27, 2011 was produced (the "Audit Report") by Barbour and Associates (the "Auditor").

[27] The Audit Report is attached to the Law Society's Notice to Admit (the "NTA").

[28] The Law Society conceded that it would not proceed with allegation 2 if the Panel should find the Respondent committed professional misconduct as set out in allegation 1.

[29] In light of the Panel's finding of professional misconduct as set out below in relation to allegation 1 of the 2011 Citation, the Panel makes no findings of fact relating to allegation 2.

FACTS RELEVANT TO ALLEGATION 1

[30] In September or October 2008, Mr. Tak received a cash retainer of approximately $2,000 (the "KP Retainer Funds") from his client ("KP"). KP retained Mr. Tak to act for him regarding a civil assault matter.

[31] Mr. Tak did not deposit the KP Retainer Funds into his law practice's trust or general account. Instead he used them for his personal use. Mr. Tak failed to perform legal services for KP.

[32] Mr. Tak is deemed to have admitted that he misappropriated the KP Retainer Funds and that this conduct constitutes professional misconduct.

FACTS RELEVANT TO ALLEGATIONS 3 AND 4

[33] On December 1, 2009, SK, KP's new counsel, made a complaint to the Law Society that Mr. Tak did not reply to letters she sent to him dated November 9, and 23, 2009, and that he did not reply to a telephone message she left for him on November 30, 2009.

[34] Mr. Tak failed to respond to communications from another lawyer, SK, that required a response, contrary to Chapter 11, Rule 6 of the *Professional Conduct Handbook*, and in particular, he failed to respond to letters dated November 9, 2009 and November 23, 2009, and he failed to respond to a telephone message on November 30, 2009. The Respondent is deemed to have admitted the truth of these facts.

[35] On February 3, 2010, Mr. Tak wrote to the Law Society and explained that he did not deposit the KP Retainer Funds into his law firm's trust account but rather deposited them into his general account. He attached a copy of his general ledger for December 2008. He wrote:

> Further to the recent Discipline hearing and the direction that I provide you with documentation with respect to the KP retainer from September of 2008 I can advise that a review of my trust ledger indicates that the funds were not deposited in trust in September of 2008 but rather that they were deposited in my general account in December of 2008. There is a note in the KP file indicating the funds should be transferred to his credit in trust but that was not done. I have attached a copy of my general account statement for December that shows the deposit being made on December 3, 2008. Also attached is a letter to KP that is self-explanatory wherein I have returned his retainer in light of the complaint that has been made.

[36] The Audit Report evidences, at paragraphs 225 through 249, that Mr. Tak had not deposited the KP Retainer Funds into his general account and, where Mr. Tak had made notations on his general bank statement that certain deposits represented the KP Retainer Funds, the notations were incorrect. We accept these facts.

[37] Mr. Tak is deemed to have admitted the conduct set out in allegation 4 of the 2011 Citation that on February 3, 2010, in the course of the investigation by the Law Society of a complaint made by KP, he represented to the Law Society that he deposited the KP Retainer Funds to his general account in December 2008, when he knew or ought to have known that he did not deposit the funds to his general account in December 2008 or at any other time, and we accept this deemed admission as fact.

2012 CITATION

[38] A client ("SS") gave Mr. Tak a written authorization dated November 4, 2008 for him to obtain $9,700 from SS's bank to be used as retainer funds.

[39] On November 4, 2008, SS's bank issued a bank draft to Mr. Tak in the amount of $9,700 (the "SS Retainer Funds").

[40] Mr. Tak did not deposit the SS Retainer Funds into his law practice's trust account as required by Rule 3-51, nor did he deposit them to his general account.

[41] Instead, Mr. Tak deposited the SS Retainer Funds into his personal bank account and used them for his own benefit.

[42] Mr. Tak did not provide an invoice or receipt to SS in respect of the SS Retainer Funds.

[43] Mr. Tak failed to attend a series of court appearances on behalf of SS, and did not notify SS or the court that he would not attend the court appearances.

[44] In November 2010, while the Auditor was conducting the 4-43 investigation, SS complained to the Law Society.

[45] Between November 26, 2010 and December 14, 2011, Law Society staff wrote to Mr. Tak ten times

inquiring about his handling of the SS Retainer Funds.

[46] Mr. Tak did not respond to letters from the Law Society dated November 26, 2010, December 14, 2010, January 10, 2011, February 8, 2011, March 24, 2011, May 12, 2011, August 2, 2011, August 16, 2011, November 25, 2011 and December 14, 2011.

[47] Mr. Tak received the SS Retainer Funds of $9,700 in his capacity as a barrister and solicitor in November 2008, and he misappropriated those funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

[48] Mr. Tak failed to provide a substantive response to communications from the Law Society concerning its investigation regarding the SS Retainer Funds, contrary to Chapter 13, Rule 3 of the Professional Conduct Handbook, and in particular he failed to respond substantively to letters dated November 26, 2010, December 14, 2010, January 10, 2011, February 8, 2011, March 24, 2011, May 12, 2011, August 2, 2011, August 16, 2011, November 25, 2011, and December 14, 2011. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATIONS 2 AND 13

[49] On or about March 23, 2010, a client ("MS") retained Mr. Tak with respect to a trafficking charge.

[50] MS provided Mr. Tak with retainer funds of approximately $6,000 (the "MS Retainer Funds").

[51] The MS Retainer Funds were provided to Mr. Tak in instalments.

[52] The first instalment was a cash payment of $2,000. MS's mother witnessed MS giving the first instalment to Mr. Tak. Mr. Tak did not deposit this cash payment into his law practice's trust account as required by Rule 3-51, nor did he deposit it to his general account.

[53] The second instalment was a cheque dated June 23, 2010 for $4,000 from MS's mother. On or about July 2, 2010, Mr. Tak deposited the $4,000 cheque into his law firm's general account.

[54] Mr. Tak did not provide an invoice or receipt in respect of the MS Retainer Funds.

[55] Mr. Tak failed to respond to phone calls from his client MS, did not appear for scheduled court dates and failed to meet with MS to discuss his case. Mr. Tak admits he did not return any of MS's calls.

[56] Mr. Tak was suspended from practice from July 16, 2010 to August 30, 2010 and again from December 7, 2010 until January 1, 2011 when he ceased membership due to non-payment of fees.

[57] On March 3 and 18, 2011, the Law Society wrote to Mr. Tak to seek his response to the allegations about the MS Retainer Funds.

[58] Mr. Tak did not provide a substantive response to either of the Law Society's letters dated March 3, and 18, 2011.

[59] Mr. Tak received the MS Retainer Funds of $6,000 in total in his capacity as a barrister and solicitor and he misappropriated those funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

[60] Mr. Tak failed to provide a substantive response to communications from the Law Society regarding its investigation of the MS Retainer Funds, contrary to Chapter 13, Rule 3 of the P*rofessional Conduct Handbook*, and in particular, he failed to respond substantively to letters dated March 3, 2011 and March 18, 2011. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATION 3

[61] In 2010, a client ("JJ") retained Mr. Tak to represent him regarding a criminal appeal matter.

[62] At the time of the retainer, JJ was in custody at the Fraser Regional Correction Centre.

[63] JJ provided Mr. Tak with a retainer of $3,500 (the "JJ Retainer Funds") through JJ's wife.

[64] JJ's wife gave the JJ Retainer Funds to Mr. Tak in cash in three instalments in or about April to June 2010.

[65] Mr. Tak instructed JJ and his wife to deposit the JJ Retainer Funds into his personal bank account, and not into his law practice's trust or general account.

[66] JJ's wife deposited the JJ Retainer Funds into Mr. Tak's personal bank account.

[67] Mr. Tak did not provide an invoice or a receipt to JJ or his wife in respect of the JJ Retainer Funds.

[68] Mr. Tak received the JJ Retainer Funds of $3,500 in his capacity as a barrister and solicitor in April to June 2010, and he misappropriated those funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATION 4

[69] In May 2010, a client ("PB") retained Mr. Tak to represent him to defend a charge of impaired driving.

[70] PB provided Mr. Tak with retainer funds of approximately $5,000 (the "PB Retainer Funds").

[71] The PB Retainer Funds were provided to Mr. Tak in two instalments.

[72] The first instalment was a cash payment of $1,000 provided to Mr. Tak on or about May 13, 2010.

[73] The second instalment was provided to Mr. Tak by bank draft, in the amount of $4,000 on or about October 14, 2010.

[74] Mr. Tak failed to deposit the $1,000 cash portion of the PB Retainer Funds into his law firm's trust account as required by Rule 3-51, nor did he deposit it to his general account.

[75] Mr. Tak deposited the $4,000 bank draft portion of the PB Retainer Funds into his law firm's general account.

[76] Mr. Tak did not provide PB with an invoice or receipt in respect of the PB Retainer Funds.

[77] Mr. Tak received the PB Retainer Funds of $5,000 in his capacity as a barrister and solicitor in May and October 2010, and he misappropriated the PB Retainer Funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATIONS 5 AND 14

[78] In 2008, a client ("BP") retained Mr. Tak to represent him with respect to a charge of manslaughter.

[79] BP's mother provided Mr. Tak with retainer funds of approximately $15,000 (the "BP Retainer Funds").

[80] The BP Retainer Funds were provided in four instalments by BP's mother.

[81] The first instalment of $6,000 was provided by bank draft dated June 27, 2008.

[82] The second instalment of $6,000 was provided by bank draft dated August 19, 2008.

[83] The third instalment of $2,000 was provided by bank draft dated February 18, 2009.

[84] The fourth instalment was a cash payment of $1,000.

[85] Mr. Tak did not deposit the BP Retainer Funds to his law firm's trust account as required by Rule 3-51.

[86] Mr. Tak did not provide BP or his mother with an invoice or receipt in respect of the BP Retainer Funds.

[87] In July 2011, BP's mother made a complaint to the Law Society.

[88] On August 15, 2011, December 14, 2011, January 13, 2012 and February 17, 2012, the Law Society wrote to the Respondent to seek his response to the allegations about the BP Retainer Funds.

[89] The Respondent did not provide a substantive response to the Law Society's letters dated August 15, 2011, December 14, 2011, January 13, 2012 and February 17, 2012.

[90] Mr. Tak received the BP Retainer Funds of $15,000 in his capacity as a barrister and solicitor in June 2008 to March 2009, and he misappropriated the BP Retainer Funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

[91] Mr. Tak failed to provide a substantive response to communications from the Law Society regarding its investigation of the BP Retainer Funds, contrary to Chapter 13, Rule 3 of the Professional Conduct Handbook, and in particular, he failed to respond substantively to letters dated August 15, 2011, December 14, 2011, January 13, 2012, and February 17, 2012. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATION 6

[92] In or about September 2010, a client ("JT") retained Mr. Tak to act for him regarding a criminal law matter.

[93] JT provided Mr. Tak with retainer funds of $5,000 (the "JT Retainer Funds").

[94] The JT Retainer Funds were provided to Mr. Tak in two instalments.

[95] On or about September 15, 2010, JT provided Mr. Tak with $500 cash.

[96] On or about September 17, 2010, JT provided Mr. Tak with a cheque in the amount of $4,500.

[97] Mr. Tak did not deposit the $500 cash to his law firm's trust account as required by Rule 3-51, nor did he deposit the funds to his general bank account.

[98] Mr. Tak deposited the cheque dated September 17, 2010 to his law firm's general bank account on or about September 20, 2010.

[99] Mr. Tak did not provide JT with an invoice or receipt in respect of the JT Retainer Funds.

[100] On his bank statement that reflected the deposit, Mr. Tak made a note incorrectly attributing the deposit of $4,500 of the JT Retainer Funds to another client and also incorrectly applied $4,500 of the JT Retainer Funds as payment from another client.

[101] Subsequently, JT retained another lawyer to act for him, and Mr. Tak provided JT's new lawyer with $4,000 of the JT Retainer Funds.

[102] Mr. Tak received the JT Retainer Funds of $5,000 in his capacity as a barrister and solicitor in September 2010, and he misappropriated approximately $1,000 of the JT Retainer Funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATION 7

[103] On or about November 2009, a client ("RJ") retained Mr. Tak to act for him regarding a criminal matter.

[104] RJ provided Mr. Tak with retainer funds of $5,000 (the "RJ Retainer Funds").

[105] The RJ Retainer Funds were provided in cash in two instalments.

[106] RJ provided the first instalment of $2,000 to Mr. Tak in or about November 2009, and the second instalment of $3,000 to Mr. Tak during December 2009.

[107] Mr. Tak did not deposit the RJ Retainer Funds into his law firm's trust account as required by Rule 3-51, nor did he deposit them to his general bank account.

[108] Mr. Tak did not provide an invoice or a receipt in respect of the RJ Retainer Funds.

[109] Mr. Tak received the RJ Retainer Funds of $5,000 in his capacity as a barrister and solicitor in November and December 2009, and he misappropriated the RJ Retainer Funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATION 8

[110] During 2009, a client ("SM") retained Mr. Tak to act for him regarding a criminal matter.

[111] SM provided Mr. Tak with retainer funds of approximately $6,000 (the "SM Retainer Funds").

[112] The SM Retainer Funds were provided in cash instalments during the latter half of 2009.

[113] The initial instalment of the SM Retainer Funds was $2,000.

[114] Subsequently, SM provided Mr. Tak with cash instalments of $1,800, $1,200 and $1,000.

[115] Mr. Tak did not deposit the SM Retainer Funds to his law firm's trust account as required by Rule 3-51, nor did he deposit the funds to his general bank account. Mr. Tak did not provide SM with an invoice or receipt in respect of the SM Retainer Funds.

[116] Mr. Tak received the SM Retainer Funds in his capacity as a barrister and solicitor in 2009, and he misappropriated the SM Retainer Funds by making personal use of them when he was not entitled to do so. The Respondent is deemed to have admitted the truth of these facts.

ALLEGATIONS 10, 12, 15, 16 AND 17

[117] On December 19, 2011, Law Society staff wrote to Mr. Tak's counsel to ask him to respond to questions concerning the Audit Report.

[118] In the letter, the Law Society also inquired about, among other issues, Mr. Tak's obligations to file Goods and Services Tax ("GST") returns and remit funds collected for GST, and Mr. Tak's representation of ST and PC including how Tak had handled retainer funds provided to him by ST and PC.

[119] Mr. Tak did not provide a substantive response to the Law Society regarding its inquiries about the Audit Report, the filing of GST returns and remitting funds collected for GST, or the inquiries about ST and PC. These inquiries were all included in the Law Society's letter of December 19, 2011 to Mr. Tak.

[120] Mr. Tak failed to provide a substantive response to communications from the Law Society concerning its investigation of his books and accounts pursuant to an order granted under 4-43 of the Law Society Rules, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular, he failed to respond substantively to a letter dated December 19, 2011. The Respondent is deemed to have admitted the truth of these facts (allegation 10).

[121] Mr. Tak failed to provide a substantive response to communications from the Law Society regarding its investigation of the ST Retainer Funds and the PC Retainer Funds, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular, he failed to respond substantively to a letter dated December 19, 2011. The Respondent is deemed to have admitted the truth of these facts (allegations 15 and 16).

[122] Mr. Tak failed to provide a substantive response to communications from the Law Society regarding its investigation of the his obligations to file GST returns and remit funds collected for GST, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular, he failed to respond substantively to a letter dated December 19, 2011. The Respondent is deemed to have admitted the truth of these facts (allegation 17).

[123] On December 21, 2011, Law Society staff wrote to Mr. Tak regarding its investigation of a complaint received from the Ministry of the Attorney General that Mr. Tak had been practising law while suspended, had failed to provide adequate service to a client and failed to account to clients for certain retainers.

[124] Specifically, the Law Society inquired about Mr. Tak practising law by representing PC while suspended, in part by sending emails under PC's name to Crown Counsel while Mr. Tak was suspended from practising law. Further, the Law Society inquired about the quality of service Mr. Tak provided to ST and his failure to account to ST for the ST Retainer Funds.

[125] Mr. Tak failed to provide a substantive response to communications from the Law Society regarding its investigation of the complaint received from the Attorney General of British Columbia on or about December 29, 2010, contrary to Chapter 13, Rule 3 of the *Professional Conduct Handbook*, and in particular, he failed to respond substantively to a letter dated December 21, 2011. The Respondent is deemed to have admitted the truth of these facts (allegation 12).

ALLEGATIONS 18, 19, 20, 21, AND 22

[126] The Panel makes the following finding of fact from the evidence in the Notice to Admit and the Auditor's Report.

[127] On November 2, 2010, the Law Society wrote to Mr. Tak to follow up regarding inquiries related to his collection and payment of GST that were posed to Mr. Tak in a letter from the Law Society dated October 5, 2010.

[128] One of the issues addressed in the Law Society's letter of October 5, 2010, was Mr. Tak's collection and remittance of GST during 2005 and 2006.

[129] On November 17, 2010, Mr. Tak wrote to the Law Society and confirmed he collected GST during 2005 and 2006. He also stated:

> The GST that was collected was retained by me in my account.

[130] Mr. Tak collected GST in 2005 and 2006 from clients but failed to remit such funds to Canada Revenue Agency ("CRA") in a timely manner, contrary to provisions of the *Excise Tax Act* (allegation 22).

[131] On May 31, 2006, Mr. Tak filed a trust report with the Law Society for the period ending December 31, 2005. Section B, question 9, of the Trust Report poses the question:

> The practice has paid all payroll, PST and GST remittances to government when due. If you answer "no" to this question, provide a written explanation why the necessary remittances have not been made, using the note function.

Mr. Tak answered "yes" to this question.

[132] On May 30, 2007, Mr. Tak filed a trust report with the Law Society for the period ending December 31, 2006. Section B, question 9, of the Trust Report posed the question:

> The practice has paid all payroll, PST and GST remittances to government when due. If you answer "no" to this question, provide a written explanation why the necessary remittances have not been made, using the note function.

Mr. Tak answered "yes" to this question.

[133] On June 2, 2008, Mr. Tak filed a trust report with the Law Society for the period ending December 31, 2007. Section B, question 9, of the Trust Report posed the question:

> The practice has paid all payroll, PST and GST remittances to government when due. If you answer "no" to this question, provide a written explanation why the necessary remittances have not been made, using the note function.

Mr. Tak answered "yes" to this question.

[134] In his October 5, 2010 letter to the Law Society, Mr. Tak stated that, during the course of a Law Society audit of his trust account, he told the Law Society that his Trust Reports were inaccurate regarding the filing of GST returns.

[135] In Mr. Tak's Trust Reports for the years ending December 31, 2005, December 31, 2006 and December 31, 2007, he represented to the Law Society that his practice had paid all GST remittances to the government when due, when that statement was not true (allegation 19).

[136] In October 2008, Mr. Tak was charged under the *Income Tax Act* and the *Excise Tax Act* with failing to file income tax returns for the years 2004, 2005 and 2006; and for failing to file a completed GST return for certain quarterly periods in 2002, 2004, 2005, 2006 and 2007 (the "Charges").

[137] Mr. Tak did not report the Charges to the Law Society.

[138] On January 21, 2011, Mr. Tak pleaded guilty to failing to file income tax returns for the years ended 2005 and 2006, contrary to the *Income Tax Act* and pleaded guilty to failing to file a completed GST return for the quarterly periods from January 1 to December 31, 2005 and for the quarterly periods from January 1 to December 31, 2006.

[139] On April 11, 2011, Mr. Tak was sentenced to a fine of $4,000 in respect of four of the Charges to which he pleaded guilty.

[140] The Crown directed a stay of proceedings on the remainder of the Charges and advised the court that

Mr. Tak had filed all outstanding tax returns relating to the Charges.

[141] Mr. Tak failed to notify the Executive Director of the Law Society in writing that, in October 2008, he was charged under the *Income Tax Act*, RSC, 1985, c.1 (5th Supp.) and the *Excise Tax Act*, RSC 1985, c.E-15, for failing to file income tax returns for the years ended 2004, 2005 and 2006; and completed GST returns for certain quarterly periods in 2002, 2004, 2005, 2006 and 2007 for the first quarter of 2008 (allegation 20).

[142] On November 6, 2009, CRA filed a certificate against Mr. Tak for unpaid GST in the amount of $49,181.97.

[143] The certificate was filed as judgment in the Land Title Office on December 7, 2009.

[144] Mr. Tak did not notify the Law Society of the certificate, or of its filing in the Land Title Office.

[145] On or about November 6, 2009, a certificate was filed in the Federal Court of Canada for unpaid GST in the approximate amount of $49,181.97, that was filed in the Land Title Office on December 7, 2009, (the "Judgment") and in respect of the Judgment, Mr. Tak failed to:

(a) notify the Executive Director of the Law Society in writing of the circumstances of the Judgment; and

(b) provide the Executive Director with his written proposal for satisfying the Judgment, as required by Rule 3-44 (allegation 21).

[146] In response to inquiries from the Law Society in its letter dated October 5, 2010, about Mr. Tak's collection and remittance of GST for the years 2005, 2006 and 2007, Mr. Tak wrote in his letter dated November 17, 2010, that:

> The GST that was collected was retained by me in my account.

[147] On February 8, 2011, the Law Society wrote to Mr. Tak's counsel and asked that Mr. Tak clarify what he did with the GST funds he collected for the years in question:

> ... Is he suggesting that he did retain all of the collected GST in his general account and that he continues to hold these funds? If this is not what he meant, then I ask that he clarify when GST funds collected from his clients were disbursed from his general account (e.g. did Mr. Tak withdraw the funds for his benefit on a regular and ongoing basis, or was there always a sufficient surplus of funds in his general account to settle his GST obligations to CRA.)

[148] Mr. Tak's counsel wrote to the Law Society by letter dated June 6, 2011, in reply to the Law Society's February 8, 2011 letter. Counsel wrote:

> The earlier response was not meant to suggest that Mr. Tak retained all the GST funds collected and simply did not remit them. Mr. Tak was not keeping track of what was needed to make the remittances; however, he can confirm that while at times there was a sufficient amount in his general account to make the remittances required, there were certain times when there was not a sufficient amount to make the required remittances. The GST collected was commingled with money he collected as fees and as a consequence no distinction was made between the two.

[149] We accept the Auditor's evidence at paragraph 116 of the Audit Report and find that the GST collected was not maintained as a form of trust, but was used by Mr. Tak to pay expenses and drawings by Mr. Tak. None of the GST collected by Mr. Tak remains in the bank account.

[150] In a letter dated November 17, 2010, Mr. Tak misled the Law Society by stating he had collected GST from his clients and retained the funds he had collected for GST in his account, when he knew that

statement was not true (allegation 18).

ALLEGATION 9

[151] The Panel makes the following findings of fact based on paragraphs 36, 37, 38, 41, 42, 46, 47, 56 and 57 of the Audit Report:

> (a) Mr. Tak had not recorded any transactions in his law firm's general bank account since September 11, 2008, and no longer maintained any kind of accounting records (Audit Report paragraph 36).
>
> (b) Mr. Tak did not maintain validated bank deposit receipts for his law firm's general bank account (Audit Report paragraph 37).
>
> (c) Mr. Tak did record funds received and disbursed in connection with his law practice, but he did not record these transactions accurately, and no accurate record was kept of receipt of client funds (Audit Report paragraph 56).
>
> (d) Mr. Tak had not prepared trust reconciliations for his law firm's trust account since November 2009 (Audit Report paragraph 38).
>
> (e) The trust listing that Mr. Tak prepared to reconcile unexpended trust fund balances against the client trust ledgers was not an accurate listing of the client trust ledgers, as there were some instances in which Mr. Tak had listed a balance that was not included in the client listing, and in other instances balances were included on the listing that were not in the client trust ledgers (Audit Report paragraph 41).
>
> (f) Mr. Tak did not record three specific transactions in the client trust ledgers (Audit Report paragraph 42).
>
> (g) Before September 11, 2008 (when Mr. Tak ceased recording transactions in his general bank account),Mr. Tak rendered invoices that were not paid in full, but Mr. Tak did not record the accounts receivable (Audit Report paragraph 46).
>
> (h) Mr. Tak did not provide receipts to clients for the cash he received from them for fees rendered or retainers (Audit Report paragraph 47).
>
> (i) Since 2007, Mr. Tak avoided the use of the trust accounting system, and not all funds received from clients were recorded in either the trust accounting system or the general bank account system. He reported that trust funds were consistently mis-recorded or not recorded at all (Audit Report paragraph 57).

[152] The Panel makes the following findings of fact based on the Respondent's deemed admissions set out in paragraph 156 of the NTA:

> 156. The Respondent failed to keep accounting records in compliance with the provisions of Part 3, Division 7 of the Law Society Rules between September 2008 and March 2010 and in particular he failed to:
>
> > (a) record in a chronological order all funds received and disbursed in connection with his law practice as required by Rule 3-59, specifically he did not do so in respect of the SS Retainer Funds, the MS Retainer Funds, the JJ Retainer Funds, the PB Retainer Funds, the BP Retainer Funds, the JT Retainer Funds, the RJ Retainer Funds and the SM Retainer Funds;
> >
> > (b) deposit all trust funds to a trust account as required by Rule 3-51, specifically he did not do so

in respect of the SS Retainer Funds, the MS Retainer Funds, the JJ Retainer Funds, the PB Retainer Funds, the BP Retainer Funds, the JT Retainer Funds, the RJ Retainer Funds and the SM Retainer Funds;

(c) account in writing to his clients for the SS Retainer Funds, the MS Retainer Funds, the JJ Retainer Funds, the PB Retainer Funds, the BP Retainer Funds, the JT Retainer Funds, the RJ Retainer Funds and the SM Retainer Funds;

(d) maintain general account records as required by Rule 3-61;

(e) maintain trust account records as required by Rule 3-60;

(f) prepare monthly trust reconciliations in respect of his trust account within 30 days as required by Rule 3-65;

(g) maintain a cash receipt book of duplicate receipts and issue receipts from the cash receipt book as required by Rule 3-61.1 and specifically he did not do so in respect of the SS Retainer Funds, the MS Retainer Funds, the JJ Retainer Funds, the PB Retainer Funds, the BP Retainer Funds, the JT Retainer Funds, the RJ Retainer Funds and the SM Retainer Funds;

(h) record transactions in his general account within 30 days or at all, as required by Rule 3-63 and specifically he did not do so in respect of the SS Retainer Funds, the MS Retainer Funds, the JJ Retainer Funds, the PB Retainer Funds, the BP Retainer Funds, the JT Retainer Funds, the RJ Retainer Funds and the SM Retainer Funds;

(i) record transactions in his trust account within 7 days or at all, as required by Rule 3-63.

The Respondent admits this conduct is professional misconduct.

LEGISLATION

[153] Section 38(4) of the *Legal Profession Act* states:

38(4) After a hearing, a panel must do one of the following:

(a) dismiss the citation;

(b) determine that the respondent has committed one or more of the following:

(i) professional misconduct;

(ii) conduct unbecoming a lawyer;

(iii) a breach of this Act or the rules;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer;

(v) if the respondent is not a member, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming a lawyer, or a breach of this Act or the rules.

BURDEN OF PROOF

[154] In arriving at its decision, the Panel recognizes that the burden of proof rests solely upon the Law Society. The standard now followed by panels of the Law Society of British Columbia stems from the

Supreme Court of Canada in *FH v. MacDougall*, 2008 SCC 53, 297 DLR(4th) 193. The onus of proof was set out and applied in *Law Society of BC v. Schauble*, 2009 LSBC 11 and *Law Society of BC v. Siefert*, 2009 LSBC 17. In *Shauble* the panel quoted from *MacDougall* as follows:

> The onus of proof is on the Law Society, and the standard of proof is a balance of probabilities: … evidence must be scrutinized with care and must always be sufficiently clear, convincing, and cogent to satisfy the balance of probabilities test.

ISSUES

[155] The issues for the Panel are whether the Respondent breached the *Legal Profession Act* or the Law Society Rules in each allegation of the combined 2011 and 2012 Citations and, if so, whether the Respondent has committed professional misconduct.

[156] In *Law Society of BC v. Lyons*, 2008 LSBC 09, the panel considered the distinction between a breach of the *Legal Profession Act* or the Rules that constituted a "rules breach" under s. 38(4)(b)(iii) of the Act and one that constituted "professional misconduct" under s. 38(4)(b)(i). The panel stated:

> [32] 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 not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29)
>
> ...
>
> [35] 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.

[157] The established test for professional misconduct originated with *Law Society of BC v. Martin*, 2005 LSBC16 and has been followed by the decision of *Re: Lawyer 12*, 2011 LSBC 11 and other Law Society panels in later cases. The test is:

> Whether the facts, as made out, disclose a marked departure from that conduct the Law Society expects from its members; if so, it is professional misconduct.

[158] A breach of the *Legal Profession Act* or Law Society Rules does not of itself constitute professional misconduct. In other words, a breach of the Rules or the Act will not necessarily be deemed to be professional misconduct unless the behaviour is a marked departure from the conduct expected of lawyers.

[159] The following table sets out the categories, the allegations and citation references for convenience in our analysis as follows:

CATEGORY OF ALLEGATION	ALLEGATION NUMBER	CITATION REFERENCE

Misappropriation of funds	#1 #1 - #8	2011 Citation 2012 Citation
Misleading and/or attempting to mislead	#4 #18 and #19	2011 Citation 2012 Citation
Failure to respond to the Law Society	#5 #10 - #17	2011 Citation 2012 Citation
Failure to respond to another lawyer	#3	2011 Citation
Failure to report charges to the Law Society	#20	2012 Citation
Failure to report judgment to the Law Society	#21	2012 citation
Failure to remit GST collected	#22	2012 Citation
Failure to follow accounting rules	#9(a) – (f), (h) – (j)	2012 Citation

MISAPPROPRIATION OF FUNDS: ALLEGATION 1, 2011 CITATION; ALLEGATION 1 – 8, 2012 CITATION

[160] The category of misappropriation of funds applies to allegations 1 and 2 of the 2011 Citation and 1 to 8 of the 2012 Citation. The Law Society Rules 3-56(1) and 3-57 are set out as follows for ease of reference:

3-56(1) A lawyer must not withdraw or authorize the withdrawal of any trust funds unless the funds are

(a) properly required for payment to or on behalf of a client or to satisfy a court order,

(b) the property of the lawyer,

(c) in the account as the result of a mistake,

(d) paid to the lawyer to pay a debt of that client to the lawyer,

(e) transferred between trust accounts,

(f) due to the Foundation under section 62(2)(b) of the Act, or

(g) unclaimed trust funds remitted to the Society under Division 8.

3-57(1) In this Rule, “fees” means fees for services performed by a lawyer or a non-lawyer member of the lawyer’s MDP, and taxes on those fees.

(2) A lawyer who withdraws or authorizes the withdrawal of trust funds under Rule 3-56 in payment for the lawyer’s fees must first prepare a bill for those fees and immediately deliver the bill to the client.

(3) A bill or letter is delivered within the meaning of this Rule if it is

(a) mailed to the client at the client’s last known address,

(b) delivered personally to the client,

(c) transmitted by electronic facsimile to the client at the client’s last known electronic facsimile number,

(d) transmitted by electronic mail to the client at the client’s last known electronic mail address, or

(e) made available to the client

(i) by means that allow the client to review the content of the document and save or print a copy, or

(ii) by other means agreed to by the client.

(4) As an exception to subrule (2), a lawyer need not deliver a bill if the client instructs the lawyer otherwise in writing.

(5) A lawyer must not take fees from trust funds when the lawyer knows that the client disputes the right of the lawyer to receive payment from trust funds, unless

(a) the client has agreed that the lawyer may take funds from trust to satisfy the lawyer’s account and the client has acknowledged that agreement in writing or the lawyer has confirmed the client’s agreement in a letter delivered to the client,

(b) a bill has been delivered under subrule (3), whether or not the client has directed otherwise under subrule (4),

(c) the lawyer has given the client written notice that the fees will be taken from trust unless, within one month, the client commences a fee review under section 70 of the Act or an action disputing the lawyer’s right to the funds, and

(d) the client has not commenced a fee review under section 70 of the Act or an action at least one month after written notice is given under paragraph (c).

(6) Despite subrule (5), if a lawyer knows that the client disputes a part of the lawyer’s account, the lawyer may take from trust funds fees that are not disputed.

(7) A lawyer must not take fees from trust funds impressed with a specific purpose, if the object of the trust has not been fulfilled, without the express consent of the client or another person authorized to give direction on the application of the trust funds.

[161] Allegation 1, 2011 Citation – The Law Society submits that the Respondent committed professional misconduct as set out in Allegation 1 because the facts disclosed that the Respondent:

(a) accepted funds from his client and did not provide a receipt or place the funds in trust;

(b) immediately appropriated the funds to his own use; and

(c) failed to do the legal work for the client prior to using the client's personal funds.

[162] The findings of fact set out in paragraphs 30 to 32 support a misappropriation of client funds in breach of Rule 3-57(1). The clear and concise evidence shows that the Respondent had little regard for the trust that his clients had in him, and his duty or the duties imposed on him by his status as a member of the Law Society of British Columbia. The misbehaviour is not merely a breach of the Rules in these circumstances. In this case the Respondent treated the funds as his own personal property from the moment he received them and showed no intention of ever holding the funds in trust until after the legal services and a proper account had been rendered. This conduct constitutes a marked departure from the conduct the Law Society expects from its members and is professional misconduct.

[163] As the Panel found the Respondent has committed professional misconduct as to Allegation 1, the Law Society is not proceeding with Allegation 2 of the 2011 Citation, and we will not consider that allegation further.

ALLEGATIONS 1 - 8 OF THE 2012 CITATION

[164] The Respondent received funds from 8 clients totalling the sum of $40,200, and he misappropriated those clients' funds for his own personal use. He is deemed to have admitted the truth of these facts.

[165] The Panel finds that the Respondent intentionally and without any explanation converted client funds to his own use. There can be no doubt on the facts that this was not a mere or inadvertent mishandling of client trust funds. The Respondent displayed a complete and utter disregard for his professional obligation to safeguard his clients' funds.

[166] Even applying an abundance of caution to the issue of intent, we are guided by the authority set out in *Law Society of BC v. Ali*, 2007 LSBC 18, in which the lawyer transferred trust funds to her personal account on a number of occasions without explanation and without providing accounts to her clients. The panel in that case found that the respondent's conversion of the clients' funds to her own personal use was deliberate and specific and greater proof of an intention to steal was not required.

[167] Similarly, in this case the Panel finds that the Respondent's behaviour constitutes a marked departure from the conduct expected of a member, and that the Respondent committed professional misconduct as set out in Allegations 1 through 8 of the 2012 Citation.

MISLEADING AND/OR ATTEMPTING TO MISLEAD: ALLEGATION 4, 2011 CITATION; ALLEGATIONS 18 AND 19, 2012 CITATION

[168] The category of "misleading and/or attempting to mislead" applies to Allegation 4 of the 2011 Citation and Allegations 18 and 19 of the 2012 Citation. Chapter 13, Rule 3 of the *Professional Conduct Handbook* applicable at the time set out the regulatory standards expected from members in their dealings with the Law Society. It is reproduced here for convenience. This rule has been replaced with section 7.1 of the current *Code of Professional Conduct*, which is substantially the same.

3. A lawyer must

(a) reply promptly to any communication from the Law Society;

(b) provide documents as required to the Law Society;

(c) not improperly obstruct or delay Law Society investigations, audits and inquiries;

(d) cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's firm;

(e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and

(f) otherwise comply with the Law Society's regulation of the lawyer's practice.

[169] Each of Allegations 4 in the 2011 Citation and 18 and 19 in the 2012 Citation contends that the Respondent misled or attempted to mislead the investigators of the Law Society.

[170] Whether the behaviour constitutes professional misconduct is determined, once again, by applying the "marked departure test" as defined in the *Martin* case (*supra*).

[171] Our findings of facts surrounding Allegation 4 in the 2011 Citation are that the Respondent wrote to the Law Society and stated that he deposited the KP retainer funds into his law firm's account when he knew or ought to have known that he did not deposit the KP retainer funds to his law firm's general bank account at any time.

[172] The Respondent is deemed to have admitted the truth of these facts, and we accept that admission and find that he committed professional misconduct because his deliberate misstatement to the Law Society was an attempt to cause the Law Society investigator to have a wrong idea or impression about the deposit of the retainer funds, and as such it is a marked departure from the conduct that is expected of a member of the Law Society.

[173] In Allegation 18 it is contended that the Respondent misled the Law Society in a letter dated November 17, 2010 by stating that he had collected GST from his clients and had retained the collected GST in his account when he knew that statement was not true.

[174] In our findings of fact relating to Allegation 19, which are set out in paragraphs [133] – [136] above, we found that the Respondent filed a trust report with the Law Society for the period ending December 31, 2005 and in it he certified that he had paid all payroll, PST, and GST remittances when due, and that he filed a trust report with the Law Society on May 30, 2007 in which he certified that he had paid all payroll, PST, and GST remittances. In addition, on June 2, 2008 the Respondent filed a trust report with the Law Society for the period ended December 31, 2007 and certified that he had paid all payroll, PST, and GST remittances to the government when due.

[175] The facts show that these remittances were not made, and the Respondent admits to misleading the Law Society by stating that he had collected GST from his clients and retained the collected GST in his account when he knew that statement was not true. We agree with the Respondent's admission and find that Allegation 19 has been proven and amounts to professional misconduct as a marked departure from conduct expected of Law Society members.

FAILURE TO RESPOND TO THE LAW SOCIETY: ALLEGATION 5 2011 CITATION; ALLEGATIONS 10 - 17 2012 CITATION

[176] The category of "failing to respond to the Law Society" applies to Allegation 5 of the 2011 Citation and Allegations 10 to 17 of the 2012 Citation. The applicable rule is Chapter 13, Rule 3(a) of the *Professional Conduct Handbook* set out above.

[177] A brief summary of the facts surrounding this allegation is necessary to clarify the chronology of events leading to Allegation 5.

[178] The KP matter became the subject of a Citation that was heard by a panel on June 27, 2010.

[179] In the June 27, 2010 hearing the panel determined that the Respondent committed professional misconduct by failing to respond to communication from the Law Society promptly or at all with respect to a letter dated October 29, 2009 and a telephone message left on November 19, 2009.

[180] The Respondent applied at the hearing of this matter to adjourn the hearing of both the facts and determination and the disciplinary action phases of the hearing. He obtained an adjournment of the disciplinary action phase only, and that adjournment was on the condition set by the panel that the Respondent provide the Law Society with his trust ledgers or records and any bank statements and records relating to the $2,000 KP deposit.

[181] The Respondent provided some documentation, which are included as exhibits to these proceedings, and the KP investigation continued with a trust audit ordered by the Law Society pursuant to Rule 4-43, which was not completed until the interim report of the Auditor in December, 2010.

[182] The Law Society sent a follow up letter dated February 15, 2011 to the Respondent through his legal counsel asking counsel to seek answers from the Respondent to questions arising from the Audit Report. It is the failure to respond to this letter that is the subject of Allegation 5.

[183] It may not be surprising from the clear and cogent evidence in the Audit Report that the Respondent found it difficult to answer the questions posed in the letter. The evidence of misappropriation of funds and misleading the Law Society described in the allegations and as set out in the Audit Report may have been too difficult for the Respondent to respond to.

[184] Notwithstanding how difficult it may be for the Respondent to respond in such a situation, as a member of the legal profession, he has a duty and an obligation to use his very best efforts personally, or through counsel, to respond and not to leave the communication completely unanswered.

[185] The panel in *Law Society of BC v. Tak*, 2010 LSBC 07 followed the leading case, *Law Society of BC v. Dobbin*, 1999 LSBC 27 at paragraph 20, as a statement of the importance of communication:

> [20] If the Law Society cannot count on prompt, candid and complete replies by members to its communication, it will be unable to uphold and protect the public interest which is the Law Society's paramount duty.

[186] The Panel finds that the failure to respond in this case is not simply a mere breach of a Rule, although it is possible in other circumstances that a failure to respond to the Law Society could be such. However, in this case the failure to respond is in the context of a serious ongoing inquiry involving suspicion of misappropriation of client funds that goes to the very core of the reputation of the legal profession.

[187] For these reasons, we find that the Respondent's failure to respond to the February 15, 2011 letter from the Law Society constitutes conduct that is more serious in these circumstances than a mere breach of the Law Society Rules and a marked departure from the conduct expected of lawyers. We find the Respondent committed professional misconduct.

[188] The ongoing audit continued, and the evidence caused the Law Society to continue to seek answers from the Respondent through his legal counsel by way of a letter dated December 19, 2011, which is the basis for Allegation 10.

[189] The Law Society also made ten inquiries between November 26, 2010 and December 14, 2011, and

we find as fact that the Respondent did not reply to any of those letters. This forms the substance of Allegation 11.

[190] The substance of Allegation 12 is that the Law Society's letter of December 21, 2011 to the Respondent in response to a complaint from the Attorney General's office was not responded to. The facts support the Law Society's position that the Respondent did not provide a substantive response to communications regarding the December 21, 2011 letter. We also find as a fact that, on February 17 and 22, 2012, the forensic accountant was provided with access to some of the Respondent's client files. This, however, does not constitute a substantive response.

[191] The Law Society again wrote to the Respondent on March 3 and 18, 2012 and made inquiries about the MS retainer funds. The respondent's failure to respond to either letter is the subject of Allegation 13.

[192] Allegation 14 concerns letters dated August 15, 2011, December 14, 2011, January 13, 2012, and February 17, 2012 concerning the BP retainer funds, and the Respondent did not provide a substantive response to any of those letters.

[193] Allegations 15, 16, and 17 relate to a letter dated December 19, 2011 that the Law Society wrote to the Respondent seeking answers to questions about the Audit Report and the Respondent's representation of former clients PB and SS, including transcripts of Law Society interviews with PB and SS. The Law Society also inquired about the Respondent's collection and remittance of GST.

[194] The Law Society followed up on December 21, 2011 with more specific inquiries about the Respondent's representation of PB, and the Respondent did not provide a substantive response to the December 19, 2011 or December 21, 2011 letters.

[195] The Panel finds that the reasoning applied to Allegation 5 applies equally to Allegations 10 – 17 and concludes by finding that the Respondent has committed professional misconduct with respect to Allegations 10 - 17 inclusive.

FAILURE TO RESPOND TO ANOTHER LAWYER - ALLEGATION 3, 2011 CITATION

[196] Allegation 3 - 2011 Citation – The Law Society alleges the Respondent committed professional misconduct by failing to respond to communication from another lawyer, contrary to Chapter 11, Rule 6 of *The Professional Conduct Handbook*, a copy of which is reproduced below for convenience:

> 6. A lawyer must reply reasonably promptly to any communication from another lawyer that requires a response.

[197] The Panel finds as a fact that the letters dated November 9 and 29, 2009 had been sent, and the Respondent failed to respond to those letters as well as the telephone message of November 30, 2009 [see paragraphs 33 and 34 above].

[198] In *Law Society of BC v. Smith*, 2005 LSBC 27, a lawyer was cited for having failed to respond to communication from staff at an insurance company in respect to a client matter. The panel concluded that this conduct constituted professional misconduct and stated as follows:

> The Panel emphasizes that the duty for all members to respond promptly is a duty that is owed not only to fellow members and to the Law Society but also to lay persons with whom the member may be dealing with in course of acting for a client.

[199] In *Law Society of BC v. Goddard*, 2007 LSBC 46, the respondent lawyer was found to have committed professional misconduct in 14 different instances, including three different instances of failing to

respond to another lawyer. At paragraphs 24 and 25 the panel commented:

> [24] … In the *Smith* case (*supra*), the Hearing Panel concluded that a breach of Chapter 11, Rule 6 in failing to respond to another lawyer constitutes professional misconduct.
>
> [25] We can think of no principle that justifies a different characterization of a failure to respond to a communication requiring a response from someone who is not a lawyer.

[200] *Goddard* is authority that the Respondent's failure to respond to communication from colleagues amounts to professional misconduct. In the *Goddard* case, the respondent was found to have failed to respond to another lawyer in three instances.

[201] If there was any doubt, we also rely on the *Smith* case (*supra*). In that case the respondent failed to respond to communication from an insurance company in respect to a client matter and was also found guilty of professional misconduct.

[202] Both *Smith* and *Goddard* emphasize that there is a duty on lawyers to respond promptly to communication requiring a response and that duty is owed to lawyers and non-lawyers alike.

[203] The Respondent is deemed to have admitted that he failed to reply to requests for communication from the other lawyer on three separate occasions and we find the Respondent committed professional misconduct.

FAILURE TO REPORT CHARGES TO THE LAW SOCIETY - ALLEGATION 20, 2012 CITATION

[204] The category of failing to report charges to the Law Society applies to Allegation 20 of the 2012 Citation. The applicable Rule is 3-90(1.1) reproduced here for convenience.

> 3-90(1.1) A person charged with an offence must provide the Executive Director with a copy of any statement of the particulars of the charge immediately upon receipt.

[205] The Panel found in paragraph [143] that the Respondent failed to notify the Executive Director in writing that he was charged under the *Income Tax Act* and the *Excise Tax Act*.

[206] The Law Society's mandate to protect the public is a paramount duty. As a regulator, the Law Society attempts to ensure that its members at all times remain of good character and repute, act with honour and integrity, and remain competent. Failure to report criminal charges promptly prevents the Law Society from taking steps necessary to protect the public from a member in free fall. Failure to file income tax returns, GST returns, and to pay the taxes due under the Canadian legislative system is not an honourable act. The Respondent is deemed to have admitted the truth of the relevant allegations, and we accept that admission and find that the Respondent's failure to report charges to the Law Society promptly, or at all, amounts to professional misconduct.

FAILURE TO REPORT JUDGMENT TO THE LAW SOCIETY - ALLEGATION 21, 2012 CITATION

[207] The obligation under Rule 3-44 to notify the Executive Director immediately of an unsatisfied monetary judgment is part of a lawyer's professional responsibility to the Law Society; it is part of the "financial responsibility" requirements set out in Part 3, Division 6 of the Law Society Rules. Rule 3-44 of the Law Society Rules provides as follows:

> 3-44(1) A lawyer against whom a monetary judgment is entered and who does not satisfy the judgment within 7 days after the date of entry must immediately notify the Executive Director in writing of

(a) the circumstances of the judgment, including whether the judgment creditor is a client or former client of the lawyer, and

(b) his or her proposal for satisfying the judgment.

(2) Monetary judgments referred to in subrule (1) include

(a) an order nisi of foreclosure,

(b) any certificate, final order or other requirement under a statute that requires payment of money to any party,

(c) a garnishment order under the Income Tax Act (Canada) if a lawyer is the tax debtor, and

(d) a judgment of any kind against an MDP in which the lawyer has an ownership interest.

(3) Subrule (1) applies whether or not any party has commenced an appeal from the judgment.

(4) If a lawyer fails to deliver a proposal under subrule (1)(b) that is adequate in the discretion of the Executive Director, the Executive Director may refer the matter to the Discipline Committee or the Chair of the Discipline Committee.

[208] In *Law Society of BC v. Welder*, 2012 LSBC 18, the hearing panel held that the obligation to notify the Law Society of an unsatisfied monetary judgment under Rule 3-44 is part of a lawyer's professional responsibility. In that case, the panel found that a lawyer's failure to immediately report unsatisfied judgments against him and his failure to communicate with the Law Society regarding its inquiries about how he proposed to satisfy judgments that the Law Society knew about, constituted professional misconduct.

[209] In *Law Society of BC v. Lessing*, 2013 LSBC 29 (s. 47 Review), the review panel also considered a respondent who said he was unaware of the rule but who had breached it on eight occasions, and the last two breaches occurred after the Law Society had written to him about the rule and his previous breaches of it. At paragraph 89 the review panel said:

> The failure to report judgments must be looked at in the context of the purpose of the Rule requiring reporting and the Respondent's failure to report the last two judgments. The purpose of the Rule is to protect the public. Failure to report judgments may be a sign of more severe problems that may pose a danger to the public.

[210] Previously, in *Re: A Lawyer*, 2002 LSBC 11, the respondent failed to notify the Law Society of an unsatisfied judgment against her within seven days of its entry. The respondent lawyer said she forgot to report the judgment, as her attention was focused on payment of the judgment, which was done within 30 days of its entry. She had satisfied the judgment before the Law Society first contacted her about it. Noting that the purpose of the Rule is to ensure that lawyers are financially responsible, the panel made a finding of a rules breach, rather than professional misconduct, and reprimanded the respondent.

[211] The Panel finds the Respondent's behaviour to be more egregious than in *Re: A Lawyer* because, in that case, the respondent had satisfied the judgment within 30 days and had simply forgotten to notify the Law Society. In this case, there is no evidence that the Respondent has ever tried to satisfy the judgment, and the underlying reason for the judgment occurred as a result of the Respondent's failure to remit GST funds he collected from clients. This exacerbates the Respondent's failure because of the Respondent's fiduciary duty relating to GST remittances.

[212] Due to the seriousness of the failure to report the judgment in the Respondent's circumstances, the

Panel accepts the Respondent's deemed admission and finds that the conduct amounted to professional misconduct.

FAILURE TO REMIT GST COLLECTED ALLEGATION 22, 2012 CITATION

[213] As reviewed in paragraphs 132, 136, 137, 147, and 151, we have found that the Respondent commingled any funds that he did collect for GST with his own funds and that he consistently failed to file GST returns and failed to remit that GST that he did collect to CRA. This behaviour led ultimately to criminal charges. In *Law Society of BC v. Whitman*, 2008 LSBC 24, the respondent failed to remit GST and PST for two years and submitted PST returns that were false. The result in that case was a finding of professional misconduct.

[214] In *Law Society of BC v. McMicken*, 2004 LSBC 16, the respondent failed to remit both GST and employee source deductions to CRA. The result was a finding of professional misconduct.

[215] In *Law Society of BC v. Welder*, 2005 LSBC 49, the respondent did not remit collected GST to the government, but instead diverted the funds to meet other expenses. The panel stated, "This Panel views the taking of those monies given to a lawyer for a specific purpose and used by that lawyer for his own purposes as a serious breach of a fiduciary obligation."

[216] The Panel accepts the Respondent's deemed admission and finds that the Respondent's serious breach of a fiduciary obligation under the *Income Tax Act*, and the *Excise Tax Act* constitutes professional misconduct.

FAILURE TO FOLLOW ACCOUNTING RULES - ALLEGATION 9 (a) – (f), (h) – (j), 2012 CITATION

[217] Part 3, Division 7 of the Law Society Rules contains many specific instructions to regulate trust accounts for the protection of the public and the Panel has made its finding of facts in paragraphs 153 through 164 of the Factual Findings above. The Respondent is deemed to have admitted that his behaviour in failing or neglecting to keep proper books and records to record transactions in his law firm's general bank account since September 1, 2008 and that he no longer maintained any kind of accounting records, as was clearly evidenced in the Audit Report. Such failure was disgraceful and exactly the type of record keeping that the Law Society, in the public interest, must not tolerate.

[218] In *Law Society of BC v. Lyons* (*supra*), the panel set out a test to determine whether a particular set of facts constitutes professional misconduct or alternatively a breach of the Act or the Rules. Under that test the panel must weigh 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.

[219] In the Respondent's case, there are nine breaches that endured over 18 months. The breaches of the Rules are serious. Several of the breaches of the Rules are ancillary to and appeared, moreover, to be an attempt to mask the Respondent's misappropriation of trust funds resulting in harm to the Respondent's clients and the public generally. The evidence and the fact is that the Respondent showed little interest or care for the harm it caused his clients to have him misappropriate their retainer funds before doing any legal work for them.

[220] The Panel finds that the Respondent failed to keep his accounting records in compliance with the provisions of Part 3, Division 7 of the Law Society Rules and the Panel finds that the repeated failures to maintain proper trust and financial accounting records are not only a marked departure from the conduct that is expected of a member of the Law Society, given the apparent callousness of the Respondent's

behaviour in this regard, they are in fact an extreme departure from the conduct that is expected. Accordingly, we find that the Respondent has committed professional misconduct.

CONCLUSION

[221] Pursuant to Section 38(4) of the *Legal Profession Act*, we have determined that the Respondent has committed the following:

(a) breach of Rule 3-56(1) and professional misconduct with respect to the matters set out in Allegations 1 of the 2011 Citation and 1 through 8 of the 2012 Citation by misappropriating client funds;

(b) breach of Chapter 13, Rule 3 of the *Professional Conduct Handbook* and professional misconduct with respect to the matters set out in Allegation 4 of the 2011 Citation and Allegations 18 and 19 of the 2012 Citation by misleading and/or attempting to mislead the Law Society investigators;

(c) breach of Chapter 13, Rule 3(a) of the *Professional Conduct Handbook* and professional misconduct with respect to the matters set out in Allegation 5 of the 2011 Citation and Allegations 10 through 17 of the 2012 Citation by failing to respond to numerous communications and inquiries from the Law Society investigators;

(d) breach of Chapter 11, Rule 6 of the *Professional Conduct Handbook* and professional misconduct with respect to the matters set out in Allegation 3 of the 2011 Citation by failing to respond to communications from another lawyer;

(e) breach of Rule 3-90 and professional misconduct with respect to the matters set out in Allegation 20 of the 2012 Citation by failing to report charges to the Law Society;

(f) breach of Rule 3-44 and professional misconduct with respect to the matters set out in Allegation 21 of the 2012 Citation by failing to report a certificate of judgment to the Law Society;

(g) professional misconduct with respect to the matters set out in Allegation 22 of the 2012 Citation by failing to remit GST monies collected from clients to Canada Revenue Agency; and

(h) professional misconduct with respect to the matters set out in Allegation 9(a) – (f), (h) – (j) of the 2012 Citation by failing to abide by the Law Society regulations for management of trust funds and accounting.

[222] There will be a further hearing to determine the disciplinary action pursuant to section 38 of the *Legal Profession Act*.